AGAINST THE MASTERS OF WAR:

THE OVERLOOKED FUNCTIONS OF CONFLICT LITIGATION BY INTERNATIONAL COURTS

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I

INTRODUCTION: WHO'S AFRAID OF POLITICAL COURTS?

The involvement of international courts in highly divisive political issues is generally seen as a high-risk course of action for the respective court but also for the conflict in question. Violent inter-and intrastate conflicts are of a mega-political nature per definition: They concern the very existence of states and often result in fundamental divisions within the political community. Over the last seventy years, international courts have developed a significant, diverse, and wide-ranging practice of litigation of violent conflicts[1] that is no longer constrained to traditional state-to-state dispute settlement.[2] In the 21st century, individuals affected by violent conflicts can take recourse to human rights courts, while perpetrators face justice before international criminal tribunals. In the increased institutionalization of international law in the post-Cold war era, the judicialization of peace and security matters has been a focal point for the project of a rule-based world order.[3]

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1. *See generally* Christian J. Tams, *International Courts and Tribunals and Violent Conflict*, *in* OXFORD HANDBOOK ON THE INTERNATIONAL LAW OF GLOBAL SECURITY 735 (Robin Geiß & Nils Melzer eds., 2021) (discussing the variety of adjudication provided by international courts).

2. *See generally* Dapo Akande, *The Role of the International Court of Justice in the Maintenance of International Peace*, 8 AFR. J. INT'L & COMPAR. L. (1996) (outlining the International Court of Justice and its contributions to international peace).

3. *See* Karen J. Alter, Emilie M. Hafner-Burton & Laurence R. Helfer, *Theorizing the Judicialization of International Relation*s, 63 INT'L STUD. Q. 449, 458–59 (2019); *see also* Courtney Hillebrecht, Alexandra Huneeus & Sandra Borda, *The Judicialization of Peace*, 59 HARV. INT'L L.J. 279, 316–18 (2018). *See generally* Eric C. Ip & Giselle T.C. Yuen, *Judging Wars: The International Politics of Humanitarian Adjudication*, 3 CORNELL INT'L AFFS. REV. (2010) (highlighting the influence international courts have had on modern conflicts).

Yet, the more international courts have become involved in these conflicts, the more criticism has arisen about their involvement.[4] Critics fear that judicialization will rather increase political division instead of mediating it and might contribute to renewed hostilities instead of securing or stabilizing peace.[5] Individual reparation and restitution awarded by human rights tribunals long after the violence had occurred might reopen old wounds,[6] while court involvement in international criminal law might also provoke a prolongation of war because the threat of prosecution prevents responsible power holders to give up office.[7] With the demise of liberal internationalism and the re-emergence of geopolitical violent conflicts,[8] the project of conflict litigation finds itself at a crossroad.

At the same time, the delegation of conflict-related issues to international courts also raises distinctive practical concerns for those courts. This includes organizational backlog, rising budgetary pressures, increased risk of politicization and, in the most extreme cases, backlash against international courts.[9] This has provoked a renewed debate on the negative consequences of conflict-jurisprudence to the institutional authority of international courts, which

4. *See generally* HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (1948) (proposing a pragmatic approach to international relations that prioritizes maximizing the interests of individual nations); E. H. CARR, TWENTY YEAR'S CRISIS, 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS (1939) (providing a classic realist critique of utopian cooperation as being hindered by survival interests).

5. For a roundtable discussion demonstrating this is also of concern to international judges and prosecutors see *Preventing and Mitigating Conflicts: Role of International Courts*, U.S. INST. OF PEACE (Apr. 11, 2014), https://www.usip.org/events/preventing-and-mitigating-conflicts-role-international-courts [https://perma.cc/5LSN-W3FN].

6. *See* Megan J. Ballard, *Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations*, 28 BERKELEY J. INT'L L. 462, 492–94 (2010); *see also* Scott Leckie, *Post-Conflict Reparation, Restitution and Human Rights – Where to Head from Here*, 27 NETH. Q. HUM. RTS. 3, 5–6 (2009).

7. Michael Gilligan, *Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime*, 60 INT'L ORG. 935, 937 (2006); *see also* Hyeran Jo & Beth Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 443, 445 (2016) (highlighting concerns that the ICC may aggravate political conflicts); Adam Branch, *Uganda's Civil War and the Politics of ICC Intervention*, 21 ETHICS AND INT'L AFFS. 179, 189 (2007) ("[T]he ICC, in a quest for effectiveness, may end up not only undermining its legitimacy but also lending support to violent and anti-democratic political forces.").

8. *See* Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221, 223–24 (2020) ("This [liberal international] era is now decidedly over, and we may be returning to an era in which international law is facilitative of authoritarian governance."); *see also* Achilles Skordas, *The Rise of the Neo-Hobbesian Age: Thirty Years Since the Fall of the Berlin Wall*, 79 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, HEIDELBERG J. INT'L L. 469, 478 (2019) (Ger.) ("The Neo-Hobbesian Age is defined by a plurality of conflicts with strong background in global social forces. There is no end in sight for these conflicts, which bear high levels of risk for the security of humankind."); Allen S. Weiner, *Authoritarian International Law, the Use of Force, and Intervention*, 114 AJIL UNBOUND 220, 221–24 (2020) (discussing the rise of authoritarian governments and the likely impact on international law).

9. *See* Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J. L. CONTEXT 197, 220 (2018) ("[B]acklash [against international courts] is most often a reaction to new socio-political or legal developments.").

is reflected in several reform processes, for instance on inter-state cases,[10] provisional measures,[11] and the streamlining of rules of procedure and evidence.[12] Those who fear the rise of overly political courts, just as in domestic contexts, call for even more restrictive international adjudication in situations, which concern massive systematic human rights abuses, geopolitical interests, or socioeconomic difficulties. Those issues can be characterized as megapolitical, i.e., they are highly divisive or polarizing social or political issues.[13]

Conceptually, we follow the broader definition of mega-politics as proposed by the special issue editors, namely that "judicialized mega-politics applies whenever [international courts] are adjudicating legal issues that divide domestic societies or inter-state relations such that one would anticipate that, whatever the outcome, important and sizable social or political groups will end up greatly upset."[14] Conflict litigation is a prime example for a study of mega-politics. However, as we will discuss in Part II, it takes various forms. From high-profile mega-political disputes, often taking the form of inter-state cases or the criminal prosecution of well-known political or military leaders, to medium or low-profile mega-political disputes pursued by individuals and alleged victims of violent conflict. Yet, the latter can equally result in significant political pushback, for instance when the individual case raises questions of mass reparations, requires the state to adopt general measures, or just sheds light on historical episodes of violence and questions of responsibility. One must thus assume that every case relating to a situation of violent conflict before an international court has at least the potential to become a mega-political dispute.

In contrast to domestic courts, international courts have limited leeway in dodging political questions, and even less mega-political questions.[15] This holds

10. STEERING COMM. FOR HUM. RTS., EFFECTIVE PROCESSING AND RESOLUTION OF CASES RELATING TO INTER-STATE DISPUTES (DH-SYSC-IV), COUNCIL OF EUR., https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/effective-processing-and-resolution-of-inter-state-disputes [https://perma.cc/C2RJ-KMZ4].

11. Press Release, INT'L CT. OF JUST., ADOPTION OF A NEW ARTICLE 11 OF THE RESOLUTION CONCERNING THE INTERNAL JUDICIAL PRACTICE OF THE COURT, ON PROCEDURES FOR MONITORING THE IMPLEMENTATION OF PROVISIONAL MEASURES INDICATED BY THE COURT (Dec. 21, 2020), https://www.icj-cij.org/public/files/press-releases/0/000-20201221-PRE-01-00-EN.pdf [https://perma.cc/PSF5-5PRX].

12. *See generally* INDEP. EXPERT REV., *Independent Expert Review of the International Criminal Court and the Rome Statute Final Report* (Sept. 30, 2020), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf [https://perma.cc/7Q2N-UD5B] (detailing expert recommendations to make ICC policies more effective and efficient).

13. *See* Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 94 (2008) (defining mega-politics as "matters of outright and utmost political significance that often define and divide whole polities") [hereinafter Ran Hirschl, *The Judicialization of Mega-Politics*]; *see also* Ran Hirschl, *The Judicialization of Politics*, *in* OXFORD HANDBOOK OF LAW AND POLITICS 119, 120 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008) (discussing the judicialization of mega-politics as "the transfer to courts of contentious issues of an outright political nature and significance") [hereinafter Ran Hirschl, *The Judicialization of Politics*].

14. Karen J. Alter and Mikael Rask Madsen, *The International Adjudication of Mega-Politics*, 84 LAW & CONTEMP. PROBS. 4, no. 4, 2021, at 1.

15. *See* Jed Odermatt, *Patterns of Avoidance: Political Questions before International Courts*, 14

particularly true when they have to adjudicate violent conflicts or in a situation of post-conflict justice. Indeed, international courts face domestic and transnational mega-political issues on a daily basis. Their tasks range from interpreting bilateral treaties on fundamental questions of statehood to upholding their mandates in sensitive policy areas, like human rights or international criminal law. They often have been established in response to the pitfalls of brute international power politics or the absence of national jurisdictional structures to deal with such issues adequately.

While a clear distinction between the realms of law and politics is already hard to obtain in most national systems, it is even less present in the global legal order where an overarching constitutional framework is still not in place. International courts have to navigate legal constraints and political questions.[16] This is particularly difficult in the area of peace and security as it lacks a coherent institutionalized regime. In particular, with a highly polarized UN Security Council in need of reform, international adjudication often seems to be the only viable option for participants and victims of violent conflicts to hold perpetrators and state actors accountable. Domestic analogies to the rise of political courts are thus difficult to uphold, and, at least from the perspective of international relations, often misinterpret the role and function of international courts in the global order.

