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Politico-Legal Inter-State Disputes: Should the United Nations International Law Commission Be Requested to Commence Studies on the "Opportunities for Holistic Dispute Settlement?"

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An analysis of typical international disputes shows how, in different degrees, they may well contain a political element, sometimes a strong one. . . . [What are] the options available to the judge? Either he can boldly enter the political arena, or he can endeavour to legalize the issues, i.e., to reshape the area of political dispute into one capable of legal decision, or he can adopt a mixed approach.

— Lord Wilberforce, Josephine Onoh Memorial Lecture 1986

ABSTRACT

Both Article 2 and Article 93 of the United Nations (U.N.) Charter[1] *mandate the International Court of Justice*[2] *(ICJ) to maintain international peace and security through pacific settlement of inter-state disputes. This Article examines a core assumption of the jurisdictional provision of the Statute of the International Court of Justice—Article 36.*[3] *Paragraph (2) of Article 36 introduces a filter mechanism that limits the jurisdiction of the court to legal disputes only.*[4] *Consequently, the court cannot entertain or take political disputes. Political disputes are to be deemed nonjusticiable. This filter mechanism gives the impression that the ICJ is purely a court of law that has no concern with politics. But such a presumption is false because of a fundamental reality of inter-state disputes—namely, that they are always, first and foremost, political in nature. Invariably, Article 36(2) presumes that international courts can isolate disputes' legal matrixes from the intertwining antecedent political content, review them, and render back to the parties legal answers that peacefully resolve the challenges that brought them to court in the first instance. This Article argues that current international dispute*

1 U.N. Charter art. 2, ¶ 93.

2 *Id.*

3 Article 36(1) provides that "[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." *Statute of the International Court of Justice*, INT'L CT. JUST., https://www.icj-cij.org/en/statute [https://perma.cc/9CTZ-NB5L].

4 Article 36(2) states that "[t]he states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes." *Id.*

settlement systems envisaged under Article 95 of the U.N. Charter may have evolved with an inherent blind spot that insists, as Article 36(2) does, that the ICJ can address only legal and not political disputes. If so, then the ICJ may have persisted under a false pretense all these years; namely, the pretense that it does not address political questions while consciously and cautiously resorting to judicial activism—sometimes minimally and at other times extensively—depending on the exigencies of the situation. This approach caused outright consternation in the aftermath of the Customs Union case.[5] *At other times, this approach has benefited from mere ambivalence and resignation of concerned parties, as in the Corfu Channel case.*[6] *Albania, a nonmember of the U.N. at the time, had issued a preliminary objection to the jurisdiction of the ICJ in the matter, arguing that the U.N. Security Council lacked the capacity to compel it to refer its dispute with the United Kingdom (U.K.) to the court. On March 25, 1948, the ICJ ruled that, by agreeing to refer its dispute with the U.K. government to the Security Council, Albania had committed itself to the Security Council's decision on the matter.*[7]

This Article recommends a review of the jurisdictional provision of the ICJ to ensure internal logical coherency of the assumptions that underpin the jurisdictional mandate of the ICJ. The benefits would include the enhancement of clarity and logic both in the ICJ statutory provisions and in the practice of the court. They would ensure certainty between the literal and textual clarity of the Statute of the International Court of Justice and the actual practice of the ICJ. Article 38 of the Statute of the International Court of Justice is widely regarded as the basis for international law generally.[8] *Moreover, going forward, there*

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5 Customs Regime Between Germany and Austria, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No.41 (Mar. 19) (discussed below). *See also* Leland M. Goodrich, *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, 32 AM. J. INT'L L. 738, 738–58 (1938); John C. Knechtle, *Isn't Every Case Political – Political Questions on the Russian, German, and American High Courts*, 26 REV. CENT. E. EUR. L. 107, 107–28 (2000); THOMAS M. FRANCK, POLITICAL QUESTIONS JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992); Susan R. Burgess, *Foreign Affairs, Executive Power and Constitutional Limits*, 18 LEGAL STUD. F. 513, 513–22 (1994) (book review); Manley O. Hudson, *The Advisory Opinions of the Permanent Court of International Justice*, 10 INT'L CONCILIATION 910, 910–69 (1925); Herbert W. Briggs, *The United Nations and Political Decision of Legal Questions*, 42 AM. SOC'Y INT'L L. PROC. 42, 42–52 (1948).

6 The Corfu Channel Case (U.K. v. People's Republic of Alb.), Judgment, 1949 I.C.J. 4 (Apr. 9).

7 The Corfu Channel Case (U.K. v. People's Republic of Alb.), Preliminary Objection, 1949 I.C.J. 15 (Mar. 25).

8 *See also* BEN CHIGARA, LEGITIMACY DEFICIT IN CUSTOM: A DECONSTRUCTIONIST CRITIQUE (2018).

is likely to be a stronger, not weaker, prevalence of hotly contested inter-state disputes clearly marked by evidence of both very strong fundamental political and legal questions in equal measure. These hotly contested politico-legal disputes will require urgent and credible answers to ensure international peace and security. These are likely to be around issues on exploitation of shared watercourses, global warming and climate change, climate migration and right to asylum, and so forth. To be authentic to the mission of facilitating international peace and security through the Pacific settlement of inter-state disputes, the ICJ will need to be ready to offer holistic answers that address both the legal and the political issues that underpin those disputes.

I
THE PROBLEM: INCONSISTENCY BETWEEN THE FORMAL JURISDICTION OF THE ICJ AND THE COURT'S ACTUAL PRACTICE

Inter-state relations are always political in nature. They are the preserve of what Christian Reus-Smit and Duncan Snidal call the "international political universe."[9] Definitions of the discipline include "a struggle for power among nations," "the interaction of state politics with the changing pattern of power relationships," and "interactions of state policies within the changing patterns of power relationships."[10] Classic politico-legal disputes include the continuing U.K.-EU debacle over trading rules applicable to Northern Ireland in relation to the post-Brexit agreement and the deracialization of land use in post-apartheid rule Southern African Development Community (SADC) states.[11]

Firstly, the withdrawal agreement[12] (Brexit agreement) between the U.K. and the European Union (EU) introduced a protocol on the rules that would govern Northern Ireland's trading relationship with the

9 CHRISTIAN REUS-SMIT & DUNCAN SNIDAL, THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS 11–12 (2010).

10 *Id.*

11 *See* Ben Chigara, *Introductory Note to Southern African Development Community Tribunal – Mike Campbell (Pvt) Ltd. and Others v. Republic of Zimbabwe*, 48 INT'L L. MATERIALS 530, 530–32 (2009); Ben Chigara, *Incommensurabilities of the Southern African Development Community (SADC) Land Issue*, 25 AFR. J. INT'L & COMPAR. L. 295, 295–325 (2017); Ben Chigara, *What Should a Re-constituted Southern African Development Community (SADC) Tribunal Be Mindful of to Succeed?*, 81 NORDIC J. INT'L L. 341, 341–77 (2012).

12 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 2020 O.J. 384.

EU—the Protocol on Northern Ireland.[13] Arguably, this was the most difficult phase of the Brexit negotiations. Challenges have persisted in the implementation phase with counter accusations of lack of good faith from either side. The matter appears to be headed to the courts for resolution. On July 22, 2022, the European Commission launched four new legal procedures against the U.K. after the U.K. had certified a new law to undo some of the rules governing post-Brexit trading arrangements for Northern Ireland contained in the Brexit agreement (2019).[14]

The Dominion of the U.K. comprises England, Wales,[15] Scotland,[16] and Northern Ireland.[17] Geographically, the island of Ireland is shared between Northern Ireland and the Republic of Ireland, which is a member state party of the EU.[18] The question of what trade rules would apply to Northern Ireland threatened efforts to reach the withdrawal agreement. Its political aspects had earlier exercised the negotiations that resulted in the Good Friday Agreement[19] that was brokered on

13 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, E.U. & Euratom-U.K., 2020 O.J. L 29/7.

14 *See also* Philip Blenkinsop, *EU Sues Britain Again, Saying Northern Ireland Bill Erodes Trust*, REUTERS (July 22, 2022), https://www.reuters.com/world/uk/eu-launches-four-legal-procedures-against-uk-over-northern-ireland-2022-07-22/ [https://perma.cc/D2JW-CQYA].

15 The Statute of Wales (1284) annexed Wales to the crown of England. Further, Henry VIII's Act of Union of 1536 united England and Wales. *See Welsh Timeline*, CYMRU, https://www.tcs.cymru/wp-content/uploads/2019/09/welsh-timeline.pdf [https://perma.cc/NC93-TU8F].

16 In 1707 the English and Scottish Parliaments passed legislation known as Acts of Union. *See Act of Union 1707*, UK PARLIAMENT, https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/act-of-union-1707/ [https://perma.cc/QZ4W-6MES]. These pieces of legislation led to the creation of the United Kingdom of Great Britain on May 1, 1707. *Id.*

17 Acts of Union that came into force on January 1, 1801, had been adopted by the United Kingdom of Great Britain and Ireland in both Dublin and Westminster in 1800. *See An Act for the Union of Great Britain and Ireland*, UK PARLIAMENT, https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliamentandireland/collections/ireland/act-of-union-1800/ [https://perma.cc/4EJG-4FJ9]. Under the terms of the Union, the Irish Parliament was abolished, and Ireland given 100 MPs at Westminster with an additional twenty-eight of their number appointed as Lords for life in the upper chamber—House of Lords. *Id.*

18 *See Ireland and the EU: A History*, IR. DEP'T FOREIGN AFFS., https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/irelandintheeu/ireland-in-the-eu-history.pdf [https://perma.cc/Z33S-87CL].

19 Northern Ireland Peace Agreement, Apr. 10, 1998, 37 I.L.M 751 [hereinafter The Good Friday Agreement].

April 10, 1998, by U.S. Senator George Mitchell, ending decades of civil war that Rainer Grote describes as

> one of the longest and most protracted in recent European history. It is a legacy of England's long and often violent involvement in Ireland, which started as early as the late 12th century when the first English settlers arrived in Ireland. Not surprisingly, the attempts to settle the conflict have been equally complex, often straddling the boundaries between international and constitutional law and establishing a multi-layered political and institutional framework.[20]

Critically, as a region of the U.K., the question of Northern Ireland's post-Brexit trading relations with the EU provoked the question of whether a firm border would be required between it and the Republic of Ireland to give effect to the Brexit agreement. The idea of introducing a firm border on the island is a very sensitive, divisive, and inflammatory matter.

Secondly, the U.K. EU, post-Brexit challenges refer to the implementation of a thoroughly negotiated international agreement on the trade relations that shall apply between Northern Ireland (a region of the U.K.) and the EU. While this might appear *prima facie* to be a question of treaty implementation (and therefore a legal issue to be administered under the Vienna Convention on the Law of Treaties 1969),[21] nothing could be further from the truth. As David Gantz observes, trade agreements are frustratingly "time-consuming, and difficult legal and political processes."[22] If so, these politico-legal disputes, I argue, require holistic resolution approaches and not monolithic ones, like under Article 36(2), whose presumptions about inter-state disputes are inconsistent with the reality of international relations. Such politico-legal challenges in inter-state relations could not be sufficiently addressed by legal procedures alone, with the hope of a sufficient and lasting resolution.

Unsurprisingly, World Trade Organization (WTO) Dispute Settlement Body[23] (DSB) case reports show, in some instances, the same issue repeatedly coming before dispute settlement panels and

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20 Rainer Grote, *Northern Ireland*, *in* MAX PLANCK ENCYCLOPEDIAS OF INT'L L. (2008), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1327 [https://perma.cc/2G68-WYUJ].

21 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

22 David A. Gantz, *The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreements?*, 49 LOY. U. CHI. L.J. 361, 361–85 (2017).

23 *See also WTO Dispute Settlement: Resolving Trade Disputes Between WTO Members*, WORLD TRADE ORG. (June 1, 2015), https://www.wto.org/english/thewto_e/20y_e/dispute_brochure20y_e.pdf [https://perma.cc/WX3C-7ESF].

even before the appellate body itself; hence, case reports often carry suffixes like No.1, then No.2, and sometimes No.3.[24] This points to incomplete and insufficient resolutions of pressing issues in previous rounds of the deliberations. To put it differently, the recurrence of particular questions infusing political and legal disputes before the WTO DSB probably indicates unresolved, enduring, and undying political issues that legal attention alone may not have put to bed.[25]

Inter-state disputes will always be fundamentally political in nature because they reflect political interests[26] and aspirations of competing national interests. If so, this raises the question of whether judicial dispute settlement bodies are appropriately equipped, trained, and authorized to holistically attend to the numerous politico-legal disputes that reach their registry desks. This question immediately provokes the sub-question of whether the assumptions that underpin the jurisdictional declarations of Article 36 of the Statute of the ICJ[27] sustained both internal coherency and heuristic power of the court. This is because, while this provision confers the widest possible jurisdiction on the court—namely, "all cases which the parties refer to it"[28]—paragraph two of this provision nevertheless filters the ICJ's jurisdiction to legal disputes only.[29] What happens then to politico-legal disputes that states cannot single handedly resolve by themselves?

