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6-1-2011

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Recommended Citation
Anna Spain, *Examining the International Judicial Function: International Courts as Dispute Resolvers*, 34 Loy. L.A. Int'l & Comp. L. Rev. 5 (2011).
Available at: http://digitalcommons.lmu.edu/ilr/vol34/iss1/2

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Examining the International Judicial Function: International Courts as Dispute Resolvers

ANNA SPAIN*

INTRODUCTION

International courts are a fundamental component of the international legal system.[1] They exist to provide an impartial forum capable of settling disputes between nations by administering binding decisions based on international law. But when should international courts aim to serve a different goal? How might their international judicial function bring about an end to a legal dispute in order to further aims of critical importance to the international community as a whole? Are international courts responsible for promoting global peace and security and is it ever appropriate for courts and judges to engage in judicial peacemaking?

Questioning the function of international courts, and the judges they engage, is an intrepid task, in part, because of certain assumptions about what dispute settlement is and what it is not. Asking courts to engage in activities that extend beyond adjudication seems contrary to the authority vested in them by the international community of States

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* Associate Professor of Law, University of Colorado Law School. This article was originally presented at the Project on International Courts and Tribunals (PICT) symposium on The International Judicial Function at the University of Amsterdam in March 2011. I am grateful to Jean d'Aspremont, David Caron, Cesare Romano, Yuval Shany, Phillipe Sands, Judge Tullio Treves of the International Tribunal for the Law of the Sea, the participants of the PICT symposium, and the participants of the University of Colorado Law School workshop for their helpful comments. I also wish to give special thanks to Professor Samantha Besson for her detailed written response to an earlier draft, which has provided insights I have incorporated here.

1. This article uses the term "international courts" to describe judicial and arbitral institutions that engage in international adjudication. *See* Philippe Sands, *Introduction* to RUTH MACKENZIE ET AL., THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS ix–xvi (2d ed. 2010) (defining international courts and tribunals and describing the array of institutions that comprise the international judicial system).

and may threaten their legitimacy.[2] However, the very historical formation of many judicial institutions provides an alternative narrative. That narrative imagines that courts are institutions that have been created after times of international conflict in order to address the causes that led to war and to prevent States from resorting to the use of force as a means for resolving their differences.[3] This history calls into question whether international courts should concern themselves with the promotion of global peace and security.

Within this context, this article undertakes an examination of the international judicial function of international courts, exploring both what it is and what it ought to be. There are two commonly held ways of understanding the purpose of the international judicial function in this context. A conservative view understands the judicial function of international courts as one of dispute settlement. As institutions formed by international agreement to provide adjudication through judicial settlement or arbitration, international courts have the authority and the capacity to produce binding judgments that settle disputes.[4] Under this perspective, dispute settlement is a functional, pragmatic activity. Courts perform their duties without exceeding their judicial authority with the aim of serving their State clients. This function is valuable and necessary and has grown in recent decades with the establishment of new judicial forums.[5]

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2. *See, e.g.*, R.P. ANAND, STUDIES IN INTERNATIONAL ADJUDICATION 183–90 (1969) (discussing the challenges and limitations of the judicial process and the ICJ). Anand also notes that

> if the judges are asked to solve questions for which accepted judicial techniques afford no satisfactory answer, the matter indeed becomes difficult and disturbing . . . . In a rapidly changing and varied world . . . in order that international law may be adapted to changing conditions, alongside the judicial bodies, it is essential to develop other procedures of adjustment.

Id. at 186.

3. *See, e.g.*, Nancy Amoury Combs, *Diplomatic Adjudication*, 2 CHI. J. INT'L L. 267, 273 (2001) (describing the function of the Iran-U.S. Claims Tribunal as serving both a functional purpose of effectively managing the adjudication of claims and a diplomatic aim of managing the relationship between the United States and Iran).

4. Joseph Sinde Warioba, *Monitoring Compliance with and Enforcement of Binding Decisions of International Courts*, 5 MAX PLANCK Y.B. UNITED NATIONS L. 41 (2001).