As highlighted by the editors of this special issue, the international adjudication of mega-politics is difficult to avoid and not necessarily harmful for democracy. State actors deliberately call upon international courts to stabilize conflict through an impartial third party, to hamper power politics, to allow for alternative means of conflict management, as well as to communicate to the international community as a whole the continued validity of shared norms and principles. But international courts are not primarily thought to bring peace to warring countries[17] nor to deter actors from violating international humanitarian or human rights law or to decide on the right way for a post-conflict society to move forward.[18]

INT'L J. L. CONTEXT 221, 222–24 (2018) (observing that adjudication between states is often inherently political); Martti Koskenniemi, *The Function of Law in the International Community: 75 Years After*, 79 BRIT. Y.B. INT'L L. 353, 364 (2008) (discussing how international courts address controversies with political implications). For an argument against the differentiation between level versus political disputes, the latter allegedly being nonjusticiable before international courts, see generally HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933).

16. *See* Tom Ginsburg, *Political Constraints on International Courts*, *in* OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 483, 483–502 (Cesare P. R. Romano, Karen J. Alter & Yuval Shany eds., 2013) (discussing various political restraints on international courts).

17. *See generally* KAREN ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014) (discussing the influence international courts can have by merely stating what the law is); ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME?: A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION (2014) (highlighting how international courts have gained legitimacy, and how they can retain it through the public law adjudication model); YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS (2014) (evaluating the effectiveness of international courts via goal and outcome comparison).

18. Christian J. Tams, *World Courts as Guardians of Peace*, 15 GLOB. COOP. RSCH. PAPERS 5, 19–

Against this background, we adopt a counter-perspective to the literature on judicialization and backlash and instead claim that judicialization also poses opportunities and benefits for the law and practice of conflict resolution. Discussing the various forms of involving international courts in conflicts (Part II), we argue that the involvement of international courts slows down conflicts (Part III), enables the creation of a common space for the contestation of application and validity of legal norms in the context of the conflict (Part IV), and provides for the communicative dynamics to create trust (Part V).

Judicial procedures give courts agency in engaging in the stabilization of normative expectations, the contestation of diverse norm interpretations, the clarification, and even the creation of new normative frameworks. International courts do not merely address the concrete litigants but bystanders and the broader public to reassure them of the validity of specific norms and the legal system as a whole, thereby diffusing and cultivating legal consciousness.[19] In this sense, judicialization transforms political conflict into legal disputes, which provide rules for the participation of actors, the acceptance of arguments, and structures of debate. This does not necessarily end the political conflict but it opens up alternative routes in managing and containing it.

This article makes both a theoretical and empirical contribution to this special issue. On the one hand, it expands on the focus on judicial authority by returning to the core of the mega-politics discussion: the dispute over a particular social, political, or legal problem in front of a judicial body. By moving this dispute to a judicial forum, actors are purposefully judicializing norm contestation. This type of institutionalized norm contestation before international courts can positively impact conflict management in three ways: First of all, the violent political-military conflict is transformed into a legal dispute. Secondly, the respective proceedings before international courts allow for norm diffusion and stabilization. Thirdly, the specific framework of international adjudication also produces the necessary preconditions for the creation of trust, both within the parties as well as among the international community.

Empirically, the article adopts an eclectic comparative perspective rather than focusing on a specific court, as conflict litigation extends over a variety of judicial fora and the proceedings concerning violent conflicts are innumerable. This also allows us to take into account different institutional designs and types of authority, for instance, courts with an arguably low level of authority that still regularly face disputes concerning violent conflicts such as the Inter-American Court of Human Rights (IACtHR) and the International Criminal Court (ICC).

21 (2016) (describing international courts as dispute resolvers as opposed to routinely resolving post-conflict conditions).

19. *See* Christopher Daase & Nicole Deitelhoff, *Justification and Critique of Coercion as World Order Politics*, *in* JUSTIFICATION OF WAR AND INTERNATIONAL ORDER 489, 492–95 (Lothar Brock & Henrik Simon eds., 2021) ("The current intensification of the normative crisis of international politics makes a fundamental resetting— or at least an endorsement— of the normative foundations of international order necessary.").

Ultimately, it is important to point out the limits of this contribution: We do not challenge the difficulties posed by the judicialization of violent conflicts for international courts. Mega-political issues *do* bear risks for courts including the loss of their legitimacy and ultimately their abandonment. It also involves risks for the respective conflicted societies by provoking new violence or prolonging existing violence. However, our aim is not to prove an empirical causality in a binary form, i.e., that the judicialization of mega-politics is good vs. bad for international courts and political conflicts. At least on matters concerning violent conflicts, international adjudication is often the only viable alternative to violent intervention. Hence, we aim to adopt a counterpoint in the current debate and shine a light on too often overlooked and less analyzed functions of the judicialization of mega-politics.

II

INVOLVING INTERNATIONAL COURTS IN VIOLENT CONFLICTS

It is difficult to think of a topic which is less mega-political than the question of war and peace. Violent inter- and intra-state conflicts are of a mega-political nature by definition. They usually affect a significant number of people, either implicitly or explicitly, and both their root causes and their consequences are highly divisive for polities. They are also a crossbreed between international law and international politics. In both disciplines, the specific definition of what constitutes a "violent conflict" is marred with significant conceptual turf wars. For the aim of this paper, a clear definition of violent conflict is not necessary. On the contrary, it is the process by which quite diverse situations involving violent conflicts are transformed into legal disputes before international courts which is of interest to us.

Violent conflicts do not turn up before international courts by accident. Their judicialization is a purposeful and strategic action. While every violent conflict can be assumed a mega-political dispute, its judicialization takes different forms and thus falls squarely into the three categories of cases that raise mega-political questions proposed by the editors of this special issue. In the history of conflict litigation, four types of actors have emerged which can initiate judicial proceedings related to violent conflicts.

First of all, directly affected states can initiate legal proceedings against other state parties before international courts, which the special editors discuss as inter-state driven mega-politics. This emerges from the classical model of international dispute settlement, where a court has to interpret and apply the respective clauses of a particular treaty, convention, or declaration to the parties at hand. Questions on the threshold of support required for the violation of the principle of non-intervention, i.e., the non-interference in domestic affairs, are one of the most popular categories of conflict litigation at the ICJ.[20] However, in the last decade,

20. *See* Marcelo Kohen, *Principle of Non-Intervention 25 Years After the Nicaragua Judgment*, 25 LEIDEN J. INT'L L. 157, 160 (2012) (discussing the historical development and modern non-intervention

we have also observed a significant rise of inter-state cases launched at the Permanent Court of Arbitration (PCA),[21] the International Law of the Sea (ITLOS),[22] as well as regional human rights courts such as the European Court of Human Rights (ECtHR).[23] The main challenge for launching inter-state applications consists of procedural requirements, in particular jurisdiction and admissibility.

Secondly, with the rise of human rights courts in Europe, the Americas, and Africa, directly affected individuals can also initiate proceedings and hold state authorities accountable for their loss of life, inhuman treatment or torture, as well as infringements on the rights of property and private life in the context of violent conflicts. While those cases most generally fall into the category of sovereign-driven mega-politics, they also overlap with inter-state driven mega-politics. For instance, at the European Court of Human Rights, a practice has emerged in which inter-state cases are launched in parallel to a multitude of individual complaints.[24] This increases the role of individuals in situations of violent conflicts as it allows them to raise specific issues in their interest, for instance on expropriation and the right to return. Victims of human rights violations in violent conflicts can thus become independent agents and are enabled to pursue action, even if this is against the interest of their home state or another state party.

In the European human rights system, well-known examples concern the violence in Cyprus, Georgia, Eastern Ukraine, and, most recently, Armenia and Azerbaijan.[25] However, this does not mean that they are without challenges. Individual applications related to a broader inter-state conflict are usually not processed as long as the interstate case is pending. This practice created a massive backlog of cases at the ECtHR, where in January 2019 seventeen percent of all applications were individual cases arising out of inter-state conflicts.[26] Moreover, the individuals and communities concerned are at a massive disadvantage vis-à-

applicability).

21. Dapo Akande, *Peace Palace Heats Up Again: But Is Inter-State Arbitration Taking Over the ICJ?*, EJIL:TALK! (Feb. 17, 2014), https://www.ejiltalk.org/the-peace-palace-heats-up-again-but-is-inter-state-arbitration-overtaking-the-icj/ [https://perma.cc/6D92-AE9W].

22. Dapo Akande, *International Tribunal for the Law of the Sea Gets Busier*, EJIL:TALK! (Aug. 2, 2011), https://www.ejiltalk.org/the-international-tribunal-for-the-law-of-the-sea-gets-busier/ [https://perma.cc/A22F-4P8R].

23. *See* Isabella Risini, *The Inter-State Application Under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement*, *in* INTERNATIONAL STUDIES IN HUMAN RIGHTS, at 1, 1–5 (Ser. No. 125, 2018) (discussing the increasing use of the European Convention on Human Rights' inter-state application).

24. *See* Philip Leach, *On Inter-State Litigation and Armed Conflict Cases in Strasbourg*, 2 EUR. CONVENTION ON HUM. RTS. L. REV. 27, 33–34 (2021).

25. STEERING COMM. FOR HUM. RTS., *Draft CDDH Report on the Effective Processing and Resolution of Cases Relating to Inter-State Disputes*, COUNCIL OF EUR. 9–10 (2020), https://rm.coe.int/steering-committee-for-human-rights-cddh-committee-of-experts-on-the-s/16809f059e [https://perma.cc/4BK3-Y76W].