Firstly, if all inter-state disputes are fundamentally political in their nature, are they all capable of transitioning from political to legal capsules without distortion of their content and the conflicting aims of the dispute for the ICJ to then sufficiently address? Secondly, even if we assumed for a moment that such a transition was sometimes possible, the question immediately arises about the residual antecedent pressing political aspects of the consequent legalized political disputes that any determinations of the court could not address in its settlement.

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24 *European Communities – Regime for Importation, Sale and Distribution of Bananas*, WORLD TRADE ORG. (Nov. 8, 2012), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm [https://perma.cc/X4AT-PAP]. *See also* Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WTO Doc. WT/DS27/AB/RW2/ECU (adopted Nov. 26, 2008).

25 *See also* Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States*, WTO Doc. WT/DS27 (May 22, 1997).

26 *See especially* LOUIS HENKIN, HOW NATIONS BEHAVE (2d ed. 1989).

27 Statute of the International Court of Justice, art. 36, June 26, 1945, 993 T.S., 67 U.K.T.S. 26.

28 *Id.*

29 *Id.*

A core assumption of Article 36 of the Statute of the ICJ is that, when disputes are submitted, the ICJ is able to isolate the legal matrixes from the intertwining antecedent political content, consider it, and render back to the parties a legal answer that resolves the challenges that first brought the parties to court.[30] This Article shows that current international inter-state dispute settlement systems may have evolved with an inherent blind spot that remains ambivalent to the reality of inter-state disputes. These systems have persisted in their functions, often applying judicial activism tactics to get by. Sometimes this approach has caused consternation and at other times ambivalence. However, these dispute settlement systems now require an appraisal of their jurisdictional mandates to sufficiently align them with their functions, which include dealing with disputes that lie on the interface of politics and public international law.

Such a development would strengthen the legitimacy of systems for pacific settlement of disputes and bring them closer to actualization of their purpose to enhance international peace and security. It would also strengthen the internal logical coherency and textual clarity about the practice of inter-state dispute settlement mechanisms.

Emergent challenges that lie on the interface of politics and public international law require holistic settlement that addresses both their political and legal aspects. These emergent challenges include patent control and access to vaccines.[31]

Thomas Franck helpfully defined legitimacy as a pull toward voluntary compliance among users of a procedure.[32] This Article argues that, regarding international dispute settlement procedures, such legitimacy depends upon a *holistic approach* that is not limited by whether and how a tribunal has reached the determination that the matter before it is susceptible to judicial settlement or not. This Article recommends the following:

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30 *Id.*

31 Sam Fleming & Michael Peel, *EU Member States Squabble over Vaccine Distribution*, FIN. TIMES (Mar. 14, 2021), https://www.ft.com/content/d14df110-cbb0-4652-98cb-15e716cfff7b [https://perma.cc/YD9X-HAGX]. *See also* Laurie Goering, *World's Dwindling Water Supplies Bring Greater Risk of Conflict: Report*, GLOB. CITIZEN (Aug. 22, 2019), https://www.globalcitizen.org/en/content/plans-to-share-resources-from-cross-border-water-b/ [https://perma.cc/2B4V-STF5]; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SIXTH ASSESSMENT REPORT (2022), https://www.ipcc.ch/ [https://perma.cc/9CC5-Y5CQ].

32 THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 25 (1990).

1) An overhaul of jurisdictional provisions of the ICJ statute to undo the internal incoherency between the wide jurisdiction of the court—all matters referred to the court and its ability to hear legal disputes only. The jurisdictional filter contained in Article 36(2) of the statute of the ICJ appears to misunderstand the fundamental politico-legal nature of inter-state disputes. This has the effect of minimizing the court's opportunities to fulfill its function of contributing to the maintenance of international peace and security by facilitating pacific dispute settlement between nation states.

2) The U.N. General Assembly requests the International Law Commission (ILC) to commence a study on the opportunities available for the possible holistic settlement of inter-state disputes with a view to recommending jurisdictional and other reforms for the optimization of the role of international dispute settlement organs.

A holistic jurisdiction for dispute settlement procedures has potential to maximize the chances of realizing the U.N. Charter twin paramount goals of pacific settlement of all disputes that may occur in inter-state relations (Article 2(3))[33] and the prohibition of the use of war as a tool of statecraft in inter-state relations (Article 2(4)).[34] However, paragraph (2) of the ICJ's jurisdictional provision appears to have had the effect of severely restricting the broad jurisdiction initially bestowed upon the court in the preceding paragraph. This restriction opens up justifiable scrutiny of the ICJ's compliance with this injunction to limit its work to only disputes of a legal nature. Paragraph (2) also raises the question of internal coherency in the formulation of the jurisdictional provision because it appears to misconstrue the nature of inter-state disputes—namely, that they do not present in black and white, legal or political denominators. Rather, they often present a combination of both political and legal matrixes in varying formulations—sometimes more political than legal and vice versa.

This logical incoherency at the heart of the court's jurisdictional clause is unnecessary and may be responsible for some of the world's

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33 U.N. Charter art. 2, ¶ 3 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.").

34 U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

enduring inter-state disputes that parties have elected not to bring to the ICJ to avoid getting legal answers to what they perceive as predominantly political issues. Since the end of World War II, Russia and Japan have failed to resolve their problem regarding the sovereign ownership of the Kuril Islands.[35] Nevertheless, they appear to prefer to not submit it to the ICJ. This recommends the view that international disputes require a holistic approach that responds to the composite matrixes of inter-state disputes and not just the narrow, and sometimes less significant, legal issues. The alternative view is problematic because the fight for an international rule of law may be characterized as

> a fight against politics, which is understood as a matter of furthering subjective desires and leading into an international anarchy. Though some measure of politics is inevitable, it should be constrained by non-political rules: . . . "the health of the political realm is maintained by conscientious objection to the political."[36]

If treaties are an example of objective law separate from political idiosyncrasies of states, then the practice of entering reservations to treaties maintains the relationship between the "objective law" and the "subjective, self-opinionated politics." Martti Koskenniemi writes, "As contemporaries increasingly saw Europe as a 'system' of independent and equal political communities (instead of a *respublica Christiana*), they began to assume that the governing principles needed to become *neutral and objective—that is, legal*."[37] This nineteenth-century assumption among legal scholars might have proceeded on an understanding of the European law as public law that focused on procedure rather than substantive standards.[38] The attempt to cleanly separate politics from law in inter-state relations may suit the positive law scholar but not the empiricist who continuously encounters the impact of both politics and law in almost equal measure in inter-state relations.

In their conclusions on a study that focused on cases in which the ICJ had declared that it lacked jurisdiction, Rita Teixeira and Ricardo Bastos observed that:

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35 *See also* Alex Ivanov, *The Kuril Islands Problem as a Stumbling Point Between Russia and Japan*, EUREPORTER (Sept. 17, 2021), https://www.eureporter.co/world/russia/2021/09/17/the-kuril-islands-problem-as-a-stumbling-point-between-russia-and-japan/ [https://perma.cc/V7NR-5GVL].

36 Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 5, 5 (1990).

37 *Id.* at 6 (emphasis added).

38 *Id.*

> the range of legal issues that can arise when the ICJ is examining the question of jurisdiction is very wide, including questions of interpretation of specific reservations made to declarations accepting the compulsory jurisdiction of the Court, the appliance of the reciprocity principle and compromissory clauses in multilateral treaties (problems within the scope of jurisdiction *ratione materiae*), as well as questions of recognition and statehood and of membership of the UN (problems within the scope of jurisdiction *ratione personae*), or even the determination of the time of the relevant facts in [the] dispute and [whether] they occurred prior to the consent given by states (problems of jurisdiction *ratione temporis*).[39]

In their relations with one another, states appear wary of turning to judicial resolution, matters that they regard as either purely or mostly political even where international peace and security might be the main concern. The ICJ is not unmindful of such concerns of states. It observed in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* that:

> certain States have however expressed the fear that the *abstract nature of the question* might lead the Court to make *hypothetical or speculative declarations* outside the scope of its judicial function. The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write "scenarios," to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information. The Court will simply address the issues arising in all their aspects by applying the *legal rules relevant to the situation*.[40]

Nonetheless, instigators prioritize the law as the *go-to mechanism* in international dispute resolution because of its presumed dignified, civilized, and rational choice attributes. Guzman shows how in-spite of its lack of coercive institutions that are commonly associated with functionality of national legal systems, international law is held together and works primarily because of the rational choices of its principal subjects who are themselves independent sovereign equals.[41] Keohane on the other hand suggests that international law has been quite resistant to rational choice analysis. This is probably because, as he sees it, defining rationality involves very difficult issues of

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39 Rita Teixeira & Ricardo Bastos, *The Cases Where the International Court of Justice Lacked Jurisdiction: A Brief Analysis and Commentary*, *in* TOWARDS A UNIVERSAL JUSTICE? PUTTING INTERNATIONAL COURTS AND JURISDICTIONS INTO PERSPECTIVE 23, 33 (Dário M. Vicente ed., 2016).

40 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 3, 226, ¶ 15 (July 8) (emphasis added).

41 *See* ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008).

information. Borrowing from Jon Elster, in discussing "pure rationality," he argues that:

> [a]n action, to be rational, must be the final result of three optimal decisions. First, it must be the best means of realizing an individual's desires, given his beliefs. Next, these beliefs must themselves be optimal, given the information available to him. Finally, the person must collect an optimal amount of evidence—neither too much nor too little.[42]

This Article focuses on these assumptions with the aim of evaluating the presumed separability of the legal issues from the overriding political content in matters presented for resolution at the ICJ. This is critical to understand international law's proper role in dispute resolution among subjects of international law, particularly in disputes that lie on the interface of politics and public international law. Such disputes almost always raise jurisdictional objections, not because the dispute is claimed to be motivated by political concerns but because the dispute itself is claimed to be political and not legal and therefore nonjusticiable.

Warning litigants to bring only judicial questions and not political matters to the Constitutional Court of South Africa and citing a list of several previous cases, Justice O'Regan insisted that:

> *courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community.* The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at re-arranging budgets. *In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.*[43]

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42 Robert O. Keohane, *Rational Choice Theory and International Law: Insights and Limitations*, 31 J.L. STUD. 307, 308 (2002).

43 Mazibuko v. City of Johannesburg 2010 (4) SA 567 (CC) at 27, ¶ 55 (S. Afr.) (emphasis added) (quoting Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC) (S. Afr.)). *See also id.* ¶¶ 61–67 for the development of the idea of allocation of competencies to the three different arms of government, proscribing the Judiciary from meddling in purely political matters.

II
HYPOTHESIS—THAT MORE DURABLE MECHANISMS THAT RESPOND HOLISTICALLY TO BOTH THE POLITICAL AND THE LEGAL CONTENT OF INTER-STATE DISPUTES ARE NEEDED TO ENABLE PACIFIC SETTLEMENT OF INTER-STATE DISPUTES THAT ARE ALWAYS FUNDAMENTALLY POLITICAL IN THEIR NATURE

Several factors can combine to influence states' decisions on how they proceed regarding the management of their contradictions and disputes with one another. These include, for instance, state interest, unequal distribution of economic and political power, and international social influence in the practice of inter-state relations. Even among allies, concerns, such as climate change, human migration, international terrorism, global fresh water supply, and pandemic vaccine production and control, to name a few, can trigger complex contradictions. Therefore, more resilient mechanisms for managing inter-state contradictions and disputes must be developed to safeguard from the potential to resort to primal instincts of armed conflict.

More resilient dispute settlement mechanisms are needed to prevent warfare in a world that appears to be on edge in many complex situations. Vaccine production and control became a serious matter of contradiction between post-Brexit U.K. and the EU in a hitherto unimaginable way during the 2020 COVID-19 pandemic.[44] Enormous uncertainty played out as the two parties eyeballed each other and exchanged bitter accusations. The assertion that democracies do not war against each other[45] may soon need support of other mechanisms to stem the potential possibility of resorting to warfare in the light of emergent contradictions. Democracies may need this support particularly where underlying state interest, unequal distribution of economic and political power, and social influence become pivotal in the choices each state has to make.[46]

In the continuing feud with her French counterpart over illegal migration into the U.K. from France, then Home Secretary Priti Patel is reported to have ordered her department to rewrite maritime laws so that migrants seeking to reach the U.K. across the English Channel

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44 *See also* Stephen McDermott, *Timeline: How the EU Provoked Anger in Ireland and the UK with Plans for a Hard Border for Vaccines*, THE JOURNAL (Feb. 1, 2021, 6:05 PM), https://www.thejournal.ie/timeline-eu-vaccine-northern-ireland-protocol-article-16-5341455-Feb2021/ [https://perma.cc/USV2-X3WS].

45 Alex Mintz & Nehemia Geva, *Why Don't Democracies Fight Each Other? An Experimental Study*, J. CONFLICT RESOL. 484, 484–503 (1993).