26. STEERING COMM. FOR HUM. RTS., *Contribution of the CDDH to the Evaluation Provided for by the Interlaken Declaration*, COUNCIL OF EUR. 37 (2019), https://rm.coe.int/steering-committee-for-human-rights-cddh-contribution-of-the-cddh-to-t/1680990d49 [https://perma.cc/MDY9-QXR6].

vis inter-state proceedings as their application will only be processed years, or even decades, after the violation has occurred. In many instances, this means that the adjudication of individual proceedings related to inter-state conflicts takes place in deeply divided post-conflict societies when properties have long been reassigned to different populations and perpetrators have returned to normal life. In such a situation, judicial proceedings might open up old wounds, require significant state intervention, and thus threaten a fragile peace. They pose exactly the domestic challenges envisioned by Ran Hirschl's analysis of mega-politics.[27]

The third group of cases concerning violent conflicts is initiated by the international community at large – either by international organizations themselves or by state parties not directly affected. While the UN or specialized agencies have always been able to request advisory opinions on questions related to violent conflict,[28] in the post-Cold war era, international organizations and third parties have also been actively involved in initiating proceedings against state parties directly before international courts. In international criminal law, a UN Security Council resolution established international criminal tribunals for the Former Yugoslavia and Rwanda to hold perpetrators accountable in the 1990s and can also refer situations directly to the ICC under Chapter VII of the UN Charter.[29] Moreover, the broad proprio motu investigative powers of the ICC prosecutor can be interpreted as actions in the name of the international community.

The fourth and final option to initiate proceedings concerns self-referrals which were rather accidentally invented. This is the most recent option of involving international courts in the adjudication of violent conflicts and requires the state, in which a violent conflict takes place or whose nationals had committed atrocities, to request an international adjudication on its own behalf. According to Art. 14 (1) of the Rome Statute, "[a] State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes."[30] The voluntary deferral of jurisdiction to the ICC is a novelty in the history of international criminal law. It depicts a clear shift from the idea of state sovereignty to the state taking a complementary role in the prosecution of violent conflicts.

In particular, the early history of the ICC demonstrates the appeal of this new procedure as a variety of situations concerning massive violent conflicts have been referred directly to the ICC. Examples include the Democratic Republic of

27. *See* Ran Hirschl, *The Judicialization of Mega-Politics*, *supra* note 13, at 107–12 (noting the risk of political courts in the domestic arena).

28. *See, e.g.*, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J 66 (July 8), https://www.icj-cij.org/public/files/case-related/93/093-19960708-ADV-01-00-EN.pdf [https://perma.cc/YNK5-DEPP].

29. U.N. Charter art. 48, ¶ 2.

30. Rome Statute of the International Criminal Court, art. 14(1), July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002).

the Congo, Uganda, the Central African Republic (twice self-referred), Mali, Comoros, Gabon, and Palestine. Self-referral is a voluntary unilateral act that demonstrates that countries embroiled in violent conflicts pursue international adjudication by themselves, even if this runs the risk of their nationals being prosecuted. It holds the potential to give more legitimacy to the involvement of international courts in those mega-political conflicts and ensure cooperation with the respective state authorities.

Yet, the practice of self-referrals paints a more mixed picture. On the one hand, self-referrals were often motivated by domestic political considerations. In many instances, the governing authority involved the ICC to try rebel groups and guerrilla leaders, while hampering the investigation into crimes committed by state authorities.[31] This threatens both the impartiality of the Office of the Prosecutor of the ICC as well as its effectiveness in investigating situations of violent conflict. On the other hand, even though most situations in front of the ICC were voluntary referrals by the respective state parties, this did not prevent the criticism of African bias of the Court. In 2016, fifteen years after the Court had opened its doors, nine out ten situations under investigations concerned African states, while another four were under preliminary investigation. Not only did this create significant criticism of bias, Eurocentrism, or flat-out racism of the ICC, but also led several African countries to turn their back on the ICC and withdraw from the Rome Statute. Succinctly put by Tor Krever, "[t]he International Criminal Court does not, and cannot, exist outside politics and its activities reflect that."[32]

While the first and second groups of cases clearly fall into the categories developed by the editors of this special issue, the third and fourth groups of cases cannot be easily integrated into the proposed framework. However, the latter groups also feature high levels of international and domestic politicization and thus a similar risk of state pushback. The four pathways to the international judicialization of violent conflicts demonstrate that international courts cannot avoid being involved in highly decisive mega-political questions concerning war and peace. This holds true regardless of the temporal connection: whether international courts are requested to intervene in ongoing situations of violence and human rights abuses, to prevent the continuous loss of human life and territorial conquests via provisional measures, or when they have to adjudicate questions of state responsibility or individual criminal responsibility in the aftermath of a violent conflict and have to confront not only questions of transitional justice but also human suffering on a large scale. This also implies that not every participant in the proceedings will be satisfied with the outcome of the judicial process.

31. *See* Adam Branch, *Uganda's Civil War and the Politics of ICC Intervention*, 21 ETHICS & INT'L AFFS. 179, 191–94 (2007) (discussing the ICC's targeting of a Ugandan rebel group).

32. Tor Krever, *Africa in the Dock: On ICC Bias*, CRITICAL LEGAL THINKING (Oct. 30, 2016), https://criticallegalthinking.com/2016/10/30/africa-in-the-dock-icc-bias/ [https://perma.cc/JZH6-WHZV].

So how does this square with the central assumptions of the mega-politics concept? According to Ran Hirschl, mega-political conflicts are better placed in the realm of politics.[33] This is due to two reasons: substantive and institutional. On the one hand, Hirschl argues that the substantive issues of the dispute should not be decided by technocratic expertise, but require the political involvement of a variety of actors to make the decision democratically legitimate. On the other hand, he cautions that the involvement of courts in mega-political questions raises the risk of politicization and challenges to their authority.

In line with this special issue, we argue that both assumptions, the substantive and the institutional, cannot be transferred easily to the judicialization of violent conflicts in international politics, and thus the outlook for the authority of international courts is not as pessimistic. International adjudication as a global public good is contrary to Hirschl's view of technocratic domestic courts. To respond to the first assumption, there is no equivalent of a democratic political sphere in the international society. The UN General Assembly has no competence for matters of violent conflict and the model of the UN Security Council is certainly not more deliberative or democratic than international adjudication. In contrast to the Security Council, international adjudication follows agreed-upon rules and standards of due process and allows for the inclusion of affected state parties and victims as well as non-directly affected states, international organizations, and NGOs via amicus curiae.

To rebut the second assumption, it is important to point out that international courts are often significantly more independent from political decision-making than constitutional courts. They do not rely on the approval of an electorate and strategies to constrain their activities, or require high majorities or even amendments of founding documents that are difficult to achieve. To be sure, disgruntled state parties might refuse to participate in the proceedings, block the appointment of judges, attempt to cut the Court's funding, or decide to withdraw their consent to the jurisdiction of the Court. However, often such moves have a limited effect. Even when one of the two superpowers, the US, withdrew its consent to the compulsory jurisdiction of the ICJ in 1985 after the Nicaragua decision, the ICJ's survival was not at stake.

Thus, the question is not whether international courts could – or even should – avoid the adjudication of violent conflicts, but rather how the adjudication can work in a mutually beneficial way: for the court, for the norms involved, for the affected states and societies. Just as international courts cannot avoid mega-political conflicts, the adjudication of mega-politics does not have the same negative consequences as originally assumed by Ran Hirschl. Following the guiding questions posed by this special issue, we will focus on the positive implications of conflict litigation for the underlying dispute (III), the law (IV), and the political and social consequences (V).

33. *See generally* Ran Hirschl, *The Judicialization of Politics* and, id., *The Judicialization of Mega-Politics*, *supra* note 13 (analyzing the significant reliance on courts to address political controversies).

III

SLOWING DOWN: TRANSFORMING VIOLENT CONFLICTS INTO LEGAL DISPUTES

The transformation of violent, mega-political conflicts into legal disputes has several implications for the underlying dispute. First of all, it is important to point out that not every inter-state conflict comes before international courts. Indeed, only a small minority of all inter-state conflicts find their way to The Hague, Strasbourg, San Jose, Hamburg, or Arusha. Secondly, to initiate legal proceedings, the complex and highly divisive political conflicts have to be transformed into legal disputes. This means that they have to adhere to procedural requirements and frame the substantive questions into the respective legal regime. Consequently, the political conflict is both disaggregated and multiplicated at the same time. This means that, on the one hand, the issues relating to the conflict are separated and divided among several highly specialized international adjudicative fora, and, on the other hand, the conflict itself is multiplied in parallel proceedings, each addressing different parts of the same set of facts.[34] For instance, the underlying mega-political conflict between Russia and Ukraine generated a series of international litigations before various international courts. While those proceedings were all legally different, they were part of a wider political strategy to transfer the violent conflict into the legal realm. In turn, even half-baked victories on the legal battlefield – whether at the ECtHR, the ICJ, ITLOS, or an ICSID tribunal – are also exploited by political actors in domestic media and public discourse, thus reaffirming their mega-political nature.

The procedural requirements of a legal dispute further complicate the transformation of violent conflicts into legal disputes. The existence of a treaty, which allows state parties to bring proceedings, is the main hurdle and sometimes results in creative, but rather fictitious situations in which the judicialization of major geopolitical conflicts and interstate wars depends on the compromissory clause in an international human rights treaty.[35] By trying to fit the square peg in the round hole, the real conflict is transformed into a legal-interpretative

34. Thomas Schultz & Niccolò Ridi, *Comity and International Courts and Tribunals*, 50 CORNELL INT'L L.J. 577, 601–04 (2017) (highlighting comity references when multiple international forums are adjudicating matters arising from the same controversy); *see* James Crawford & Penelope Nevill, *Relations Between International Courts and Tribunals: The "Regime" Problem*, *in* REGIME INTERACTION IN INTERNATIONAL LAW 235, 237 (Margaret A. Young ed., 2012) (discussing situations where "cases operate in parallel, but never meet"). *See generally* Nikolaos Lavranos, *Regulating Competing Jurisdiction Among International Courts and Tribunals*, 68 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG J. INT'L L.] 575, 575–621 (2008) (Ger.) (discussing how to regulate regime problems occurring when multiple international courts adjudicate issues relating to the same conflict).

35. For instance, on the International Convention on the Elimination of All Forms of Racial Discrimination in the ICJ case on the 2008 Russo-Georgian war. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ. Fed'n), Preliminary Objection, 2011 I.C.J. (Apr. 1), https://www.icj-cij.org/public/files/case-related/140/140-20110401-JUD-01-00-EN.pdf [https://perma.cc/4R2G-L9QY].

question that barely reflects the complex situation. The disaggregation of the conflict in various legal disputes might encourage forum shopping and enable various parallel proceedings over several international courts, which can result in diverging outcomes thus undermining legal certainty.[36]

However, the initiation of proceedings on violent conflicts before international courts poses several advantages. First of all, moving a conflict from the battlefield to the international judicial system is usually a positive development. It symbolizes a shift in the respective personnel in decision-making, from the military to lawyers. It also entails the potential to slow down active hostilities as international adjudication creates international attention. While the final judgment on the merits takes several years, the possibility of interim measures or preliminary orders allows international courts to intervene even in situations of acute violence.[37] Pursuing international adjudication could also prevent the reignition of violence as international courts are non-majoritarian institutions through which weaker state parties or conflict actors could also pursue justice, thus favoring a strategy of judicial reckoning over violent attacks.[38]

Secondly, the judicialization of the violent conflict allows for its processing in the language of the law. This means that historically fraught and geopolitically complex situations have to be narrowed down and translated into questions of procedure and substance according to international treaties. The parties have to face each other in a common legal vocabulary, which implies often a rhetorical de-escalation and lack of propagandistic vocabulary, at least in the written submissions.

Thirdly, the disaggregation of a conflict among several judicial fora delineates the conflict in several separate judicial proceedings focusing on one element of the conflict. While this may raise difficulties in addressing the core conflict, it is also more manageable to address only one legal aspect of the conflict than the highly complex, politicized, and ultimately destructive political conflict. Again, we do not expect *one* international court to settle *the* dispute between Ukraine

36. *See* Lawrence Hill Cawthorne, *International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study*, 68 INT'L & COMPAR. L. Q. 779, 814 (2019) ("The fact that the structure of international dispute settlement can result in the disaggregation of disputes has been presented as both a blessing and a curse . . . For [some], this disaggregation of disputes carries with it such negative externalities as forum-shopping, overlapping jurisdiction, and abuse of process.").

37. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order, 2020 I.C.J. (Jan. 23), https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf [https://perma.cc/79RQ-ZQBX]; Eur. Ct. Hum. Rts. Press Release 377, Court Grants an Interim Measure in the Case of Armenia v. Azerbaijan (Dec. 16, 2020), http://hudoc.echr.coe.int/eng-press?i=003-6889210-9244085 [https://perma.cc/VS38-ADB8].

38. *See* Mike Corder, *Palestinians Ask International Court to Open 'Immediate Investigation' Into Israel*, PBS (May 22, 2018), https://www.pbs.org/newshour/world/palestinians-ask-international-court-to-open-immediate-investigation-into-israel [https://perma.cc/7VJE-WFMJ] (discussing Palestine pressuring the ICC to open an investigation). *See also* ICC, Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine (Mar. 3, 2021), https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine [https://perma.cc/7DBS-JCCX].

and Russia *permanently*.[39] This is far beyond what an international court can realistically achieve. However, the parallel proceedings at the ICJ under the CERD and ICSFT Conventions, at the ECtHR, the ICC, ICSID, and ITLOS might be able to address some elements of the broader conflict and achieve at least some type of post-conflict justice and accountability, for instance, compensation for expropriation, the release of vessels, prisoners' exchanges, and just satisfaction for material and immaterial damages. Hence, for the conflict as such, its transfer from a political-military conflict to a legal dispute before an international court can be very beneficial.

The transferal of conflicts from the battlefield to the courtroom is a strategy often pursued by the less powerful. States that only possess inferior political, military, or economic capacities, international organizations, as well as individuals, appeal to the international community for judicial intervention. In recent years, several high-profile cases concerned actions perpetrated by powerful P5 states such as China,[40] Russia, and the UK,[41] who have in turn refused to abide by the respective decisions. This was neither unexpected, nor is it common for international courts to successfully settle the underlying (geo-) political dispute. Still, international organizations, states, and individuals continue to bring such cases to the fora of international adjudication. International adjudication might be flawed, but it is still an important forum for raising the international spotlight on a situation of violence, thereby increasing the pressure to act for the international community. While international courts cannot evade political questions, they also cannot provide political solutions.

In some instances, the respective proceedings can also be understood as a form of strategic litigation, as part of a wider diplomatic strategy. An emerging, but highly interesting development in this regard concerns the initiation of proceedings by third-states parties, which are not involved in the violent conflict. The most prominent example is The Gambia which, supported by the Organization of Islamic Cooperation (OIC), brought proceedings against Myanmar for violations under the Genocide Convention. Article IX of the Genocide Convention allows for state parties which are not directly affected to bring a case. The case against Myanmar is the first case in the ICJ's history in which a third-state not only participated but initiated the judicial proceedings.[42]

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39. *See* STEERING COMM. FOR HUM. RTS., *supra* note 26.

40. *See, e.g.*, Philippines v. China, PCA Case Repository, 11–12 (Perm Ct. Arb. 2016).

41. For instance, on the Chagos Island, *see* Mauritius v. U.K., PCA Case Repository 2011-03, 11 (Perm. Ct. Arb. 2015); Legal Consequences of the Separation of the Chagos Island from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. (Feb. 25), https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf [https://perma.cc/7LYL-73X5]; Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), Case No. 28, Order 2021/2 of Feb 3, 2021, https://www.itlos.org/fileadmin/itlos/documents/cases/28/C28_Order_2021-2_03.02.2021.pdf [https://perma.cc/Z4NH-RP7R].

42. *See also* Michael A. Becker, *The Plight of the Rohingya: Genocide Allegations and Provisional Measures in* The Gambia v. Myanmar *at the International Court of Justice*, MELB. J. INT'L L., Dec. 2020, at 11 (examining the broader impact of the decision on ICJ practice); Christina M. Cerena, *Provisional*

A major factor explaining The Gambia's exceptional action lies in the country's then-attorney general and justice minister Abubacarr Tambadou. Tambadou, who is an expert in international human rights law and served on the prosecuting team at the International Criminal Tribunal for Rwanda, visited a Rohingya refugee camp in Bangladesh with a delegation from the OIC in May 2018.[43] When talking to refugees, he "saw genocide written all over these stories" and thus began lobbying the OIC to take action under the Genocide Convention against Myanmar.[44] The Gambia had just recently undergone a democratic transition in 2017 when opposition leader Adama Barrow took power after 22 years of dictatorship under former President Yahya Jammeh. The application against Myanmar thus also indicates The Gambia's return to the international legal community and serves to posit the new government as a protector of international law and core legal norms. This becomes apparent also in the application of The Gambia to the ICJ:

> The Gambia, mindful of the *jus cogens* character of the prohibition of genocide and the *erga omnes* and *erga omnes partes* character of the obligations that are owed under the Genocide Convention, institutes the present proceedings to establish Myanmar's responsibility for violations of the Genocide Convention, to hold it fully accountable under international law for its genocidal acts against the Rohingya group, and to have recourse to this Court to ensure the fullest possible protection for those who remain at grave risk from future acts of genocide.[45]

In a similar vein, the Netherlands announced in September 2020 to "hold Syria responsible under international law for gross human rights violations and torture in particular".[46] Joined by Canada in spring 2021, the Netherlands plans to enter into negotiations with the Assad government and, if those are unsuccessful, to submit the charges to the ICJ under the Convention against Torture.[47] Naturally, those two judicial disputes differ considerably – the

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Measures: How International Human Rights Law is Changing International Law (Inspired by Gambia v. Myanmar*)*, 11 NOTRE DAME J. INT'L L. 34, 57–59 (2021) (arguing that international human rights bodies often neglect formal requirements of international law when presented with urgent situations that could lead to irreparable harm); Marco Longobardo, *The Standing of Indirectly Injured States in the Litigation of Community Interests Before ICJ: Lessons Learned and Future Implications in Light of The Gambia v. Myanmar and Beyond*, 24 INT'L CMTY. L. REV. (forthcoming 2021) (highlighting the history of ICJ jurisprudence in non-injured state claims); Martin Mennecke, *The International Court of Justice and the Responsibility to Protect: Learning from the Case of* The Gambia v. Myanmar, 13 GLOB. RESP. TO PROTECT 324, 339–44 (explaining the role of the ICJ and the responsibility to protect).

43. Aaron Ross, *With Memories of Rwanda: The Gambian Minister Taking on Suu Kyi*, REUTERS (Dec. 5, 2019, 8:05 AM), https://www.reuters.com/article/us-myanmar-rohingya-world-court-gambia/with-memories-of-rwanda-the-gambian-minister-taking-on-suu-kyi-idUSKBN1Y91HA [https://perma.cc/4P5F-BKHA].

44. *Id*.

45. Application of Convention on the Prevention and Punishment of the Crime of Genocide, (Gam. v. Myan.), Request for the Indication of Provisional Measures, 2019 I.C.J. ¶15 (Nov. 11), https://www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf [https://perma.cc/FBN7-74UM].

46. GOV'T OF THE NETH., *The Netherlands Hold Syria Responsible for Gross Human Rights Violations,* (Sep. 18, 2020), https://www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations [https://perma.cc/TY9N-63L5].

47. GOV'T OF THE NETH., *Joint Statement of Canada and the Kingdom of the Netherlands Regarding Their Cooperation in Holding Syria to Account*, (Mar. 12, 2021),

Myanmar case concerns ongoing violence and human rights abuses and requires provisional measures, while the Syrian case concerns systematic and widespread patterns of violence which had been carried out over several years. However, both cases constitute important, symbolic projects to advance community interests before international courts. They demonstrate how less powerful states take recourse to judicial means to slow down the conflict and hold states accountable for massive human rights abuses in the absence of political or military actions.