46 *See* HENKIN, *supra* note 26, at 49–87.

from France on flimsy and unsafe inflatables are redirected back to France by any number of means.[47] This is yet another example of tensions that evidence both a political and legal matrix fused into one.

International lawyers must adjust their expectations regarding the capacity of international law as currently practiced to manage and resolve those disputes that lie on the interface of public international law on the one hand and politics on the other. This opinion is justified by two factors that weigh on the function of the law in inter-state relations. One is underlying state interest, and the other is the unequal distribution of economic and political power and social influence among subjects of international law. The former always defies rational choice theory,[48] which is the argument that, given a choice between the reasonable and the less reasonable option, human beings will likely follow the reasonable option and avoid the less reasonable one. I will return to this when I examine the implications of this observation from the ICJ perspective in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*[49] against another state. The latter appears to manifest the instinctive statecraft of enlisting all possible advantages and opportunities at a state's disposal to achieve its goals in its inter-state relations.

These two factors often combine in different proportions and continually interact variably according to each circumstance to create or to establish formidable underlying, unending, intriguing, and tireless disputes. Current examples include the Palestine[50] issue, the Cuba/ USA[51] embargo U.S.[52] conflict, the Renaissance Dam issue,[53] the

47 Rajeev Syal, Jamie Grierson & Angelique Chrisafis, *France Accuses Patel of Blackmail in Row over Channel Migrants*, THE GUARDIAN (Sept. 9, 2021), https://www.theguardian.com/uk-news/2021/sep/09/france-accuses-patel-of-blackmail-in-row-over-channel-migrants#:~:text=Priti%20Patel%20has%20been%20accused,crossing%20the%20Channel%20by%20boat [https://perma.cc/RTS9-GX2K].

48 *See* John Scott, *Rational Choice Theory*, *in* UNDERSTANDING CONTEMPORARY SOCIETY: THEORIES OF THE PRESENT 126–38 (G. Browning, A. Halcli, & F. Webster eds., 2000).

49 Legality of the Threat or Use of Nuclear Weapons, *supra* note 40.

50 *See also* U.N. Hum. Rts. Council, *Rep. of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967: John Dugard (Special Rapporteur)*, U.N. Doc. A/HRC/4/17 (Jan. 29, 2007).

51 *See* Douglas A. Borer & James D. Bowen, *Rethinking the Cuban Embargo: An Inductive Analysis*, 3 FOREIGN POL'Y ANALYSIS 127, 127–43 (2007). *See also* Richard Garfield & Sarah Santana, *The Impact of the Economic Crisis and the U.S. Embargo on Health in Cuba*, 87 AM. J. PUB. HEALTH 15, 15–20 (1997).

52 Garfield & Santana, *supra* note 51.

53 Daniel Abebe, *Egypt, Ethiopia, and the Nile: The Economics of International Water Law*, 15 CHI. J. INT'L L. 27, 27 (2014).

Southern African Development Community (SADC) land issue,[54] and the control of Kashmir.[55] The minimization of the jurisdiction of the ICJ by Article 36(2) is asymmetrical to the nature of inter-state disputes. This has enormous potential for hindering the ICJ as the principal judicial organ of the U.N. in filling its mandate of ensuring international peace and security by providing adequate means for pacific settlement of inter-state disputes.

III
THE CHALLENGE

Historicization of dispute resolution among nation states evidences two factors that constantly interact to undermine the function of the law in inter-state relations—namely, underlying state interest and the unequal distribution of economic and political power and social influence among subjects of international law. Consequently, the sphere of inter-state relations is predominantly political.[56] Thus, attempting to use the law[57] to settle the political cannot entirely be said to be objective because, often, political choices defy logic and its imperatives. The claim that the rule of law operates to separate political decision-making from judicial decision-making[58] wears thin in the effort to resolve inter-state disputes, which are inherently political. Nevertheless, operation of this principle should remain paramount in regard to the establishment of institutions with primary responsibility for political matters on the one hand and, on the other, legal issues.

Where would states resolve their disputes if the ICJ ruled that a dispute was nonjusticiable because it was political and not judicial in nature or too abstract? Would such an impasse not threaten international peace and security in some cases? In its *Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons* against

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54 Chigara, *Incommensurabilities of the SADC Land Issue*, *supra* note 11, at 295.

55 Fahmida Ashraf, *Models of Conflict Resolution and the Kashmir Issue: Pakistan's Options*, 56 PAK. HORIZON, Apr. 2003, at 119–33.

56 *See also* Frederico Fabbrini, *States' Equality v. States' Power: The Euro-Crisis, Inter-State Relations and the Paradox of Domination*, 17 CAMBRIDGE Y.B. EUR. LEGAL STUD. 1, 1–33 (2015); Christina Parajon Skinner, *Ethical Dilemmas in Inter-state Disputes*, 68 ALA. L. REV. 281, 281–302 (2016); Joseph F. Zimmerman, *Introduction: Dimensions of Interstate Relations*, 24 PUBLIUS 1, 1–11 (1994); Shabtai Rosenne, *The Role of the International Court of Justice in Inter-State Relations Today*, 20 REV. BDI 275, 275–89 (1987).

57 *See* H.L.A. HART, THE CONCEPT OF LAW (1961); RONALD DWORKIN, LAW'S EMPIRE (1986).

58 *Mazibuko v. City of Johannesburg* 2010 (4) SA 567 (CC) at 28 ¶ 47 (S. Afr.).

another state, the ICJ observed that it had *a priori* to determine whether the advisory opinion request actually raised a *legal question* within the meaning of its statute and of the U.N. Charter.[59] Invoking its own jurisprudence in the *Western Sahara* case,[60] the ICJ stated that questions framed in terms of law and raising problems of international law are by their very nature susceptible of a reply based on law.[61] They appear, therefore, to be questions of a legal character. The ICJ reasoned that the General Assembly's question to it was indeed a legal question since the court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the court must identify the existing principles and rules, interpret them, and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law. The fact that the question may also carry political content, would not suffice to deprive it of its character as a "legal question" nor "deprive the Court of a competence expressly conferred on it by its Statute." [62] Whatever the political connotations a question may pose, the Court could not refuse to admit the legal aspects of a question.

Indeed, the ICJ is well aware that disputes do not present in black or white, legal or political. Rather, they present as conflations and hazes of legal and political issues. Therefore, pursuant to Article 36(2) of its own statute, if the ICJ determines that it has jurisdiction over the matter, then it must address the legal issues raised by the dispute. However, the presumption that the law is the natural *go-to mechanism* for settling inter-state disputes is undermined by the fact that the court must determine *a priori* whether the dispute is legal (and therefore justiciable) or not legal (and therefore unjustifiable). Where intertwining political, nonlegal issues manifest, the court gives the impression, if it decides to proceed with the matter, that it then makes clinical and surgical incisions into the matters presented to separate for its attention only the legal matters. This is a curious proposition: judges as surgeons, clinically incisive and accurate in mending and judicially tending the dysfunctional cells in parties' inter-state relations.

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59 Legality of the Threat or Use of Nuclear Weapons, *supra* note 40.

60 Western Sahara, Advisory Opinion, 1975 I.C.J. 61, at 18, ¶ 15 (Oct. 16).

61 *Id.*

62 *See* Rev. U.N. Trib., 166, Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J. 158, at 172, ¶ 14 (July 12, 1973).

In the Western Sahara case, Second Phase (1966),[63] the ICJ had to determine *a priori* whether the political, moral, and humanitarian considerations advanced by the applicants were capable of generating *legal rights and obligations* that individual members of the League of Nations could claim or enforce.

> The Court must now turn to certain questions of a wider character. Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. *It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline.* Otherwise, it is not a legal service that would be rendered.[64]

> Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law. All States are interested and have an interest in such matters. *But the existence of an "interest" does not of itself entail that this interest is specifically juridical in character.*[65]

> It is in the light of these considerations that the Court must examine what is perhaps the most important contention of a general character that has been advanced in connection with this aspect of the case, namely the contention by which it is sought to derive a legal right or interest in the conduct of the mandate from the simple existence, or principle, of the "sacred trust."[66]

The differentiation of "the legal" from "the humanitarian," "the moral," and "the political" appears to have been pivotal to the court's strategy for setting out its response to the question of the applicants' own individual standing to litigate on the basis of conduct provisions of the mandate of South Africa over South West Africa (Namibia) under the U.N. trusteeship system that was set out in Chapter XII of the U.N. Charter (1945).[67]

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63 South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.) Second Phase Judgment, 1966 I.C.J. 6 (July 18).

64 *Id.* ¶ 49. *See also* Application for Review of Judgement No. 158 of United Nations Administrative Tribunal, Advisory Opinion, 1972 I.C.J. 9, ¶ 14 (July 14).

65 South West Africa Cases, *supra* note 63, ¶ 50 (emphasis added).

66 *Id.* ¶ 51.

67 *See also* Bharat H. Desai, *A New Mandate for the Revived UN Trusteeship Council*, 51 ENV'T POL'Y & L. 97, 97–110 (2021); Mark E. Wojcik, *The UN at 75: Success Stories*

But what if the court's attempt at a surgical incision into the matter to extract from it only the legal elements that it has jurisdiction over under Article 36(2) of its statute scuppers or fails? What then? The court's decision in the *Legality of the Threat or Use of Nuclear Weapons* is a case in point.[68] This decision has been roundly criticized in scholarly works[69] precisely because, in the end, the court's decision appears to have prioritized political and not legal interests of the state as an entity. It ruled that it "could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[70]

This makes instigators' idealization of the law as the panacea to dispute settlement in matters that may lie on the interface of politics and public international law extremely curious. This interface is sometimes congested with emotive, historical, and controversial matters that emasculate the law's presumed capacity to offer a solution that the parties involved would voluntarily accept and enforce.

Sometimes, the last place disputants wish to end up is at the ICJ itself. This is likely because the ICJ is constrained by its statute to limit its attention to legal matters. What the disputants may probably be seeking and hoping for is a holistic settlement to their dispute, addressing the legal questions, any historical injustices, political considerations, and other social factors.

Following a lucid examination of the development and impact of international courts, Miguel de Serpa Soares concludes that "in fact, the vast majority of disputes are settled by non-judicial means."[71] Is this possibly because of a recognition by states of the incongruency between their own understanding of their disputes as a conflation of political and legal issues and the offering of the ICJ to attend only to the legal aspects when states prefer a more holistic approach?

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from the Trusteeship System 33 PACE INT'L L. REV. (Spring) 309, 309–14 (2021); Robert Holland, *Trusteeship Aspirations*, 25 FOREIGN AFFS. 118, 118–29 (1946); H. Duncan Hall, *The Trusteeship System*, 24 BRIT. Y.B. INT'L L. 33, 33–71 (1947).

68 Legality of the Threat or Use of Nuclear Weapons, *supra* note 40.

69 *See especially* Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 417, 417 (1997).

70 Legality of the Threat or Use of Nuclear Weapons, *supra* note 40, ¶ 97.

71 Miguel de Serpa Soares, *From Absence to Abundance: Tracing the Development and Impact of International Courts*, *in* TOWARDS A UNIVERSAL JUSTICE? PUTTING INTERNATIONAL COURTS AND JURISDICTIONS INTO PERSPECTIVE 10, 11 (Dário Moura Vicente ed., 2016).

Deracialization of land use in the SADC has rehearsed this conundrum in classic fashion. It has been described as a typical example of disputes that are least suited for judicial settlement because of its conflict with Nozick's entitlement theory and with the *Mabo* case No. 2 jurisprudence that reset the standard regarding indigenous claims to dispossessed lands under modern public international law.[72] Nonetheless, Western states refuse to accept that and insist upon unsustainable property rights arguments that completely disregard the political nature of the racialized land use challenges of affected SADC states—namely, Namibia, South Africa, and Zimbabwe.

Upon colonization by Western states in the latter half of the nineteenth century, successive white minority governments that dominated the SADC passed pieces of legislation that authorized the forcible removal of native Africans from their agriculturally productive lands to make way for settler European commercial enterprises.[73]

The result was that, at independence from white rule in 1980,[74] Zimbabwe's land allocation was a classic case of racialized land rights. Only five percent of the population (whites) owned and controlled ninety-five percent of Zimbabwe's prime agricultural land, while the majority native Black population was crowded into semi-desert arid lands with the least potential for agricultural production.[75] Some powerful Western states insist that the majority-rule governments of Namibia, South Africa, and Zimbabwe must buy back land from the white communities on a willing-seller, willing-buyer basis to support their deracialization of land use programs (land reform projects).[76] However, under Nozick's entitlement theory, to qualify for protection under the law, the original acquisitions must themselves have been just acquisitions,[77] which the contested SADC land titles were not.

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72 Chigara, *Incommensurabilities of the Southern African Development Community (SADC) Land Issue*, *supra* note 11, at 295–325. *See* Robert Nozick, *An Entitlement Theory*, *in* SOCIAL JUSTICE 85 (Matthew Clayton & Andrew Williams eds., 2006) for a discussion on entitlement theory. *See also* Mabo and Others v Queensl., 2 H.C.A. 23 (1992) (Austl.), for the public international law jurisprudence regarding indigenous land claims.