IV

PROVIDING SPACES FOR NORM CONTESTATION: COURTS AS NORM INSTITUTIONALIZATION

The adjudication of violent conflicts can also positively contribute to the stabilization of international legal norms. In constructivist scholarship, judicial procedures can be understood as a particular form of norm institutionalization that shields norms against challenge and provides for specific rules on how to process contestation. Antje Wiener, for example, emphasizes the role that institutionalization plays in processing challenges to norms.[48] By developing normative understandings and organizational scripts, institutions limit the range of acceptable arguments[49], thereby civilizing the process of contestation. In such cases, contestation helps strengthen rather than destabilize norms—assuming there is a proper framework for deliberating their meaning.[50] Courts are a form of institutionalization that ensures that normative disputes remain within the confines of the law because rules of procedure and a judge or jury can determine the appropriateness and legality of claims. Thus, they work as a showstopper to escalation.[51]

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https://www.government.nl/documents/diplomatic-statements/2021/03/12/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-their-cooperation-in-holding-syria-to-account [https://perma.cc/5TXK-B85B].

48. ANTJE WIENER, THE INVISIBLE CONSTITUTION OF POLITICS: CONTESTED NORMS AND INTERNATIONAL ENCOUNTERS 204–08 (2006); Antje Wiener, *Normative Baggage in International Encounters: Contestation all the Way*, *in* ON RULES, POLITICS AND KNOWLEDGE: FRIEDRICH KRATOCHWIL, INTERNATIONAL RELATIONS, AND DOMESTIC AFFAIRS 202, 203 (Oliver Kessler, Rodney Bruce Hall, Cecilia Lynch & Nicholas Onuf eds., 2010).

49. Nicole Deitelhoff, *The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case*, 63 INT'L ORG. 33, 44–61 (2009).

50. Adam Bower, *Contesting the International Criminal Court: Kenyatta, Bashir, and the Status of the Nonimpunity Norm in World Politics*, 4 J. GLOB. SEC. STUD. 88, 91 (2019).

51. For a similar argument with regard to international negotiations, where institutional mechanisms such as procedural fairness or the absence of a hierarchy encourage effective arguing, see generally Thomas Risse, *Let's Argue!: Communicative Action in World Politics*, 54 INT'L ORG. 1, 15 (2000) (describing how shared institutions or norms can structure interaction); Kathryn Sikkink, *Restructuring World Politics: The Limits and Asymmetries of Soft Power*, *in* RESTRUCTURING WORLD POLITICS, TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS AND NORMS 30 (Sanjeev Khagram, James V. Riker & Kathryn Sikkink eds., 2002) (identifying how communicative power in transnational advocacy groups can shift norms internationally in the absence of hierarchy); NICOLE DEITELHOFF, ÜBERZEUGUNG IN DER POLITIK. GRUNDZÜGE EINER DISKURSTHEORIE INTERNATIONALEN

How can we apply those insights to violent conflicts? At the core of most cases of peace and security judicialization stand the most fundamental norms of public international law. The principles of non-intervention and territorial sovereignty, the prohibition of aggression, and the attribution of (criminal) responsibility constitute crucial benchmarks for the behavior of states in the late 20th and early 21st century. They are legally codified in many hard and soft legal instruments and form part of customary international law; hence, state parties do not usually call into question their general justification, but disagree on the clear contours of their application in specific cases.[52]

The judicialization of norm contestation can affirm normative expectations – even if it results in withdrawal and backlash of a superpower. The case of *Nicaragua v. United States* depicts a critical juncture in the ICJ's jurisprudence. In contrast to earlier cases, the application by Nicaragua against the US support for Contra rebels focused on an ongoing armed conflict against a hegemonic power. The Court found that the US violated the prohibition on the use of force, non-intervention, the interruption of peaceful maritime commerce, and was "in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed in Managua on 21 January 1956".[53] The US refused to participate in the proceedings, withdrew from the optional clause system, and later blocked enforcement of the judgment by the United Nations Security Council. Even though the decision of the ICJ did not succeed in resolving the conflict, it established the ICJ as an impartial and authoritative tribunal. Moreover, the judgment also exemplifies the Court's function to stabilize normative expectations by "affirm[ing] cardinal norms of international law – especially the prohibition of the use of force – in the face of contrary practices by one of the two superpowers at the time. If a court identifies a breach of law, this fundamentally confirms the validity and strengthens the normativity of the law."[54] According to Armin von Bogdandy and Ingo Venzke, the Nicaragua judgment can even be analyzed as an instance of law-making, as it provided clarification about the parameters of the normative content "that construe[s] the international prohibition on using force broadly and the right to self-defense narrowly. Moreover, the decision established the ban as customary international law and shaped the accountability of actions by non-state actors."[55]

Similarly, contestation of ICC operations on the African continent might have weakened the court's effectiveness and legitimacy on the continent but it safeguarded and even strengthened the international criminal law regime. The

REGIERENS 306 (2017).

52. Nicole Deitelhoff & Lisbeth Zimmermann, *Things We Lost in the Fire: How Different Types of Contestation Affect the Robustness of International Norms*, 22 INT'L STUD. REV. 51, 57 (2020).

53. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgment, 1986 I.C.J. 14, 137 (June 27), https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf [https://perma.cc/5V7Q-JQ4J].

54. ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION 10 (2014).

55. *Id.* at 12.

ICC experienced contestation of its operations on the African continent from the very beginning, mostly centered on the meaning of complementarity. The contestation increased dramatically once the situation in Darfur had been referred to the court by the UN Security Council without the consensus of Sudan in 2005 and with the issuing of an arrest warrant for then-president Omar al Bashir in 2008. The investigation by the court regarding post-election violence in Kenya in 2007 and 2008 fueled this contestation, a case activated on basis of the proprio motu powers of the ICC prosecutor. The Kenyan authorities questioned the arrest warrant of the ICC for then-Deputy Prime Minister Kenyatta, stating that the case was inadmissible because of the principle of complementarity. Similarly, they argued that the court would endanger peace and security in Kenya. Finally, in 2013 after Kenyatta had been elected as president of Kenya, the Kenyan government, seconded by the African Union, argued that charges against the two were inadmissible because they enjoyed immunity under international law.[56]

While none of these arguments could convince either the Court, the Assembly of State Parties, or the UN Security Council, contestation on the African continent intensified further. States as well as non-state actors increasingly framed the Court as an anti-African court.[57] In turn, cooperation with the court began to decrease and several African states even initiated their withdrawal from the statute, including South Africa, the Gambia, and Burundi. While only Burundi effectively withdrew from the court in the end, the Kenyan election investigation marked a clear line of radicalization of contestation of the court on the African continent.[58] Nevertheless, this contestation has not necessarily weakened the international criminal law regime. In fact, it supported further legal institutionalization by fueling national and regional efforts in building up judicial institutions and procedures to be able to take over these cases, such as the decision by the African Union to establish an African Court of Justice and Human Rights. So, the two cases are not judicial failures.

As we highlighted above, courts should not be seen merely as arbiters of conflict but equally as spaces for norm contestation in which the applicability and validity of legal norms can be disputed, rejected, or refreshed. When viewed in this perspective, the court does not fare as bad. In both cases, the affected countries have strengthened their legal systems to be able to challenge the court concerning complementarity — even when they ultimately failed. Moreover, both states were also forced to position themselves towards the norm set of individual criminal accountability. Finally, with the view on the broader institutional scene, the initiative of the African Union to create an African Court

56. African Union, *Decision on Africa's Relationship with the International Criminal Court (ICC)*, AU Doc. Ext/Assembly/AU/Dec.1, 91 (Oct. 12, 2013).

57. Charles Chernor Jalloh, *The African Union, the Security Council, and the International Criminal Court*, *in* INTERNATIONAL CRIMINAL COURT AND AFRICA 211 (Charles Chernor Jalloh & Ilias Bantekas eds., 2017).

58. Nicole Deitelhoff, *What's in a Name? Contestation and Backlash Against International Norms and Institutions*, 22 BRIT. J. POL. & INT'L REL. 715, 723 (2020).

of Justice and Human Rights points in the direction of strengthening legal commitments on the African continent. Hence, the court has succeeded in upholding normative commitments. However, while this does address the norm set of individual criminal accountability as a whole, it does not do so with regard to the immunity of sitting heads of state. The proposed African Court of Justice and Human Rights will not be able to try sitting heads of states, and the exit of first member states will probably prevent the court from new attempts to press charges against sitting heads of states in the near future. The ICC has already signalled its reluctance against prosecuting siting heads of state, as evidenced in the 2019 initial decision of the pre-trial chamber II on the situation in Afghanistan. There, the Court denied the prosecutor the authorization to initiate a prosecution because it would not serve the interests of justice.[59]

Norm contestation might not only provide an opportunity to clarify and develop normative commitments but can also concurrently strengthen the institutional authority of courts.[60] Even for courts with weak institutional authority, adjudicating situations of conflict provides them with publicity and agency. The transfer of fundamental social conflicts to international courts allows them to intervene in norm conflicts over the meaning and application of torture, enforced disappearances, sexual violence, as well as the legal responsibility for those acts such as head of state immunities and amnesties. While courts might have good reason to refrain from pronouncing a verdict in those delicate questions of international law — the ECtHR has just recently pronounced in the case of Georgia v. Russia (II)[61] that it is not competent to adjudicate acts during five days of hostilities as those would fall in the realm of international humanitarian law — being involved in high-profile post-conflict cases might also boost institutional authority.

The most prominent example in this regard is the Inter-American Court of Human Rights. The Court, which was established in 1979 rose to prominence in the aftermath of military dictatorships, civil wars, and genocide. With only ten to fifteen cases per year, the Court's case law has established milestones for situations of post-conflict justice, starting with Velásquez Rodrígues v. Honduras, its first case ever in 1988,[62] which has become a landmark decision targeting

59. Prosecutor v. Counsel for the Defense, ICC-02/17, Decision on the Authorization of an Investigation into the Situation in Afghanistan, ¶ 41 (Apr. 12, 2019), https://www.icccpi.int/CourtRecords/CR2019_02068.PDF [https://perma.cc/TG4A-LWWM]. Yet, the Appeal chamber amended this decision in 2020 arguing the pre-trial chamber had incorrectly applied the "interest of justice" criterion. *See* Prosecutor v. Office of Public Counsel for the Defense, ICC-12/17 OA4, Judgement on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, ¶ 46 (Mar. 5, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF [https://perma.cc/SB98-CH5X].

60. This is usually called "de-facto authority." *See generally* INTERNATIONAL COURT AUTHORITY (Karen Alter, Mikael Rask Madsen & Laurence R. Helfer eds., 2018) (examining the de facto authority of the ICC and its justifications).

61. Georgia v. Russia (II), App. No. 38263/08, ¶ 336, (Jan. 21, 2021), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-207757%22]} [https://perma.cc/9P68-Y3LQ].

62. Rodrígues v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, at 20 (July 29,

enforced disappearances. Crucially, the Court has not shied away from confronting those questions, even including far-reaching and systematic remedies for victims of violence. This culminated in decisions such as Barrios Altos[63] and La Cantuta v. Peru,[64] in which the Court pronounced amnesty laws not compatible with regional human rights standards and strengthened the right to truth.[65] Those decisions did not lead to a breakdown of the Court but essentially contributed to putting the Court on the map. In other words, it established the Court as a body that confronts the violent past of many of its state parties while providing an honest and transparent forum for victims of massive human rights abuses. While states have struggled to implement the judgments, and thus a pure compliance-oriented measurement of institutional authority remains unsatisfactory, the Court was able to expand its visibility, profile, and authority throughout the region. This allowed the Court to stretch and reinforce its position even more, peaking in Gelman v Uruguay.[66] There, the Court reaffirmed that the Uruguayan amnesty law is incompatible with the ACHR even though the respective law had been passed and subsequently reaffirmed twice by a democratic referendum. Ultimately, the IACtHR's case law was instrumental in establishing the anti-impunity norm[67] and providing global standards for holding states accountable, while also creating a strong role for the Court in regional law-making[68] and establishing itself as a central forum for many victims of violent conflicts in the region.[69] While those examples cannot be easily transposed to other regional contexts, as the experience of the African Court on Human and Peoples' Rights has demonstrated, they pose important counterexamples to reflect on the role of international courts in violent conflicts. In particular, they bring us to consider another underexplored function of international courts in situations of violent conflict: creating trust.

1988).

63. Barrios Altos v. Peru, Merits, Judgment, Inter-Am Ct. H.R. (ser. C) No. 75, ¶ 44 (March 14, 2001).

64. La Cantuta v. Peru, Merits, Judgment, Inter-Am Ct. H.R. (ser. C) No. 162, ¶ 226 (November 29, 2006).

65. Klaas Dykmann, *Impunity and the Right to Truth in the Inter-American System of Human Rights*, 7 IBEROAMERICANA 45, 58 (2007).

66. Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 232 (Feb. 24, 2011).

67. Karen Engle, *A Genealogy of the Criminal Turn in Human Rights*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, 15, 21 (Karen Engle, Zinaida Miller & D. M. Davis eds., 2016).

68. Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L.J. 1203, 1213 (2011). *But see* Jorge Contesse, *The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine*, 22 INT'L J. HUM. RTS. 1168, 1168 (2018) (highlighting the actions of the court as establishing itself as a constitutional court to the detriment of its international authority).

69. Luis van Isschot, *Assessing the Record of the Inter-American Court of Human Rights in Latin America's Rural Conflict Zones 1979-2016*, 22 INT'L J. HUM. RTS. 1144, 1148 (2018); *see also* Carlos Martìn Beristain, *Diálogos Sobre la Reparaciòn. Experiencias en el Sistema Interamericano de Derechos Humanos* (2008), Instituto Interamericano de Derechos Humanos 1–678.

V

ENABLING TRUST: INTERNATIONAL ADJUDICATION AS A MECHANISM TO CREATE TRUST IN A SITUATION OF CONFLICT

Finally, the international adjudication of violent conflict also has wider political and social consequences. In particular, we argue that judicialization of peace and conflict can also be understood to create and sustain trust among states, victims, and within the broader legal community. We define trust as an actor's judgment of other actors' or institutions' "motivation and competence to act in his or her interests" and not to exploit one's cooperation.[70] International Relations scholarship has devoted significant attention to the problem of trust in international relations.[71] In particular, it has stressed that inter-state trust is an essential element of the peaceful resolution of disputes.[72] Repeated interaction, for instance, among diplomats in several rounds of negotiations, fosters cooperation and enhances the mutual understanding of actors as honest and moral collaborators. The existence of trust is thus not a prerequisite. Instead, trust is mutually co-created among engaged participants and can thus transform violent conflicts. Peace-building activities should thus be mindful of fostering trusting relationships between adversaries.[73]

Trust and trustworthiness cannot only be nurtured among states, but also vis-à-vis institutions.[74] This means that trust might influence how non-state actors, such as civil society or victims of human rights abuses, perceive international law. When parties decide, for example, to take a contentious dispute to the Hague for conflict resolution, they are trusting the system. However, the object of trust can be varying. For example, trust can manifest itself in the superior legal position or better argumentative strategy, in the reciprocal behavior of the adversary, in the

70. Mark E. Warren, *What Kinds of Trust Does a Democracy Need? Trust from the Perspective of Democratic Theory*, *in* HANDBOOK ON POLITICAL TRUST 33, 33 (Soinja Zmerli & Tom W.G. van der Meer eds., 2017). *See generally* RUSSELL HARDIN, TRUST AND TRUSTWORTHINESS (2004) (examining standard theories of trust and advocating for the view of trust as "encapsulated interest").

71. *See* Aaron M. Hoffman, *A Conceptualization of Trust in International Relations*, 8 EUR. J. INT'L REL. 375, 375 (2002) (examining a series of measures to more accurately identify trusting relationships); Torsten Michel, *Time to Get Emotional: Phronetic Reflections on the Concept of Trust in International Relations*, 19 EUR. J. INT'L REL. 868, 868 (2013) (criticizing the dominant framework of trust scholarship and advocating for greater focus on the emotive aspects of trust). *See generally* KEN BOOTH & NICHOLAS J. WHEELER, THE SECURITY DILEMMA: FEAR, COOPERATION AND TRUST IN WORLD POLITICS (2008) (arguing that insecurity can be ameliorated through institutions and norms); Brian Christopher Rathbun, *Trust in International Relations*, *in* OXFORD HANDBOOK OF SOCIAL AND POLITICAL TRUST (Eric M. Uslaner ed., 2018) (arguing that certain types of trust are vital for maintaining features of international relations); Torsten Michel, *Trust and International Relations*, *in* OXFORD BIBLIOGRAPHIES IN INTERNATIONAL RELATIONS (2016) (highlighting various conceptual overviews of trust scholarship in international relations).

72. *See generally* BRIAN C. RATHBUN, TRUST IN INTERNATIONAL COOPERATION: INTERNATIONAL SECURITY INSTITUTIONS, DOMESTIC POLITICS AND AMERICAN MULTILATERALISM (2011) (examining the social psychological theories of trust and their implementation in multilateral international organizations).

73. Nicholas J. Wheeler, *Trust-Building in International Relations*, 4 PEACE PRINTS: S. ASIAN J. PEACEBUILDING 128, 134 (2012).

74. HARDIN, *supra* note 70, 17–23.

independence of international adjudication, or in the idea of peaceful dispute settlement. While studies have shown that diplomacy can effectively create trust, further empirical research on international courts is required. What is important for the mega-politics discussion, however, is that by initiating a dispute before an international court, an actor is strategically signaling its trustworthiness to the international community to allow for the inclusion of international courts. This shows a very different dimension of mega-political adjudication.

Against this background, we argue that international courts have essential institutional features to create the communicative dynamics for trust-building.[75] In contrast to ad-hoc diplomatic initiatives or special tribunals, permanent international courts such as the ICJ, the ICC, and the regional human rights courts have established bureaucratic frameworks and procedures.[76] As has been demonstrated in the first part of this article, they can also circumvent a possible political blockade in the UN Security Council and intervene on behalf of the international community. Their judges generally are well-respected persons of high moral calibre,[77] which can also engage in judicial diplomacy.[78] For instance, the IACtHR has developed the idea of a "traveling court", which regularly holds sessions away from its seat in Costa Rica to engage with particular countries directly, and meet with state authorities as well as victims and other civil society associations.[79] Moreover, in contrast to external diplomatic initiatives, international adjudication often features judges or arbitrators who are nationals from or appointed by the respective parties. This can help to defuse allegations of interventionism.

There are several ways international courts can use those institutional features to create trust in a situation of violent conflicts. First, international courts can act as mediators. As we have highlighted above, international courts act as a third party not directly involved in violent conflict and the crimes committed therein and thus as a kind of mediator. International courts, in this sense, might

75. *See* Low Lucinda et al., *Closing Plenary: Building Trust in International Law and Institutions*, 111 PROC. ANN. MEETING AM. SOC'Y INT'L L. 325–46 (2017) (describing the panel discussion with contributions by Judge Christine van den Wyngaert, Judge Bruno Simma, Maurice Kamto, and Philip Alston).

76. *See* Cosette D. Creamer & Zuzanna Godzimirska, *Trust in the Court: The Role of the Registry of the European Court of Human Rights*, 30 EUR. J. INT'L L. 665, 672–74 (2019) (reviewing the frameworks and procedures acting as controls in the ECtHR).

77. However, this could also pose a challenge to the development of trust. *See* Hélène Ruiz Fabri, *Conflict of Interests and International Adjudication: Trust at Stake*, 113 PROC. ASIL ANN. MEETING 222, 223 (2019) (explaining that parties sometimes prefer adjudicators with a conflict of interest because a conflict may indicate an adjudicator's subject-matter expertise).