73 *See* BEN CHIGARA, LAND REFORM POLICY: THE CHALLENGE OF HUMAN RIGHTS (2017).

74 *See* DAVID MARTIN, THE STRUGGLE FOR ZIMBABWE: THE CHIMURENGA WAR (1982).

75 *See* CHIGARA, *supra* note 73, at 13–17.

76 *See* Chigara, *Incommensurabilities of the Southern African Development Community (SADC) Land Issue*, *supra* note 11.

77 *Id.*

In synchronized rhythm, Western states imposed crippling economic embargos against Zimbabwe in protest at the latter's implementation of land reform pieces of legislation that sought to correct the colonial confiscations of native lands without compensation.[78] Addressing the U.S. Senate, Assistant Secretary of State for Africa Chester Crocker emphasized that the political objectives of the embargo were "to separate the Zimbabwean people from . . . [their government by making] their economy scream, . . . and I hope you, Senators, have the stomach for what you have to do."[79]

Clearly, the SADC land dispute between some Western states and target SADC states lies on the interface of politics and public international law. Modern public international law is clear; legacies of colonial rule are unstable, especially property rights established at the expense of native populations' own dignity in land rights during colonization. Per Justice Brennan:

> If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, [then] *the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organization" that it is "idle to impute to such people some shadow of the rights known to our law" . . . can hardly be retained.* If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.
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> *The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law*. . . . The policy appears explicitly in the judgment of the Privy Council in *In re Southern Rhodesia* in rejecting [the] argument . . . that the native people "were the owners of the unalienated lands long before either the Company or the Crown became concerned with them and from time immemorial . . . and that the unalienated lands belonged to them still."[80]

But the treatment of race and racism in current international order is extremely problematic. Amitav Acharya's lucid examination of the

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78 *See also* Reginald L. Streater, *Zimbabwe's Struggle to Break the Chains of Colonialism: Self-Determination, Land Reform, and International Law*, 33 TEMP. INT'L & COMPAR. L.J. 119 (2018).

79 *See* Philemon Mutedzi, *Zidera: It Was Never About Democracy*, HERALD (Oct. 23, 2019), https://www.herald.co.zw/zidera-it-was-never-about-democracy/ [https://perma.cc/7PY2-WWSN].

80 Mabo and Others v Queensland, 2 H.C.A. 23, ¶ 41–42 (1992) (Austl.) (emphasis added).

subject shows that although race is not a new topic in the study of international relations,

> It was a major concern behind . . . western foreign policy debates before the Second World War. [However] . . . as the United States became both the leading world power and the [center] of gravity for [international relations] as a field of study after 1945, race was (and continues to be) swept under the carpet, and racism even legitimized, by mainstream scholarship and policy discourses about international affairs and world order.[81]

If this is correct, then the light of the "enlightened world" deliberately and willfully remains dim on social and economic issues around the legacies of discredited racist policies, practices, and outcomes, including the legacy of racialized land use in post-apartheid SADC states. Acharya advocates for "close attention to be paid to the deep and symbiotic relationship between *racism in knowledge production and racism in practice*, with special attention to the role of epistemic communities, and of individual agents who act as conduits."[82]

Inter-state relations are largely the province of politics. The U.N. wishes pacific settlement to be the endgame for all inter-state disputes. Judicial, semi-judicial, or negotiation procedures should characterize the end points of dispute settlement, completely shutting out the possibility of war. This hope is utopian in that the jurisdictional mandate of the ICJ categorically does not recognize the political dimension of international disputes. This weakness threatens the possibility that pacific settlement of disputes could be the final antidote to the use of war as a tool of statecraft in inter-state relations. Until international law is fully equipped with holistic dispute settlement procedures that have capacity to address both the political and the legal dimensions inherent in inter-state disputes, war will continue to provide an outlet for the resolution of intense politico-legal disputes.

A. Heuristic Evidence of Need for Holistic Dispute Settlement Procedures in Inter-State Disputes

There is ample evidence that inter-state dispute resolution should be developed to allow the ICJ to holistically deal with the political and legal nature of disputes. Although the Kasikili/Sedudu Island case (*Botswana v. Namibia*)[83] eventually presented at the ICJ, the parties

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81 Amitav Acharya, *Race and Racism in the Founding of the Modern World Order*, 98 INT'L AFF. 23, 23 (2022).

82 *Id.* at 25 (emphasis added).

83 Kasikili/Sedudu Island (Bots./Namib.), Judgment, 1999 I.C.J. 1045 (Dec. 13).

appear to have desperately tried to avoid that eventuality, submitting perhaps only because all else had failed and knowing full well that the determination of the court would render a partial answer limited to what would be considered as the legal aspect of the matter.

By a special agreement that had entered into force on May 15, 1996, between Namibia and Botswana,[84] the two parties submitted to the ICJ their dispute over the boundaries and the legal status of the Kasikili/Sedudu Island. The matter was also circumscribed by a historical 1890 agreement between the parties' former colonial masters—Germany and Britain respectively.[85] The parties had previously appointed in 1992 a joint team of technical experts to determine the boundary between Namibia and Botswana around the Kasikili/Sedudu Island based on that 1890 colonial treaty. That joint team of technical experts could only recommend recourse to a peaceful settlement of the dispute by applying rules and principles of international law.[86] Following further deliberations at Harare, Zimbabwe, on February 15, 1995, the presidents of Botswana and Namibia finally agreed to submit the dispute to the ICJ.[87] This chronology gives a good example of a problem that festered with parties only reluctantly referring the matter to the ICJ as a last resort. The risk is that, as states increasingly perceive the ICJ to be ill-suited to resolve their disputes, the U.N.'s aim to lock out the resort to war as a tool of statecraft becomes forlorn.

In my view, the need for a U.N. ILC-led development of new dispute settlement mechanisms that are capable of holistic consideration of nation states' politico-legal disputes is overdue. The development and introduction of such mechanisms would also relieve pressure on the ICJ to engage in, what under Article 36(2) of its statute amounts to *ultra vires*, judicial activism.

Jurisprudence of the predecessor to the ICJ—namely, the Permanent Court of International Justice (PCIJ)—shows a desperate reaction to Article 36(2)'s filter mechanism that limits the ICJ's jurisdiction to legal disputes only. Shabtai Rosenne's work provides a lucid historicization of the jurisdictional mandate of the PCIJ, whose statute was adopted verbatim for the newly established ICJ in 1945. Rosenne[88]

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84 *Id.* at 1049.

85 *Id.*

86 *Id.*

87 *Id.*

88 Shabtai Rosenne, *The Role of the ICJ International Court of Justice in Inter-State Relations Today*, 20 BELGIAN REV. INT'L L. 2, 275 (1987).

concluded that the PCIJ's formative period, which ran until 1931, came to what he described as "a brutal finish" because of the court's own "controversial" advisory opinion in the *Customs Union* case.[89]

> That [decision] was widely regarded as an attempt by the [PCIJ] to involve itself in *a political matter* and to have been *motivated by political reasons*. [Nonetheless] . . . it is not easy even after this lapse of time to be sure that mistrust with regard to the purely legal approach of the Permanent Court was the only reason for the marked decline in the work of the Court in the second decade of its existence.[90]

That history of the World Court is probably of uppermost importance in the mindset of the judges of the ICJ. It explains the court's persistence in foregrounding its case reports with remarks that its pronouncements will be directed only at the legal issues presented by the parties. But the reality is that questions presented before the ICJ do not come in a vacuum that is completely separate from the political realities of the political universe, a universe that is characterized by the quest for influence, power, and dominion over others.

Hence, the earlier question of what option states would have left to resolve their dispute peacefully, if any, should the ICJ rule that the dispute presented was nonjusticiable because it was political and not judicial in nature merits serious attention. The answer is surely not reliance on more legal jargon nor technical utterances that merely gloss over the fact that, in conducting the case, the court still has intertwining political issues to "ignore'' so as not to steer toward *ultra vires* action under its jurisdictional clause in Article 36(2).

B. Could States Rely on U.N. Charter Chapter VII Competencies to Resolve Their Politico-Legal Inter-State Disputes?

The U.N. Security Council has executive power under Chapter VII of the U.N. Charter to order states to follow its own thinking, reasoning, and directives on any matter relating to international peace and security. Numerous examples show that this power of the U.N. Security Council is ill-suited for states' politico-legal disputes. This is primarily because each of the five permanent members of the U.N. Security Council wields a power to veto any proposal that they are unhappy

89 *See* Customs Regime Between Ger. & Austria, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41 (Mar. 19).

90 Rosenne, *supra* note 88, at 275 (emphasis added).

with.[91] This operates to obstruct effective, collective decision-making required to reach binding decisions on most matters that the U.N. Security Council addresses.[92]

U.N. Charter Article 27 contains the Yalta Formula agreed upon at "the summit meeting of the United States, the U.K., and the Soviet Union, held in Crimea in February 1945."[93] Regarding Council decisions,

> [T]he Yalta formula distinguish[es] between "procedural" and "all other" matters. Decisions of the Council on procedural matters require[] "an affirmative vote of seven members" out of a Council of eleven—changed to nine members when the Council was enlarged to fifteen. Decisions on all other matters required seven affirmative votes—or nine in a Council of fifteen—*"including the concurring votes of the [five] permanent members."*[94]

The challenge in the Security Council decision-making process is to secure all five concurring votes of the permanent five members. This strategic requirement has diminished the potential of the Security Council to timely address, if ever, some of the most pressing matters in inter-state relations. Michael J. Kelly writes:

> The question . . . is whether reforms can be undertaken to prevent Russia, China, Great Britain, the United States, and France—the five permanent members of the Security Council (P5)—from wielding (1) their veto power, or (2) more commonly, the threat of a veto, to shield bad actors from collective security consequences when those actors commit atrocities. Ready examples might include Russia shielding both Serbia for atrocities committed during the Balkan civil wars and Syria for atrocities committed during the Syrian civil war, and China shielding Sudan during the Darfur genocide.
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> Indeed, many in the international community believe that reform of the permanent membership is needed so badly that it has risen to the level being a near-existential matter.[95]

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91 *See* Christian Wenaweser & Sina Alavi, *Innovating to Restrain the Use of Veto in the United Nations Security Council*, 52 CASE W. RSRV. J. INT'L L. 65 (2020).

92 *See also* Michael J. Kelly, *United Nations Security Council Permanent Membership and the Veto Problem*, 52 CASE W. RSRV. J. INT'L L. 101 (2020); Jean Galbraith, *Ending Security Council Resolutions*, 109 AM. J. INT'L L. 806 (2015); Sydney D. Bailey, *Veto in the Security Council*, 37 INT'L CONCILIATION 1 (1968); J.E.S. Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y.B. INT'L L. 103 (1965–1966).

93 Bailey, *supra* note 92, at 10.

94 *Id.* at 11.

95 Kelly, *supra* note 92, at 102–03.

Sydney D. Bailey has chronicled some of the long indecisive history of the Security Council[96] that undermines the San Francisco Chain of Events Theory[97] intended to ensure enforcement action where the council deemed that a threat to peace, breach of the peace, or act of aggression under Article 39 of the U.N. Charter subsisted. Article 39 provides that "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[98] But this executive authority of the U.N. Security Council has proved to be a short straw that is undermined by selective triggering.

Bailey has shown that Resolution 54 of July 15, 1948, determined that the situation in Palestine constituted a threat to peace within the meaning of Article 39. However, five draft implementation resolutions on Palestine were vetoed: vetoes 58, 59, 105, 108, and 109. Similar outcomes that nullified the San Francisco chain of events paradigm are evident in regard to Korea—where Resolutions 82, 83, and 84, adopted in June and July 1950, used language taken from Article 39—and in regard to *Southern Rhodesia*[99] Resolution 221 of April 9, 1966, sought to "prevent the arrival at Beira, Mozambique, of vessels carrying oil" for the apartheid regime that had unilaterally broken away from Britain by declaring unilateral independence to stop the advent of decolonization and majority rule.[100]

Bailey laments that "the realities that the veto symbolizes have meant that little purpose would be served by submitting to the council a proposal for enforcement action against a great power"[101] or its cronies for that matter. Clearly, the executive authority of the U.N. Security Council cannot be relied upon to resolve disputes that lie on the cusp of power-politics and public international law. Challenges include what Fawcett has identified as three challenges—namely,

96 Bailey, *supra* note 92, at 36.

97 *Id.* The San Francisco Chain of Events Theory explains and justifies consequences of developments that threaten international peace and security. Simply put, a U.N. Security Council determination under Article 39 of the U.N. Charter (1945) of a threat to peace, breach of the peace, or act of aggression might set in motion a process that could in the end lead to U.N. collective enforcement action. Collective action is the reverse of unilateral action. The former is based on U.N. authorisation authorization, while the latter is based on a state's own determination claiming self-defence, reprisal, or countermeasures.

98 U.N. Charter art. 39, 26 June 1945, San Francisco, UKTS 67 (1946) Cmd. 7015.

99 *Id.*

100 Bailey, *supra* note 92, at 36.

101 *Id.* at 36–37.

whether the subject matter of an executive order of the Security Council referred to what essentially belongs within the domestic jurisdiction of a State. Secondly, does the subject matter of the executive order refer to a situation that qualifies as a threat to international peace and security under Chapter VII of the U.N. Charter?[102] Could the Security Council "by a resolution not governed by Article 25 of the UN Charter empower or authorize a member to take action otherwise unlawful"?[103] This situation complicates applicability of executive orders of the U.N. Security Council even further, making it an unreliable tool for addressing complex disputes that lie on the interface of politics and public international law, and leaving the door wide open to the potential of resorting to primal instincts to settle inter-state disputes by military means.

In response to Rhodesia's unilateral declaration of independence from Britain on November 11, 1965,[104] to thwart Britain's de-colonial efforts, the UN Security Council adopted on December 16, 1966, Resolution 232[105] reaffirming the inalienable rights of the people of Rhodesia to freedom and independence under black majority rule.[106] In spite of the unequivocal clarity of Security Council Resolution 232 on the matter and in contrast to earlier resolutions, Fawcett concludes that without additional coordination measures to enforce executive orders of the U.N. Security Council, its efficacy remained moot.[107]

Resolution 232[108] was absolute both in its purpose and in its foundation given as U.N. Charter Articles No. 41 and 39 required all member states of the U.N. to immediately stop and prevent commerce with Rhodesia in five categories, including the importation from Rhodesia of selected commodities, the sale of arms to Rhodesia, and participation in the supply of oil or oil products to it.[109] The order also required nonmember states parties of the U.N. to comply with its terms.[110] Although the order was specifically premised on Articles 39,

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102 Fawcett, *supra* note 92, at 108–10.

103 *Id.* at 103.

104 *See* UK PARLIAMENT, *House of Lords Debate on Rhodesia Volume 271: Debated on Tuesday 7 December 1965*, https://hansard.parliament.uk/Lords/1965-12-07/debates/c467218b-79bc-4c1f-82fd-3b28ca649571/Rhodesia [https://perma.cc/J4Z3-A25D].

105 *See* G.A. Res. 232 (CXXXIV) (Dec. 16, 1966).

106 *Id.* ¶ 4.

107 Fawcett, *supra* note 92, at 121. *See also* J. Leo Cefkin, *The Rhodesia Question at the United Nations*, 22 INT'L ORG. 649, 649 (1968).

108 *See* G.A. Res. 232 (CXXXIV) (Dec. 16, 1966).

109 *Id.* ¶ 2(f).

110 *Id.* ¶ 7.

41,[111] and 25[112] of the U.N. Charter and buttressed further by a declaration that any state that refused to implement the terms of the resolution shall be in breach of the U.N. Charter, Rhodesia was able to evade the order's sanctions regime for a good fourteen years,[113] until 1980 when majority rule overcame the white minority apartheid government led by Ian Smith.[114]

The foregoing arguments reinforce the thesis that, because the matrixes of inter-state disputes are both political and legal in nature, the filter mechanism in Article 36(2) of the statute of the ICJ is a hindrance to holistic dispute settlement. This situation is no longer sustainable, as future disputes are likely to be more intense and will compel immediate and satisfactory resolution to stave off the possibility of war.

Secondly, even where the Security Council has been successful in concluding an Article 41 type[115] resolution, that directs target states to a particular outcome, states have often shown complete disregard of the executive mandate of the U.N. Security Council. Chad, Malawi, and South Africa have all ignored U.N. Security Council resolutions, ordering the arrest and surrender of a fugitive wanted by the International Criminal Court (ICC) in connection with alleged Rome Statute (1998) Article 5 offenses when the fugitive presented on their territories.[116] There has been a general compliance failure in situations where the U.N. Security Council passed mandatory resolutions.[117] Therefore, the hope that politico-judicial, inter-state disputes could be resolved through U.N. Security Council action is dangerously illusory.

Moreover, the emergence of supranational, regional organizations with capability to trump U.N. Security Council orders may have adjusted and even diminished the U.N.'s own jurisdiction over matters of international peace and security, notwithstanding regional

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111 *Id.* at pmbl.

112 *Id.* ¶ 7.

113 *See* George W. Shepherd, Jr., *The Failure of the Sanctions Against Rhodesia and the Effect on African States: A Growing Racial Crisis*, 15 AFR. TODAY 8 (1968).

114 *See* MARTIN, *supra* note 74.

115 U.N. Charter art 41 ("The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.").

116 *See* Ben Chigara, *Towards a Nemo Judex in Parte Sua Critique of the International Criminal Court?*, 19 INT'L CRIM. L. REV. 412 (2019).

117 JOHN TRENT & LAURA SCHNURR, A UNITED NATIONS RENAISSANCE: WHAT THE UN IS, AND WHAT IT COULD BE 56–70 (2018).

arrangement provisions for peace and security enunciated in Chapter VIII of the U.N. Charter.

The view that the executive authority of the U.N. Security Council is increasingly becoming moot is quite clear from the outcomes of the *Kadi* case,[118] which involved attempts by the U.N. Security Council Counter-Terrorism Committee to apply U.N. Charter Chapter VII executive competencies by ordering states to freeze assets and banking accounts of named individuals suspected of involvement in international terrorism. The matter finally reached the supranational Court of Justice of the European Community (CtJEU), which ruled that the community instruments transforming U.N. counter-terrorism orders would not apply in the EU if they were tainted with the failure to comply with the requirements of natural justice. The court reasoned that this risked violating the *grundnorm* of the EU—namely, the principle of the rule of law.[119]

Therefore, the earlier question of where states would turn for possible resolution of their compound and complex politico-legal disputes if the ICJ ruled that the dispute was nonjusticiable because it was political does not find the U.N. Security Council as a probable answer. Thus, with both the ICJ and the U.N. Security Council excluded from the title of "go-to mechanism for resolution of politico-legal, inter-state disputes," the dignified and civilized rational choice dispute resolution opportunities would be unavailable. Resorting to judicial means normally presupposes unsuccessful attempts at diplomatic channels and procedures, including negotiation, conciliation, and mediation.[120]

Depending upon the volatility of the disputed issue, recourse to primal instincts of aggressive behaviors would become a very likely option. Skirmishes between two nuclear powers (India and Pakistan),[121] ongoing and escalating South China sea maneuvers,[122] and enduring Korean Peninsular[123] challenges offer insights into the risk of maintaining power-brokered dispute resolution as a strategy of

118 *See* Case C-402/05 P, Kadi v. Council, 2008 E.C.R. I-06351.

119 *Id.*

120 *See* Kasikili/Sedudu Island (Bots./Namib.), Judgment, 1999 I.C.J. 1045 (Dec. 13) (heuristic evidence of need for holistic dispute settlement procedures in inter-state disputes).

121 Ashok Sharma, *The Enduring Conflict and the Hidden Risk of India-Pakistan War,* 32 THE SAIS REV. INT'L AFF. 1, 129 (2012).

122 Ananta Swarup Bijendra De Gurung, *China, Vietnam, and the South China Sea: An Analysis of the 'Three Nos' and the Hedging Strategy*, 31 INDIAN J. ASIAN AFF. 1 (2018).

123 Han Dong-ho, *The Future of the Two Koreas: How to Build Peace on the Korean Peninsula*, 7 N. KOR. REV. 1, 49 (2011).

managing state-interest-based contradictions and tensions between states.

Where the political goals of the disputing parties challenge them to promote and protect their national interest by toeing the line of the law in a purely political matter, there is enormous potential for the image of the law to be tarnished with scratches of the political tumult that parties often deploy incessantly in the management and resolution of their contradictions. Evidence shows that, sometimes, states tease the law as a precursor to settling their disputes but, without any serious commitment or intent, rely on judicial means to settle the same dispute.[124] Where norms *jus cogens* are involved, there is potential to undermine the peremptory purpose of such norms, what Tanaka calls the "ambivalence of *jus cogens*,"[125] because, although Article 53[126] of the Vienna Convention on the Law of Treaties (1969)[127] gives the impression that *jus cogens* represents the sacrosanct category of international norms, "the legal effects of obligations *erga omnes* can be restricted by several factors. In this sense, it may have to be admitted that the concept of obligations *erga omnes* remains ambivalent as a means of protecting community interests in international law."[128]

C. State Perceptions of Procedures for Resolving Politico-Legal Disputes

States develop and seek to use international law to safeguard their political interests and aspirations. Without a mandate for holistic jurisdiction for both the political and the legal content of their disputes, the ICJ's capability to facilitate pacific settlement of inter-state disputes is severely weakened.[129]

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124 Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Preliminary Objections, 2021 I.C.J. 71 (Feb. 4).

125 Yoshifumi Tanaka, *The Legal Consequences of Obligations Erga Omnes in International Law*, 68 NETHER. INT'L L. REV. 1 (2021).

126 Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

127 23 May 1969, UKTS 58 (1980), Cmnd. 4474.

128 Tanaka, *supra* note 125, at 1.

129 U.N. Charter art 2, ¶ 3.

For instance, states sometimes invoke international law as a platform to challenge more powerful members to conform to agreed norms on tackling global warming[130] or to remind recalcitrant members of their responsibilities under U.N. Charter provisions on peaceful coexistence.[131] When that happens, the target state will often deploy counterarguments to the effect that the alleged violations could be justified under customary international law as a new practice in support of an evolving new doctrine that others will find acceptable. In their own defense, states sometimes invoke the defense of necessity—sometimes in circumstances that do not approach, in any way, the high threshold set under the *Caroline* test.[132]

Public necessity has been invoked by some states when seeking to justify violations of intellectual property rights that are regulated by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[133] Exceptionally, even national interest has been invoked contrary to *pacta sunt servanda* to justify the abandonment of internationally binding conventions,[134] raising more questions about the legitimacy of international law or lack thereof. In November 2020, the United States became the first country to withdraw from the Paris

130 U.N. Charter art. 1, ¶¶ 2–3. *See also* Ehsan Masood & Jeff Tollefson, *'COP26 Hasn't Solved the Problem': Scientists React to UN Climate Deal*, NATURE (Nov. 18, 2021), https://www.nature.com/articles/d41586-021-03431-4.

131 U.N. Charter art. 1, ¶ 4.

132 *See also* Antony Anghie & Charles Hill, *The Bush Administration Preemption Doctrine and the United Nations*, 98 AM. SOC'Y INT'L L. 326 (2004).

133 *See also* Junaid Subhan, *Scrutinized: The TRIPS Agreement and Public Health*, 9 MCGILL J. MED. 152 (2004); Frederick M. Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO*, 5 J. INT'L ECON. L., 469, 471 (2002); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 154.

134 The UK insists that the Brexit withdrawal agreement with the European Union will work only if it does not impact upon the integrity of the United Kingdom by establishing different trading rules for Northern Ireland and separate trading rules for the rest of the United Kingdom. For its part, the EU regards that position as a given under the Brexit agreement. The Northern Ireland Protocol was a compromise agreement in the Brexit agreement. Its main purpose was the preservation of the Good Friday Agreement by ensuring that trade between Northern Ireland, the Republic of Ireland, and the rest of the EU would flow as if Northern Ireland were still part of the EU, when in fact it is not anymore. Whereas the goods from other UK nations (England, Scotland and Wales) are now subject to customs checks, tariffs, and other administrative checks between the UK and the EU, goods from and into Northern Ireland are not. *See* The Good Friday Agreement, *supra* note 19; Grote, *supra* note 20; *Protocol on Ireland / Northern Ireland*, REVISED PROTOCOL TO THE WITHDRAWAL AGREEMENT, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf [https://perma.cc/ECW4-8JPX].

Agreement in pursuit of Donald Trump's election platform,[135] implying that the threat of global warming was insensible.[136]

Nation states habitually apply international law to seal and legalize their political agreements through legally binding treaties, conventions, and declarations among themselves and, sometimes, with international organizations. The finality of a binding legal agreement is a source of certainty about the future regarding those political questions. For instance, riparian states are quick to invoke ancient treaty agreements as platforms for insisting against politically sensitive intentions of the upstream state.[137] Rarely do states use the ICJ to get answers to legal questions. It is often U.N. institutions with *locus standi* before the court that go to the ICJ for answers to legal questions in the form of advisory opinions.

Yet still, the law's attraction and appeal are not entirely diminished because it is associated with civility. Civilized states resolve their disputes by submitting themselves to rationally produced outcomes of dignified court systems. The promise of finality is perhaps the court system's main attraction. Resort to the ICJ in complex cases, including the Western Sahara, Second Phase (1966);[138] *Legality of Threat or Use of Nuclear Weapons* (1996);[139] and *Qatar v. United Arab Emirates* (2021),[140] recommends the opinion that the ICJ's appeal as the principal forum of dispute settlement in inter-state relations under Article 92[141] of the U.N. Charter (1945) would benefit from a refreshing of the court's jurisdictional clause—Article 36(2).[142] This is because judicial settlement's promise of procedural fairness and equal treatment

135 Paris Agreement, Dec. 12, 2015, 3156 U.N.T.S. 1.

136 *See also* Matt McGrath, *Climate Change: US Formally Withdraws from Paris Agreement*, B.B.C. (Nov. 4, 2020), https://www.bbc.com/news/science-environment-54797743 [https://perma.cc/8ALD-6CLM].