78. *See* Theresa Squatrito, *Judicial Diplomacy: International Courts and Legitimation*, 47 REV. INT'L STUD. 64, 68 (2021) (highlighting the widespread practice of judicial diplomacy throughout various international tribunals).

79. Pablo Saavedra, the Secretary of the IACtHR, has developed the narrative of the "robes and backpacks" to describe the IACtHR's regular practice of entering the field and visiting the states and communities of the hemisphere. *See also* Silvia Steininger, *Creating Loyalty – Communication Practices in the European and Inter-American Human Rights Regimes*, GLOBAL CONSTITUTIONALISM (forthcoming).

become 'repositories of trust',[80] where state counsels, which are often high-ranking diplomats and legal scholars,[81] meet on neutral ground. By transforming violent conflict into legal dispute, courts provide conflicting parties with a shared language and common procedures that help them stabilize expectations about each other's intentions and provides for guidance as to the course of action. While some states have refused to appear before international courts,[82] the general rate of participation is very high.[83] By appearing before international courts, states send out a signal of good faith and commitment to international law, as well as the system of dispute settlement. The accompanying slowing down of action helps the conflicting parties to distance themselves from the actual conflict and to (re-)consider alternative means of conflict resolution.

Secondly, international courts can also contribute to establishing a historical record of the conflict. They often engage in fact-finding in the adjudicative process, thus not only identifying the respective actions of state authorities but also documenting historical, social, and geopolitical contexts.[84] International courts lend their authority to external UN fact-finding missions, and their findings can create a new, more impartial history of the conflict.[85] In particular, the extensive historical records provided for by international criminal courts have been invaluable resources for victims and their right to truth.[86] The establishment of such 'collective narratives' versus conflict-supporting narratives by the respective parties is a prerequisite for the establishment of trust and cooperation in transitional justice.[87]

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80. *See* Herbert C. Kelman, *Building Trust Among Enemies: The Central Challenge for International Conflict Resolution*, 29 INT'L J. INTERCULTURAL RELS. 639, 645–46 (2005) (introducing the concept of 'repositories of trust').

81. *See* Shashank P. Kumar & Cecily Rose, *A Study of Lawyers Appearing before the International Court of Justice*, 25 EUR. J. INT'L L. 839, 897, 908 (2014) (demonstrating empirically that a majority of lawyers appearing before the International Court of Justice were either academics or government lawyers).

82. Peter Tzeng, *A Strategy of Non-Participation before International Courts and Tribunals*, 19 LAW & PRAC. INT'L CTS. & TRIBUNALS 5, 6–8 (2020) (chronicling the history of states refusing to participate in international court proceedings).

83. *Id.* at 7.

84. *See* Moshe Hirsch, *The Role of International Tribunals in the Development of Historical Narratives*, 20 J. HIST. INT'L L. 391, 399–403 (2018) (describing the role international tribunals play in constructing collective memories by engaging in fact-finding inquiries). *See generally* JAMES GERARD DEVANEY, FACT-FINDING BEFORE THE INTERNATIONAL COURT OF JUSTICE (2016) (examining the way in which the International Court of Justice engages with facts).

85. This does not mean that the "history writing" by international courts is not contested. *See* Barrie Sander, *The Method is the Message: Law, Narrative Authority, and Historical Contestation in International Criminal Courts*, 19 MELB. J. INT'L L. 299, 314–33 (2018) (illustrating three examples where 'history writing' by international courts is contested).

86. *But see, e.g.*, Fergal Gaynor, *Uneasy Partners – Evidence, Truth and History in International Trials*, 10 J. INT'L CRIM. JUST. 1257 (2012) (examining how jurisdictional and evidentiary rules often serve to create an incomplete historical record); Aldo Zammit Borda, *History in International Criminal Trials: The 'Crime-driven Lense' and Its Blind Spots*, 18 J. INT'L CRIM. JUST. 543 (2020) (analyzing the limitations that a crime-driven lens may have on a historical record).

87. Elizabeth Wilke, Paul K. Davis & Christopher S. Chivvis, *Establishing Social Conditions of Trust and Cooperation, in* DILEMMAS OF INTERVENTION: SOCIAL SCIENCE FOR STABILIZATION AND

Thirdly, court interventions signal responsibility for committed crimes, which might contribute to the development of trust from victims. While alternative mechanisms such as truth commission or amnesties are equally helpful in managing trauma arising from conflict experiences and in furthering reconciliation, the involvement of criminal courts affirms the legal individual responsibility of perpetrators. Hence, the international criminal tribunals, the ICTY, ICTR, and the ICC in particular, pioneered addressing and including the victims of international crimes, giving them an individual standing and a chance to see justice at least for the respective crimes.[88] The ICC, for instance, created a victim's fund so that compensation payments for victims could be issued even if the convicted would not have the financial resources. The Trust Fund for Victims also implements projects funded through fines and forfeitures of convicted persons as well as voluntary donations by state parties and individual donors. In March 2021, the ICC judges ordered compensation of 30 million USD to the victims of convicted war criminal Ntaganda in the Democratic Republic of Congo.[89]

However, international courts more often fail than succeed in generating justice for victims of crimes given the enormous obstacles to international and extraterritorial jurisdiction concerning the access to and protection of evidence and witnesses. Victims are often frustrated because the court cannot take account of all crimes and the respective victims given its narrow mandate and resources, a problem that was particularly evident in the Lubanga case at the ICC in which crimes of sexual violence were sidelined.[90] Finally, reparations are often dependent on the trust fund which does not have the volume to satisfy all requests.[91] Yet, reparations are not the only available instruments to create trust among victims.

International courts also allow for the active involvement of victims in the adjudicative process, allowing them to speak their truth to the international audience and face those responsible for their suffering. In particular, when national courts and post-conflict instruments have been unable or unwilling to provide justice, recourse to international courts remains the last resort for victims of armed conflict. Naturally, the deep trauma of war and violence requires international judges to undertake oral examinations with heightened sensitivity.[92]

RECONSTRUCTION 187, 215–16 (Paul K. Davis ed., 2011); DANIEL BAR-TAL, INTRACTABLE CONFLICTS: SOCIO-PSYCHOLOGICAL FOUNDATIONS AND DYNAMICS 1440–43 (2013).

88. Luke Moffett, *Elaborating Justice for Victims at the International Criminal Court*, 13 J. INT'L CRIM. JUST. 281, 282–84 (2015).

89. Prosecutor v. Ntagand, ICC-01/04-02/06, Reparations Order, ¶ 247 (Mar. 8, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_01889.PDF [https://perma.cc/NGQ5-7DVR].

90. Rachel Killean & Luke Moffett, *Victim Legal Representation before the ICC and ECC*, 15 J. INT'L CRIM. JUST. 713, 718, 731 (2017).

91. Kelisiana Thynne, *The International Criminal Court: A Failure of International Justice for Victims?*, 46 ALTA. L. REV. 958, 979 (2009).

92. *See* Behnam Behnia, *Trust-Building from the Perspective of Survivors of War and Torture*, 78 SOC. SERV. REV. 26, 29–36 (2004) (highlighting the steps necessary for professionals to establish trust with victims of war and torture).

This can create tensions, for instance, most recently at the IACtHR, in the case of Jineth Bedoya Lima and Other v. Colombia. Following an hour-long, highly emotional testimony of journalist Jineth Bedoya who was abducted, raped, and tortured during a prison visit in 2002, the Colombian representative accused the judges of lack of impartiality and requested their recusal. Yet, the Court rejected the allegations, highlighting that "empathy with the alleged victim and the formulation of an interrogation that is comfortable, safe and that provides confidence, as well as the elimination of spaces of re-victimization, are concrete obligations of the judges" (own translations).[93]

Finally, with regard to the international legal community, the primary function of court intervention is to uphold normative commitments by judging on violations. When courts intervene, they force conflicting parties to justify their action with reference to legal principles and agreed-upon norms. Doing so should re-activate the commitment of the conflicting parties to these norms. Equally, it signals to the international community as a whole that certain commitments are upheld.[94] Additionally, such interventions can also be instrumental in identifying aspects in need of legal attention and norms in need of refinement. This is the logic of legal application discourses: They re-affirm commitment to norms and at the same time spur the further development of legal norms.[95] All in all, court interventions thus are a primary means to increase certainty in the international legal community about the validity of legal principles and norms. From a trust perspective, compliance with norms and judgments is thus not of immediate interest. Trust in the proceedings of international courts does not necessarily equal trust in the respective outcome.

VI

CONCLUSION

In the bulk of rationalist scholarship, the intervention of international courts in violent conflicts is perceived at best as irrelevant to the conflict at hand and at worst as a cause of further destabilization and violence. In institutionalist scholarship, the judicialization of mega-political issues is generally seen as a threat to the institutional authority of courts and the political community alike. Ran Hirschl argues that the transfer of mega-political issues from the realm of political debate to judicial decision-making creates the risk of 'political courts' in

93. Caso Bedoya Lima y Otra vs. Colombia, Procedural Outcome, Motion Granted, Inter-Am. Ct. H.R. (ser. C) No. 431 (Aug. 26 2021); *see also* Mariela Morales & Silvia Steininger, *Once More on Judicial Resilience: The Inter-American Court of Human Rights Responds to the Revictimizing Challenge of Colombia in the Case of Jineth Bedoya Lima and Other*, OPINIO JURIS (Apr. 1, 2021), http://opiniojuris.org/2021/04/01/once-more-on-judicial-resilience-the-inter-american-court-of-human-rights-responds-to-the-revictimizing-challenge-of-colombia-in-the-case-of-jineth-bedoya-lima-and-other/ [https://perma.cc/4JAJ-VQJU] (documenting the oral proceedings before the Court).

94. *See* Daase & Deitelhoff, *supra* note 19, at 499.