137 *See* De Gurung, *supra* note 122.

138 South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. 6 (July 18, 1966).

139 Legality of Threat or Use of Nuclear Weapons, *supra* note 40, at 226.

140 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment, 2021 I.C.J. 72 (Feb. 4).

141 U.N Charter art. 92 ("The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.").

142 U.N. Charter art. 36, ¶ 2 ("The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes.").

of the parties ranks it above all other forms of dispute settlement in inter-state relations. This promise is perceived to counterbalance inequality among states due to massively unequal economic power and political and social influence. However, if the court is then restricted to accepting only legal disputes—itself a fiction because all inter-state disputes are fundamentally political in their nature because they arise from each state's quest to protect its own political interest, then states will resort even to the prohibited threat, or actual use, of force primarily because the court will be perceived to be largely incapable of providing holistic solutions.

The law's procedural promises to hear all sides in a dispute (*audi alteram partem*)[143] and to treat all parties as sovereign legal equals are enormous credentials for any procedure dealing with any community of subjects. Hans Kelsen[144] writes that sovereignty and equality are two of the most generally recognized characteristics of nation states as subjects of international law: "[F]or to speak of 'sovereign equality' is justified only insofar as both qualities are considered to be connected with each other. Frequently, the equality of states is explained as a consequence of or as implied by their sovereignty."[145]

But what is meant by equality of states? According to Kelsen, general international law interprets it to mean that:

> no State can be legally bound without or against its will. Consequently, they reason that international treaties are binding merely upon the contracting States, and . . . the decision of an international agency is not binding upon a State which is not represented in the agency or whose representative has voted against the decision, thus excluding the majority vote principle from the realm of international law. Other applications of this principle of equality are the rules that no State has jurisdiction over another State (and this means over the acts of another State) without the latter's consent—*par in parem not habet judicium*—and that the courts of one State are not competent to question the validity of the acts of another State insofar as those acts purport to take effect within the sphere of validity of the latter State's national legal order. Understood this way, the principle of equality is the principle of autonomy of the States as subjects of international law. According to traditional

143 *See* Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat Int'l Found. v. Council and Commission, 2008 *E.C.R. I-06351* (for an example of this principle in application).

144 Hans Kelsen, *The Principle of Sovereign Equality as a Basis for International Organization*, 53 YALE L.J. 207, 207 (1944).

145 *Id.*

> doctrine, the equality of the States in the sense of autonomy is derivable from their sovereignty.[146]

Moreover, the judicial artifacts of objective decision-making by panels of legal experts that is implied by the judicial process strengthen the perception of the law as the go-to mechanism for dispute settlement among nation states, even for disputes that may lie diametrically on the interface of public international law and politics. In this sense, the law appears to be, or perhaps implies or promises, a level playing field where rich and poor, big and small, mighty and minion are treated equally. Well-established principles of natural justice, too, are meant to guide the whole process from start to finish.[147]

What is clear from all this is the strength of law's appeal as a mechanism for international dispute resolution, particularly in matters that lie on the interface of public international law and politics. The safeguards against moral vandalization of the Davids by the Goliaths of this world is clear in the human rights safeguards insisted upon and applied by the CJEU in the *Kadi* case, for instance. The case also highlights the moral contest between the political institutions and the judicial institutions in matters that lie on the interface of public and political interests. The enduring nature of this contest shows varying temperaments of the political masters toward their legal institutions.

Unflattered by the pronouncements of the subregional SADC Tribunal in landmark cases[148] that went against Zimbabwe,[149] the SADC Heads of State and Government reacted angrily. They shut down the tribunal, only to reopen it after a scrubbing of its mandate and jurisdiction.[150] The right of individual petition that had caused turmoil among the political elite in that subregion was curtailed.[151]

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146 *Id.* at 209.

147 *See* Koskenniemi, *supra* note 36, at 7.

148 *See* Chigara, *Southern African Development Community (SADC) Tribunal*, *supra* note 11, at 530–33; Laurie Nathan, *The Disbanding of the SADC Tribunal: A Cautionary Tale*, 35 HUM. RTS. Q. 871 (2013).

149 *See* Chigara, *Incommensurabilities of the Southern African Development Community (SADC) Land Issue*, *supra* note 11, at 3 (discussing the dilemma of the SADC land issue).

150 Chigara, *What Should a Re-constituted Southern African Development Community (SADC) Tribunal Be Mindful of to Succeed?*, *supra* note 11, at 349.

151 *Id.* ("In its reaction to the SADC Tribunal's rulings on disputes brought by commercial farmers resisting land redistribution, the Zimbabwean government had called the Court a 'day-dreamer' that was engaged in an 'exercise in futility.' Tanzanian President Jakaya Kikwete is reported to have remarked to fellow heads of SADC States several years earlier that in creating the Tribunal they had created a monster that would 'devour us all.' Respected retired High Court Justice Simbi Mubako called for an enquiry into the creation of the SADC Tribunal 'to establish its real motives. . . . [It is] . . . a kangaroo court and a

Disputes rooted in colonial links often carry immense political content. It is clear that, when the ICJ is presented with such disputes, the court is often severely exercised by the question of how to proceed because of its jurisdictional limit to only legal disputes contained in Article 36(2) of its own statute. This situation strengthens the thesis that more durable mechanisms that respond holistically to both the political and the legal content of inter-state disputes are needed to enable wholesome pacific settlement of inter-state disputes. These disputes are always fundamentally political in their nature.

The *Timor* case raised questions about Portugal's interest in the Timor Gap, where the materially affected parties—Australia and Indonesia—had themselves no quarrel over the matter.[152] The case arose out of Australia and Indonesia's treaty that had excluded Portugal as Mandatory of a non-self-governing territory—East Timor.[153] The treaty sets out rights and interests for exploitation of the continental shelf of the Timor Gap.[154] This followed successful negotiations between 1971 and 1972, leading to the delimitation of the continental shelf between their respective coasts.[155] That delimitation had stopped short on either side of the continental shelf between the south coast of East Timor and the north coast of Australia—the Timor Gap.[156]

Further negotiations between Australia and Indonesia regarding the Timor Gap occurred in 1979 but fell through, compelling the parties to explore the possibility of establishing a provisional arrangement for the joint exploration and exploitation of the resources of an area of the continental shelf.[157] This led to a treaty on December 11, 1989, which established a zone of cooperation in an area between the Indonesian Province of East Timor and Northern Australia. Australia followed this agreement by enacting legislation in 1990, with a view toward implementing the treaty of December 11, 1989.[158] That legislation came into force the following year, and Portugal, as Mandatory of a

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comedy. . . . In my opinion, an enquiry is called for to determine who was responsible (for its creation) and why?' This level of aversion to a core institution of an emerging supranational organisation is unheard of.").

152 East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 100 (June 30).

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

non-self-governing territory of East Timor, pleaded violation by Australia of the Timorese right to self-determination.[159]

The ICJ considered *a priori* the admissibility arguments presented by Australia:

> [T]here exists in reality no dispute between itself and Portugal [and] . . . that Portugal's Application would require the Court to rule on the rights and obligations of a State which is not a party to the proceedings, namely Indonesia. [Moreover] . . . Portugal lacks . . . interest of its own to institute the proceedings, notwithstanding the references to it in some of the resolutions of the Security Council and the General Assembly as the administering Power of East Timor, and that it cannot, furthermore, claim any right to represent the people of East Timor; its claims are remote from reality, and the judgment the Court is asked to give would be without useful effect; and finally, *its claims concern matters which are essentially not legal in nature* which should be resolved by negotiation within the framework of ongoing procedures before the *political organs of the United Nations*.[160]

The question is this: Where would the parties have turned to had the ICJ accepted Australia's admissibility arguments? Australia pointed to the U.N. Security Council, which would have been likely ineffectual because of political influence of the contesting parties and so on.[161]

Such pressures point to the lack of adequate and robust dispute settlement mechanisms regarding disputes that present on the interface of public international law and politics. The result is often awkward and characterized by technical pretensions. Foremost is the pretension that the court can somehow surgically make incisions into the matter and extricate only the legal issues, address them, and render a decision that is acceptable to the parties.

IV
DEVELOPMENT OF INTERNATIONAL LAW— U.N. CHARTER ARTICLE 13

Development of international law mandated to the ILC by Article 13 of the U.N. Charter (1945) must also include the development of more robust, adequate, and efficient dispute settlement mechanisms to deal not just with Law of the Sea (ITLOS[162]) matters and world trade

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159 *Id.* ¶¶ 18–19.

160 *Id.* ¶ 20 (emphasis added).

161 *See also* Bailey, supra note 92, at 8–66.

162 *Latest News*, INT'L TRIBUNAL FOR THE L. OF THE SEAS, https://www.itlos.org/en/main/latest-news/ [https://perma.cc/Z59C-VAAZ] ("[E]stablished by the 1982 United

issues under the WTO Dispute Settlement Understanding (DSU[163]) Agreement,[164] among other things, but also to deal with sensitive matters that may lie on the interface of public international law and politics that the ICJ is from time to time called upon to address. These types of questions are identifiable by parties' insistence first that they constitute political and not legal matters, and second that the court should wash its hands of them and not engage in any technical attempts to address only the legal aspect of contested matters.

The current ICJ dispute settlement framework curiously assumes that states will present for judicial resolution purely legal disputes. But state behaviors are motivated largely by state interest,[165] which is essentially political and not legal in nature. Unless we also accept that the law of nations is political in nature and that its dynamic deals with political matter in an effort to secure the political will of states, we will not escape the challenges that the problems on the interface of public international law and politics portray as the real character of judicial decisions of international law.

The *Legality of the Threat or Use of Nuclear Weapons* case raised the issue of whether it can be argued that, while inter-state disputes may be political in their origin, or even politically motivated, they also carry a separate existence as legal issues that the ICJ can address in a strictly legal context.[166] Attempts to characterize disputes that lie on the interface of public international law and politics in that way are problematic because of their failure to comprehend the essence of disputes in inter-state relations. In my opinion, what is required is the immediate development of further dispute settlement mechanisms that are designed to deliberately recognize, acknowledge, and determine the duality of political and legal issues that occur in inter-state disputes.

Nations Convention on the Law of the Sea[,] [the International Tribunal for the Law of the Sea] has jurisdiction over any dispute concerning the interpretation or application of the Convention, and over all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.").

163 Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1869 U.N.T.S. 401 (The Dispute Settlement Understanding of the World Trade Organization establishes a set of rules and procedures and provides a forum for resolving trade disputes between WTO member countries.). *See also* WORLD TRADE ORGANIZATION, *Understanding on Rule and Procedures Governing the Settlement of Disputes*, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [https://perma.cc/A3RQ-A99D].

164 1869 U.N.T.S. 401.

165 HENKIN, *supra* note 26, at 49.

166 Legality of the Threat or Use of Nuclear Weapons, *supra* note 40.

This would take away the burden from the ICJ of engaging in technical excursions into sometimes fictitious surgical incisions that claim to separate the intertwined legal and political issues in matters presented before the court. It would also better protect the legitimacy of the ICJ than if, as the principal judicial organ of the U.N., it had to carry on seeking to fit its purpose by engaging in technical endeavors that dim both its wit and integrity. Perhaps this is because sometimes courts conduct themselves as if under pressure to justify their own purpose.

In the alternative, the ICJ could revise its own statute and ensure the duality of political and judicial disputes. As long as states accept that, then the court could make holistic decisions instead. What remains unclear presently is what must happen to the political aspect of a dispute if the ICJ proceeds to attend to only the legal aspect of the matter. It could mean that states are going about with unresolved contradictions with one another. This is like sickly patients that have received only partial treatment for their diagnosis.

A. Politico-Legal Turbulence v. Settled Legal Understanding in Inter-State Relations

International law appears to be presently gripped with revisionist approaches to some of its principles and previously held strictures. Emergent unilateral state practice in various areas of inter-state relations is trashing doctrines that have stood for decades and helped forge and sustain both international peace and security and inter-state relations. From understandings of territorial sea limits regarding exploitation of coastal marine resources to exploitation of common watercourses, there is evidence that the filter mechanism of the ICJ's jurisdiction contained in Article 36(2) of the court's statute will only complicate matters. This complication is caused by barring the ICJ from putting its hands into service as these challenges present very dominant political content that may not easily be transitioned in their entirety into legal disputes as envisaged under Article 36(2). This section considers this alarming prospect for the judicial maintenance of international peace and security by examining emergent unilateral revisionist practices among states across a number of topics. These include the determination of territorial sea limits, the acquisition/ extension of territory, shared river courses and the no harm principle, and shared river courses and the equitable utilization principle. Apparent legislative commissions in the United Nations Convention on

the Law of the Sea[167] (UNCLOS) allow for political decisions to override legal concerns in the area of transboundary pollution by not insisting, for instance, upon the production of an adequate mechanism for shared and agreed environmental impact assessment reports at the onset of commercial transboundary environmental pollution disputes.

Regardless of unequivocal international consensus that the breadth of territorial sea should not exceed twelve nautical miles, measured from baselines determined in accordance with UNCLOS (1982),[168] Iran and Russia appeared to unilaterally establish, in 2018, an agreement that extends their share of the territorial sea in the Caspian Sea to fifteen nautical miles.[169] Pursuant to the Aktau Agreement, whose establishment is reported to have taken twenty-two years, fifty-two working groups, and five Caspian Sea summits to reach,[170] each state is authorized "[f]ifteen nautical miles from its coast as sovereign water and ten additional nautical miles as an exclusive commercial fishing zone, with the rest of the sea beyond that open to all five states for common use."[171] The agreement empowers both Russia and Iran to prevent Azerbaijan, Kazakhstan, and Turkmenistan from transporting oil and gas to Europe, thereby ensuring a larger share of the European energy market for Russia and Iran.[172]

Previous to the adoption of UNCLOS (1982), state practice on the territorial sea limit varied. Some states enforced territorial sea limits of between one to 200 miles. Only two states enforced a 200-mile claim on January 1, 1958.[173] As of February 1, 1992, twelve states enforced a 200-mile claim.[174] The U.S. Department of State Bureau of Oceans and International Environmental and Scientific Affairs writes that at the time of the first UNCLOS:

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167 United Nations Convention on the Law of the Sea, Nov. 16, 1994, 1833 U.N.T.S. 3, 397.

168 *Id.* art. 3.

169 *See* Bijan Tafazzoli, *Iran and Russia in the Caspian: Real Allies?*, YENI SAFAK (Jan. 09, 2021), https://www.yenisafak.com/en/world/iran-and-russia-in-the-caspian-real-allies-3579494 [https://perma.cc/U5EJ-BRNV].

170 *Id.*

171 *Id.*

172 *Id.*

173 BUREAU OF OCEANS & INT'L ENV'T & SCI. AFFS., U.S. DEP'T OF STATE, LIMITS IN THE SEAS NO. 112, UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS 36 (1992), https://www.state.gov/wp-content/uploads/2019/12/LIS-112.pdf [https://perma.cc/VUC5-THAZ].

174 *Id.*

> In 1958 more than half the coastal states (45) claimed a territorial sea of 3 miles; four others, the Nordic states, claimed 4 miles. At that time 15 coastal states asserted territorial seas between 5 and 10 miles, and 9 others had 12 mile limits. Only 2 states, Ecuador and Peru, claimed 200-mile territorial seas. By February 1, 1992[,] 111 (75%) of the coastal states claim[ed] 12-mile limits; 13 states claim lesser breadths while 18 states [had] claims exceeding the 12-mile limit, with 12 claims of 200 miles.[175]

Both customary international law and UNCLOS have established twelve miles as the unequivocal standard of territorial sea claims and 200 miles as an exclusive economic zone.[176]

Legal certainty on maritime delimitation norms appears to be sufficiently clear and settled. Yet increasingly, political considerations around preservation of fish stocks and fishing rights threaten to upset that legal certainty. Turkey's warning to Greece regarding the latter's intentions to reconfigure its maritime zones is a case in point. On August 26, 2020, Greece's prime minister announced several developments concerning its territorial and maritime delimitations with several of its coastal neighbors.[177] Greece's plans could not include Turkey, which would view any such move between itself and Greece as *casus belli*, cause for war.[178]

The South China Sea, too, has recently been the subject of many conflicting territorial claims.[179] Despite the abundance in clarity of maritime delimitation rules as outlined above, political concerns keep muddying the waters. Should matters escalate to ITLOS, as in the MOX Plant Case?[180] The challenge will obviously include the extrication of the legal from the political in the disputes' matrixes.

Similarly, international regulations on the acquisition of territory[181] and on shared river courses[182] have been developed and established

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175 *Id.* at 33–34.

176 *See* Tommy T.B. Koh, *The Territorial Sea, Contiguous Zone, Straits and Archipelagoes Under the 1982 Convention on the Law of the Sea*, 29 MALAYA L. REV. 2, 163 (1987); John G. Laylin, *Emerging Customary Law of the Sea*, 10 INT'L LAW. 4, 669 (1976).

177 *Greece Plans to Extend Its Western Territorial Waters*, REUTERS (Aug. 26, 2020, 3:56 AM), https://www.reuters.com/article/us-greece-territorial-waters-idUSKBN25M1BN [https://perma.cc/V49F-BYWD].

178 *Id.*

179 *See* Jihyun Kim, *Territorial Disputes in the South China Sea: Implications for Security in Asia and Beyond*, 9 STRATEGIC STUD. Q. 107, 107 (2015).

180 *See infra* note 205.

181 *See* Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L.J. 6, 1779 (2004).

182 Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384 (1996).

through treaty law, the jurisprudence of arbitration panels, and the ICJ itself. Nevertheless, the historical and sometimes existentialist political issues that these subjects trigger and the a *casus belli* arguments that they invoke point, in my view, to the question whether it is time to request the U.N. ILC, in its capacity as facilitator of the development of international law, to consider the possibility of establishing a more practical dispute settlement mechanism that recognizes, acknowledges, and weighs holistically the duality of political and legal issues that occurs in inter-state disputes. For instance, international norms on acquisition of territory have been settled for decades now.[183] Yet, in March 2014, Russia annexed Crimea in violation of the prohibition against the extension of territory by conquest under modern public international law.[184]

The simmering but intense Great Ethiopian Renaissance Dam (GERD) dispute[185] among Ethiopia, Egypt, and Sudan (the riparian states) raises existentialist questions that combine political and legal issues on the right to exploit the Nile River's water resources. Could these challenges be resolved sufficiently and to the enduring satisfaction of all the parties by focusing only on the legal and ignoring the underlying antecedent political concerns of the parties? The direction that the parties have taken, or not taken, in the effort to attend their dispute might indicate their perception of international law generally and of the relevance of the ICJ, in particular, in disputes where issues fall on the interface of politics and public international law.

The political aspect of the dispute is steeped in historical socioeconomics as existentialist issues. Ethiopia is one of the world's most drought-prone countries.[186] It goes without saying that, to counter

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183 Ben Chigara, *Terra nullius*, *in* THE NEW OXFORD COMPANION TO LAW 1160–61 (Peter Cane & Joanne Conaghan eds., 2008).

184 L. Oppenheim, OPPENHEIM'S INTERNATIONAL LAW 678 (Robert Jennings & Sir Arthur Watt 9th eds., 1996).

185 *See also* Abebe, *supra* note 53, at 27–46; Mahemud Eshtu Tekuya, *Sink or Swim: Alternatives for Unlocking the Grand Ethiopian Renaissance Dam Dispute*, 59 COLUM. J. TRANSNAT'L L. 65, 65–116 (2020); Salman M.A. Salman, *The Grand Ethiopian Renaissance Dam: The Road to the Declaration of Principles and the Khartoum Document*, 42 WATER INT'L 515 (2016); Dereje Zeleke Mekonnen, *Declaration of Principles on the Grand Ethiopian Renaissance Dam: Some Issues of Concern*, 11 MIZAN L.R. 255, 255–74 (2017); Haile Andargie Wondalem, *Substantive Scope of the Duty to Notify and Consult Planned Measures Under International Watercourse Law: The Case of Grand Ethiopian Renaissance Dam (GERD)*, 11 JIMMA UNIV. J. OF L. 55, 55–82 (2019).

186 Girma Kebbede & Mary J. Jacob, *Drought, Famine and the Political Economy of Environmental Degradation in Ethiopia*, 73 GEOGRAPHICAL ASS'N 65, 65–70 (1988).

the economic and social hardships of its climatic conditions, Ethiopia needs to develop efficient irrigation systems. Historically, Egypt had pursued and established a thorough and effective labyrinth of colonial treaties that gave it a de facto hydro-hegemony in the Nile Basin, preventing upstream countries, including Ethiopia, from the optimum benefit of the Nile resource.[187] Egypt has exploited its international social influence to block possible foreign funding of upstream country projects on the Nile.[188] Consequently, for over a century, Ethiopia had failed in its efforts to raise capital to develop irrigation projects.[189] The irony of this situation was that the land that feeds the Nile was unable to feed itself.

Financed solely by Ethiopia, the GERD is a giant hydroelectric project on one of the Nile River's main tributaries—the Blue Nile—in Ethiopia and is designed to generate 5,150 megawatts of electricity from thirteen turbines.[190] The GERD reservoir extends over an area of 1,874 square kilometers and has the potential to hold up to seventy-four billion cubic meters of water. Its economic and social benefits are transformative. It is estimated that it will have the capacity to provide access to electricity to an estimated sixty-five million Ethiopians.[191] It will become the backbone that supports most of Ethiopia's development endeavors. The GERD is expected to lift millions of people out of poverty.[192] However, Egypt, too, has an existentialist dilemma in that it depends on the Nile for its economic and social need for water.[193] Eighty-six percent of the Nile waters that reach Egypt originate in Ethiopia.[194] But the GERD is only the second major dam on any of the Nile tributaries that flow from Ethiopian territory.[195]

Egyptian claims regarding the disputed GERD are often presented as strictly legal. Egypt alleges[196] that Ethiopia failed in its duty to inform, consult, and cooperate about the project, which would harm the overall use of the Nile water resource. As an upper riparian state, Ethiopia was obliged under international law to provide prior

187 *See* Mekonnen, *supra* note 185, at 258.

188 Tekuya, *supra* note 185, at 109.

189 *Id.*

190 Abebe, *supra* note 53, at 27.

191 *Id.*

192 *See also* Tekuya, *supra* note 185.

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.*

notification documents about the technical details of the dam and to consult and cooperate on the construction and operation of the dam that would have possible adverse effects on Egypt's welfare.[197] General international watercourse law, treaties, and customary international law all favor Egypt's positions. Ethiopia opposes any suggestion that it has a binding legal obligation to notify, consult, or cooperate with Egypt over its utilization of the Nile's water resources.[198]

In his work, which explores probable approaches to the GERD dispute, Daniel Abebe considers which would be best between the doctrinal principles of international law and the socioeconomic principles or the socioeconomic approaches. He strongly argues that the traditional doctrinal approach that privileges an application of "international water law, treaties, and customary international law is unlikely to result in a legal conclusion that either state is likely to respect because such an approach fails to consider the incentives, material capabilities, and national interests of Egypt and Ethiopia."[199] He insists "that an economics approach focusing on state preferences and incentives for compliance with international law in a world without a central enforcement mechanism will better illuminate the obstacles that Egypt and Ethiopia face and the likelihood of legal resolution of the conflict."[200]

The international principles governing transboundary watercourses include the no-harm principle, which obligates riparian states to safeguard the interests of other riparian states in any endeavor they might take to harvest from the shared watercourse resource.[201] This principle is embodied in key international treaties on transboundary watercourses, including in Article 2 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992)[202] and in Articles 7, 12, and 21 of the Convention on the Law of the Non-Navigational Uses of International Watercourses (1997).[203] Mara Tignino and Christian Bréthaut write that the principle

197 *Id.*

198 *Id.*

199 Abebe, *supra* note 53, at 27.

200 *Id.*

201 *Id.*

202 Convention on the Protection and Use of Transboundary Watercourses and International Lakes art. 2, Mar. 17, 1992, 1936 U.N.T.S. 269.

203 Convention on the Law of the Non-Navigational Uses of International Watercourses arts. 7, 12, 21, May 21, 1997, 2999 U.N.T.S. 77. *See also* Reaz Rahman, *The Law of the Non-Navigational Uses of International Watercourses: Dilemma for Lower Riparians*, 19 FORDHAM INT'L L.J. 9, 9–24 (1995).

> includes different dimensions such as intra-/inter-states, intra-/inter-generations or questions related to sustainable development in the broad sense. . . . [It] is a source of litigation as it implies contested understandings and uses. It is one of the most complex and controversial principles of international water law. The reasons for this are various. First, this obligation includes both qualitative and quantitative aspects that are difficult to assess by a state sharing a transboundary water resource. The exchange of technical and scientific data is necessary to mitigate the risks of harms. Notification and consultation in good faith should be carried out with the potentially affected country regarding the appropriate measures to prevent and mitigate the risks of harms."[204]

The principle implies the need for mutual study and exchange of environmental impact assessment reports[205] in good faith, leading to probable common understanding among the concerned states on how to proceed. Under the light of overriding state interest, this principle is almost unachievable, as the GERD issue between the affected riparian states is potentially manifesting the rocket-and-missile-throwing point, which must be avoided at all costs.