95. *See generally* KLAUS GÜNTHER, THE SENSE OF APPROPRIATENESS: APPLICATION DISCOURSES IN MORALITY AND LAW (John Farrell trans., 1993).

the domestic sphere.[96] Recent research on international courts adopts a similarly negative outlook. Both the literature on backlash[97] as well as on judicialization[98] highlights the challenges of international courts with respect to highly contested domestic issues.

For violent conflicts as a prototype of mega-politics that we address in our contribution, both lines of research have highlighted possible negative externalities of international court involvement. However, the adoption of a mega-political lens for international courts paints a more mixed picture, as their involvement can contribute to resolving, advancing, or exacerbating the resolution of the dispute. International courts cannot refrain from interfering in political conflicts because they were designed to do exactly that. In an at best semi-constitutionalized political order like the global one, courts are a prime means to uphold and communicate shared norms and procedures in peace and security. In this sense, we argue that judicial intervention is not only necessary but also desired to uphold the normative commitments underpinning the international legal order. Moreover, court intervention in violent conflict can have positive effects with regards to the course of the conflict – for both victims and the international community.

Judicialization transforms the conflict into a concrete legal dispute, which disaggregates the conflict into various legal forums. This allows the fighting parties to refer to a shared language and common procedures, which helps reduce uncertainties between the parties and creates a common horizon for conflict management. Slowing down the conflict helps conflict parties to leave the fog of war and reflect on alternative means of conflict resolution. Additionally, it buys time for domestic and international groups and institutions to work on conflict resolution.

Judicialization is also one of the very few possibilities to give the victims of a conflict international legal standing. Where national redress and institutions of transitional justice fail or are absent, international courts may help victims to overcome their trauma from conflict and the crimes committed therein by identifying individual responsibility and accountability. Providing for reparation and truth-telling, as even courts with low institutional authority such as the IACtHR and the ICC can do, is another means to achieve this.[99]

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96. Ran Hirschl, *The Judicialization of Mega-Politics*, *supra* note 13, at 107–12.

97. *See generally* Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J. L. CONTEXT 197–220 (2018) (investigating the different reasons nations across the world are resisting international courts).

98. *See generally* Karen J. Alter, Emilie M. Hafner-Burton & Laurence R. Helfer, *Theorizing the Judicialization of International Relations*, 63 INT'L STUD. Q. 449–63 (2019) (theorizing the ways that judicialization instills power in litigants, judges, arbitrators, and other nonstate decision-makers).

99. *See* Christian Marxsen, *Introduction in* CRISTIÁN CORREA, SHUICHI FURUYA & CLARA SANDOVAL, *Reparation for Victims of Armed Conflict*, *in* MAX PLANCK TRIALOGUES ON THE LAW OF PEACE AND WAR (2020) 1–15.

Finally, with regard to the international legal community, judicialization is a means to communicate and reactivate normative commitments and identify areas for further development, while providing procedures on how to do so. Courts are spaces for norm contestation where the members of a legal community can debate about the necessity, effectiveness, and legitimacy of specific norms and rules, following shared rules of engagement. This is of utmost importance for the area of peace and war, where core legal concepts such as intervention or self-defense are not only vague on principle but consistently in flux.[100] The lack of a unified regime or enforcement body for international humanitarian law further highlights the crucial role of international courts, particularly human rights courts and international criminal tribunals, to provide clarification on normative understandings.[101] As such, courts are a means to re-assure each other of shared commitments.

We are well aware that these effects do not automatically materialize in each case. Due to procedural requirements, court intervention can often not address the core conflict item itself and the permanent pacification of a conflict is thus a rather elusive goal. Judicialization in a situation of post-conflict justice is also susceptible of further entrenching political, economic, social, or ethnic divides. Additionally, conflict parties often ignore court rulings or utilize them to mobilize for their cause. Thus, judgments might clarify normative meanings but still not succeed in having a deterrence effect.[102] Victims are also frequently disappointed by the limited resources and capabilities of international courts to provide justice. International courts struggle to process hundreds or even thousands of individual claims and lack financial resources to undertake fact-finding in a situation of active hostilities. The disappointing experience of the Special Tribunal for

100. *See* Christian Marxsen and Anne Peters, *Introduction – Dilution of Self-Defence and Its Discontents*, in MARY ELLEN O'CONNELL, CHRISTIAN J. TAMS & DIRE TLADI, *Self-Defence Against Non-State Actors*, *in* 1 MAX PLANCK TRIALOGUES ON THE LAW OF PEACE AND WAR (2019) 1-13.

101. Laurence Burgorgue-Larsen & Amaya Úbeda de Torres, *"War" in the Jurisprudence of the Inter-American Court of Human Rights*, 33 HUM. RTS. Q. 148, 161–62 (2011). *See generally* Frans Viljoen, *The Relationship Between International Human Rights and Humanitarian Law in the African Human Rights System: An Institutional Approach*, *in* CONVERGENCE AND CONFLICTS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW IN MILITARY OPERATIONS 303–33 (Erika de Wet & Jann Kleffner eds., 2014); Karin Oellers-Frahm, *A Regional Perspective on the Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations: The European Court of Human Rights*, *in* CONVERGENCE AND CONFLICTS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW IN MILITARY OPERATIONS 333–65 (Erika de Wet & Jann Kleffner eds., 2014); Dinah Shelton, *Humanitarian Law in the Inter-American Human Rights System*, *in* CONVERGENCE AND CONFLICTS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW IN MILITARY OPERATIONS 365–95 (Erika de Wet & Jann Kleffner eds., 2014); Gentian Zyberi, *The Jurisprudence of the International Court of Justice and International Criminal Courts and Tribunals*, *in* CONVERGENCE AND CONFLICTS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW IN MILITARY OPERATIONS 395–416 (Erika de Wet & Jann Kleffner eds., 2014).

102. *See generally* Jacqueline R. McAllister, *Deterring Wartime Atrocities: Hard Lessons from the Yugoslav Tribunal*, 44 INT'L SEC. 84 (2020) (arguing that the deterrence effect of international courts is largely dependent on: "(1) ICT officials . . . secur[ing] prosecutorial support; (2) combatant groups rely[ing] on support from liberal constituencies; and (3) combatant groups hav[ing] centralized structures.").

Lebanon, which had cost both Lebanon and the international community approx. 970 million USD over eleven years but resulted in only one in absentia judgment,[103] is a warning sign that the establishment of specialized courts can sometimes do more harm than good.[104]

Scholars and practitioners have stressed lessons for international courts adjudicating violent conflicts to improve their legitimacy, effectiveness, and accountability, mostly focusing on outreach as well as deliberation and dialogue with domestic stakeholders.[105] For instance, Courtney Hillebrecht, Alexandra Hunneus, and Sandra Borda highlight the judicialization of Colombia's peace process:

> [It] took the form of a series of dialogues—between the courts and government; among different actors within the state, such as courts, executive agencies, and the prosecutors; and among non-state actors such as NGOs, the media, and the universities—that emphasized the international law and norms of criminal accountability. (. . .) It is also that the terms of Colombia's peace were produced *through*—not *despite*—the international courts' ongoing deliberative engagement with the peace process. Without the courts' participation and apparent acquiescence, the Final Accord would not enjoy the same level of international or domestic legitimacy, and it would not show the same level of legal sophistication.[106]

Counterfactual thinking – would it have been better (for the court, for the norm, for the society) if the issue had never been adjudicated? – does not hold much promise for international courts in situations of violent conflicts. The establishment of specific courts and their handling of particular cases is historically contingent, which means the inclusion or exclusion of international courts in situations of violent conflict is not predetermined and a different fate of specific courts and conflicts is possible.[107] Yet, the structures of the post-WWII international legal order, whether during the Cold War, the era of liberal internationalism in the 1990s, or the return of geopolitics in the 21st century, have remained surprisingly stable. In the area of peace and security, no more democratic, accessible, inclusive, and transparent organs than international courts have been developed. Reimagining whether a particular court, norm, or society would have benefited from less judicialization thus likely falls into the

103. The Prosecutor v. Ayyash, STL-11-01/T/TC, Judgment (Aug. 18, 2020).

104. *See* Michael Lysander Fremuth, Andreas Sauermoser & Konstantina Stavrou, *The Special Tribunal for Lebanon: After the Judgment in Ayyash et al., Justice at Last?*, OPINIO JURIS (Oct. 26, 2021), http://opiniojuris.org/2020/10/26/the-special-tribunal-for-lebanon-after-the-judgment-in-ayyash-et-al-justice-at-last/ [https://perma.cc/8F8F-Z3N4] (presenting the criminal justice and human rights critiques of the Special Tribunal for Lebanon).

105. *See, e.g.*, JESSICA LINCOLN, TRANSITIONAL JUSTICE, PEACE AND ACCOUNTABILITY: OUTREACH AND THE ROLE OF INTERNATIONAL COURTS AFTER CONFLICT (2017) (summarizing the critical link between outreach and achieving the objectives of international courts). *But see* critically CHRISTINE SCHWÖBEL-PATEL, MARKETING GLOBAL JUSTICE: THE POLITICAL ECONOMY OF INTERNATIONAL CRIMINAL LAW (2021) 181–212.

106. Courtney Hillebrecht, Alexandra Hunneus & Sandra Borda, *The Judicialization of Peace*, 59 HARV. INT'L L.J. 279, 329–30 (2018).

107. *See* Ingo Venzke, *Situating Contingency in the Path of International Law*, *in* CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITIES OF DIFFERENT LEGAL HISTORIES 3–19, 5–8 (Ingo Venzke & Kevin Jon Heller eds., 2021).

trap of what Susan Marks described as 'false contingency': "For just as things do not have to be as they are, so too history is not simply a matter of chance and will."[108]

The structures of international law favor the judicialization of violent conflicts, whether this results from power politics, international liberalism, institutionalist bureaucracies, or new imperialism. Still, in a global order in which access to justice and democracy is so unequally distributed like ours, court intervention might still be the best and, in most instances, the only option.

108. Susan Marks, *False Contingency*, 62 CURRENT LEGAL PROBS. 1, 10 (2009).