It has been opined that in the *Gabčíkovo-Nagymaros* case,[206] the ICJ appeared to hierarchize the principles that apply to international rivers by prioritizing the reasonable utilization principle[207] over the no harm principle.[208] The case arose out of a 1977 treaty between Hungary and Slovakia on the construction and operation of the Gabčíkovo-Nagymaros system of locks,[209] a joint investment. The barrage system was aimed at achieving "the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube River for the

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204 Mara Tignino & Christian Bréthaut, *The Role of International Case Law in Implementing the Obligation Not to Cause Significant Harm*, 20 INT'L ENV'T AGREEMENTS 631, 632 (2020).

205 *See also* Mox Plant (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, 5 ITLOS Rep. 95.

206 Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7 (July 2).

207 The principle minimizes the scope of the no-harm principle by deploying the reasonableness test to any claims that the actions of one riparian state have undermined the interests of other riparian states. The reasonableness test in the law of torts refers to a hypothetical person who demonstrates average judgment or skill. The reasonable person is imbued with various generalized attributes, including risk aversion, sound judgment, and a sense of self-preservation, which prevent them from walking blindly into danger. *See also Constr., Forestry, Mining and Energy Union v MSS Strategic Med. & Rescue* (Austl. 2014).

208 Tignino & Bréthaut, *supra* note 204, at 639.

209 Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶ 15 (July 2).

development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties."[210]

The agreement collapsed following the Hungarian government's decision of May 13, 1989, to suspend the works at Nagymaros pending the completion of various studies, which the competent authorities were to finish before July 31, 1989.[211] On July 21, 1989, the Hungarian government extended the suspension of the works at Nagymaros until October 31, 1989.[212] Additionally, they also suspended the works at Dunakiliti until the same date.[213] Finally, Hungary decided on October 27, 1989, to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti.[214] This development compromised huge investments, the intended production of hydroelectricity, the improvement of navigation on the relevant section of the Danube, and the protection of the areas along the banks against flooding.[215]

The ICJ was asked to adjudge under international law *inter alia* whether Hungary was entitled to unilaterally suspend and subsequently abandon, in 1989, the work on the Nagymaros Project and part of the work on the Gabčíkovo Project, for which the treaty attributed responsibility to Hungary.[216] EU negotiations, mediation, and conciliation had failed.[217] Teams of experts had also been deployed, but no solution materialized.[218]

The ICJ ordered the parties to go back to the negotiating table in good faith and to cooperate until they reached a solution.[219] It stated that the

> need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of

210 *Id.* ¶ 15.
211 *Id.* ¶ 22.
212 *Id.*
213 *Id.*
214 *Id.*
215 *Id.*
216 *Id.* ¶ 2.
217 *Id.* ¶ 24.
218 *Id.*
219 *Id.* ¶¶ 142–43.

> water to be released into the old bed of the Danube and into the side-arms on both sides of the river.[220]
>
> [Moreover,] . . . *it is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses.*[221]

The Court then harked its *ratio decidendi* to the North Sea Continental Shelf cases where it previously emphasized that any negotiations between disputing parties oblige the parties to conduct themselves so as to ensure that their negotiations are meaningful. That will not be the case where "either of them insists upon its own position without contemplating any modification of it."[222]

What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that *the parties find an agreed solution within the cooperative context of the Treaty*. Article 26 combines two elements which are of equal importance. It provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."[223] The principle of good faith obliges the parties to apply it reasonably and in such a manner that its purpose can be realized.[224]

In the MOX Plant Case (*Ireland v. United Kingdom*)[225] OSPAR Arbitration Phase, the panel had similarly ordered the parties to go back and *renegotiate* their political differences in good faith until they reached an agreement on what might be a proper environmental impact assessment of the U.K.'s proposed development of its nuclear facility at Sellafield, Lancashire. The U.K. wanted to upgrade the facility from a demonstration center to a fully-fledged nuclear commercial processing plant.[226] The proposed full-scale commercial plant would increase British Nuclear Fuels Limited's (BNFL) MOX production

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220 *Id.* ¶ 140.

221 *Id.* ¶ 141.

222 North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 347, ¶¶ 47, 85 (Feb. 20).

223 Vienna Convention on the Law of Treaties art 26, Jan. 27, 1980, 1155 U.N.T.S. 331.

224 Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶¶ 15, 140–43 (July 2).

225 Mox Plant (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, 5 ITLOS Rep. 95.

226 *Id.*

capacity from eight tons to 120 tons a year.[227] The dispute involved potential transboundary environmental risks to the Irish Sea from the operation of the MOX plant at Sellafield and the consequent marine transportation of radioactive materials through Irish territorial waters.[228]

Ireland was concerned about a number of issues. First, it was concerned about the direct discharge from the new MOX plant, which would intensify business growth, routinely discharging radioactive substances into the Irish Sea at a much higher level.[229] Second, seaweed, shellfish, and other sea life next to the discharge from Sellafield were already manifesting concentrations of artificially made radionuclides.[230] Third, Denmark, Finland, Iceland, Norway, and Sweden had also raised concerns about radioactive release from Sellafield because of "the evidence that marine currents [had] carried radioactivity from the Irish Sea into some of the most valuable fishing grounds for Scandinavian vessels."[231] Further, Ireland was strongly concerned that frequent MOX shipments would likely increase the potential for accidents or terrorist attacks capable of radioactive contamination of the Irish Sea.[232]

The challenge was that the claims presented about BNFL's MOX-related activities were anticipatory in nature.[233] In the absence of actual harm, it would be difficult to establish the U.K.'s breach of substantive obligations relating to marine environmental protection.[234] Therefore, the dispute was more about procedural claims than the adequacy of environmental impact assessments for the proposed enlargement of the MOX plant and its transportation of radioactive materials through Irish territorial waters.[235] Perhaps the OSPAR Tribunal found the challenge to be more political, theoretical, and speculative rather than legal and therefore turned the parties away.

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227 *See* Maki Tanaka, *Lessons from the Protracted Mox Plant Dispute: A Proposed Protocol on Marine Environmental Impact Assessment to the United Nations Convention on the Law of the Sea*, 25 MICH. J. INT'L L. 360 (2004).

228 Mox Plant (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, 5 ITLOS Rep. 95.

229 *Id.*

230 Tanaka, *supra* note 227, at 362.

231 *Id.* at 363.

232 *Id.* at 370.

233 *Id.*

234 *Id.*

235 *Id.*

The equitable sharing of the Nile transboundary[236] and its significance to the economic welfare of concerned riparian states could not possibly be exaggerated. Mahemud Tekuya writes that the recent involvement of the United States and the World Bank appears to have exacerbated, instead of clarified, issues.[237] The talks appear to have reached an absolute deadlock. At issue are the colonial 1959 Nile water treaties and whether a preliminary agreement is required before the filling of the GERD. Judicial settlement of such matters that lie on the interface of colonial politics and public international law is near impossible because international tribunals, wary of their statutory jurisdictional provisions, tend only to recommend the resuscitation of negotiations between the parties. If this is correct, then it strengthens the view that inter-state relations occur in the realm of an international political universe that is governed, above all else, by states' interest and their consent to undertake obligations.[238]

From the contested powers of the U.N. Security Council Counter-Terrorism Committee to the question of the legality of upholding patents for therapies for pandemics like COVID-19, it seems that only a holistic solution could ensure voluntary compliance of the protagonists on either side. This opinion concurs with Martti Koskenniemi's argument that:

> [o]ur inherited ideal of a World Order based on the Rule of Law thinly hides from sight the fact that social conflict must still be solved by political means and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, *for reasons internal to the ideal itself*, rely on essentially contested—political—principles to justify outcomes to international disputes.[239]

Going forward, the U.N. will require more robust and up-to-the-task mechanisms for facilitating dispute resolution. The narrow legal approaches advocated in Article 36(2) of the statute of the ICJ (1945) will be problematic for the emergent challenges that lie on the interface of politics and public international law in inter-state relations.

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236 *State Succession: Assumption of Obligations Under I.B.R.D. Loan Agreements on Dissolution of the Federation of Rhodesia and Nyasaland*, 3 I.L.M. 509, 509–14 (1964) (discussing the Kariba Dam case); Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7 (July 2); Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 18 (Apr. 20); Salman M.A. Salman, *Dams, International Rivers, and Riparian States: An Analysis of the Recommendations of the World Commission on Dams*, 16 AM. U. INT'L L. R. 1477, 1477–1506 (2001).

237 Tekuya, *supra* note 185, at 65.

238 *See also* Tanaka, *supra* note 125.

239 Koskenniemi, *supra* note 36, at 7.

V
CONCLUSIONS

This Article examined the incongruency between the ICJ's jurisdiction under Article 36 and the nature of inter-state disputes that present on the interface of politics and public international law. Whereas Article 36(2) of the statute of the ICJ restricts the jurisdiction of the ICJ to legal matters, and the court remains acutely keen not to act *ultra vires*, the fact is that inter-state disputes do not occur in the legal vacuum imagined in that provision. Rather, they always occur in their international political universe identity and matrix. If this is correct, then Article 36(2)'s presumptions raise serious concerns about the potential of the ICJ fulfilling its function of contributing to international peace and security. By narrowing the wide jurisdiction of "all disputes submitted by states" initially conferred in Article 36 to only "legal disputes," paragraph (2) introduces heuristic incoherency to the application of the jurisdictional provision of the court when considered under the light of the function and purpose of the court.

Firstly, this provision presumes that inter-state disputes occurring on the interface of politics and law can comprehensively transform to legal questions that the ICJ can answer and thereby resolve in a manner that attracts voluntary compliance of the parties. Case law and commentary on the matter suggest that this is not entirely the case. Often states go to the court only as a last resort. The court's focus on legal aspects does not lead to holistic judgments that are capable of addressing both the legal questions and any antecedent political matrix of the dispute. The court, too, on occasion, appears to have courted controversy when it has appeared to address political matters. Such occasions may be motivated on the part of the court by a genuine wish to fit its purpose of contributing to international peace and security by facilitating the pacific settlement of disputes occurring among states as they shape and interact in their political universe. If this is correct, then any activism on the part of the court is unhelpful, as it only undermines its legitimacy among states. Instead, the court should amend its jurisdictional provision so that it is empowered to fully address the issues that fall on the interface of politics and public international law.

Secondly, the ICJ's jurisdictional provision presumes that the ICJ can surgically untangle intertwining matrixes of political issues from legal questions in disputes that lie on the interface of politics and public international law. State disputes are always politico-legal in nature. Addressing one aspect leaves the other element unattended. A teacher that gives partial answers will not be respected or trusted compared to

one that gives complete answers, whatever his or her excuse. State disputes require holistic answers that the current jurisdictional clause of the statute of the ICJ does not appear to support. This complicates the users' expectation that the ICJ will give decisions that generate voluntary compliance from the parties concerned. Therefore, there is a void between expectations of the court, considering its role in inter-state relations, and what states can actually get as a consequence of its jurisdictional clause. This expectation deficit needs full recognition and should be addressed.

One way of addressing this would be to ask the U.N. ILC to study the opportunities for holistic dispute settlement in inter-state relations. The U.N. ILC can recommend to the U.N. General Assembly regarding amendments to the statute of the ICJ so that it drops its incongruency with the politico-legal nature of inter-state disputes. Proposals are necessary for a new dispute settlement mechanism more capable than current ones to provide holistic settlement of state disputes occurring on the interface of politics and public international law—politico-juris disputes. The benefits of proceeding in this direction are enormous.

First, the current desperation among states regarding where to go if they desire a holistic settlement of their politico-juris disputes would be addressed. That alone would potentially strengthen the practice of pacific settlement of disputes among states, a fundamental requirement or obligation of international law. Second, the heuristic power of law as the go-to mechanism for settlement of inter-state disputes would get an enormous boost. Third, the ICJ would be spared the legitimacy-eroding, technical gymnastics that it might have indulged in the past to justify or preserve its function of contributing to international peace and security by facilitating pacific settlement of inter-state disputes. Legal answers that do not address the antecedent political questions cannot fully resolve inter-state disputes that occur on the interface of politics and law. The ICJ is aware of the reduction contained in paragraph (2) of its jurisdictional provision, Article 36, from "all disputes presented by states" to only *legal* disputes. This reduction also undermines the court's pacific settlement role. In turn, this may result in threats to international peace.

Fourth, I believe the need for a U.N. International Law Commission-led development of new dispute settlement mechanisms that are capable of holistic consideration of nation states' politico-legal disputes is overdue. The development and introduction of such mechanisms would also relieve the ICJ from pressure to engage in legitimacy-eroding approaches to its own work. Moreover, the myth

that the ICJ can surgically tear into a dispute, extract only its legal matrix, sort it out, and stitch everything back up, leaving the parties satisfied, is a myth. This myth may have run its course in the face of escalating politico-social inter-state disputes that lie on the interface of politics and public international law and that are problematic for the ICJ to address under Article 36. Perhaps the time is ripe for the U.N. General Assembly to invite the ILC to commence studies on the jurisdictional mandate of the ICJ to ensure the holistic settlement of politico-legal inter-state disputes.