5. *See* Sands, *supra* note 1, ix–xvi (describing the trend towards compulsory jurisdiction); Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT'L L. & POL. 791, 792–95 (2007) (discussing the shift toward compelling disputants to consent to the jurisdiction of an international adjudicative body); Andrea Kupfer Schneider, *Not Quite a World Without Trials: Why International Dispute Resolution Is Increasingly Judicialized*, 2006 J. DISP. RESOL. 119, 119 (2006) (discussing the increase in the use of trials to resolve international legal disputes); and *see*

A more audacious and normative understanding of the international judicial function holds that international courts are peacemakers. That is, their institutional function is to provide dispute settlement in a manner that promotes global peace and security.[6] This view finds support in the historical development of the international judicial system. Many of the judicial institutions and practices of today were born in the aftermath of armed conflicts as States sought ways to prevent future wars. The creation of the International Court of Justice (ICJ) after World War II under the UN Charter offers an archetype.[7] Even absent a clear and authoritative mandate, other courts have been known to engage in dispute resolution for peacemaking purposes. The Permanent Court of Arbitration (PCA), for example, has recognized its part in providing a peacemaking function when adjudicating disputes that are a part of ongoing armed conflicts.[8] However, there are challenges to this function and this article examines two: the doctrine of justiciability, which seeks to limit the expansion of judicial powers by restricting the type of disputes international courts may address;[9] and the doctrine of litispendence, which seeks to define how international courts should coordinate with other institutions engaged in peacemaking.[10]

These two perspectives of the judicial function of international courts—as dispute settlers or as peacemakers—are at times in tension with one another. Though all courts aim to settle disputes, not all courts

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generally Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267 (2001); Stephen Schwebel, *The Proliferation of International Tribunals: Threat or Promise*, *in* JUSTICE IN INTERNATIONAL LAW—FURTHER SELECTED WRITINGS OF STEPHEN M. SCHWEBEL 101, 107 (2011) (describing the proliferation of judicial opinions and proposing that "[a] possible if limited approach might be to extend the Court's advisory jurisdiction" to avoid conflicting interpretations of international law).

6. *See* HANS KELSEN, PEACE THROUGH LAW, 13–14 (2000) ("As long as it is not possible to remove from the interested States the prerogative to answer the question of law and transfer it once and for all to an impartial authority, namely, an international court, any further progress on the way to the pacification of the world is absolutely excluded.").

7. *See* U.N. Charter Ch. VI, art. 36.3 ("[L]egal disputes should as a general rule be referred by the parties to the International Court of Justice.").

8. *See generally, e.g.*, Delimiting Abyei Area (Sudan v. The Sudan People's Liberation Movement/Army), Final Award (Perm. Ct. Arb. 2009), www.pca-cpa.org/showfile.asp?fil_id=1240 [hereinafter *Delimiting Abyei Area*, Final Award] (providing terms for a delimitation of the Abyei area).

9. Hersch Lauterpacht, *The Doctrine of Non-Justiciable Disputes in International Law*, 24 ECONOMICA 277, 277 (1928).

10. THEODOOR J.H. ELSEN, LITISPENDENCE BETWEEN THE INTERNATIONAL COURT OF JUSTICE AND THE SECURITY COUNCIL 1 (1986).

aim to be peacemakers. The first view of their function is concerned with a court's effectiveness while the latter is concerned with its normative practice. Courts are bound to stay within their authority when engaging in judicial settlement, yet resolving disputes may require exercising extrajudicial powers to engage non-State stakeholders and extralegal issues in the dispute resolution process. Furthermore, judicial settlement is not designed to reconcile the relationship between the parties or prevent recurrence of the dispute.[11] When tensions escalate, it is not clear that dispute settlement is an effective deterrent to war.

Yet, such challenges do not absolve international courts from their responsibility to contribute to promoting global peace and security. As a central part of the international legal machinery, courts have a role that is not simply functional but is also normative. Judges and judicial institutions do not exist in a sphere that can or should be isolated from geopolitics and issues of concern to the international community. International courts need to consider how they can better contribute to an international legal system that can ensure the successful resolution of disputes.

This article argues that what is needed is a third way of understanding the international judicial function, one that respects international courts' traditional role as dispute settlers while allowing for their more engaged and proactive function as peacemakers. This requires adopting a new perspective, which abandons a dichotomous view of the international judicial function. Under this new perspective, international courts exist within the system of international dispute resolution (IDR) containing a myriad of institutions and methods that collectively aim to promote global peace and security.[12] Furthermore, the resolution of international disputes may require integrated IDR approaches, such as combining judicial settlement with negotiation.[13]

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11. *See* Richard B. Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 VA. J. INT'L L. 1, 4 (1982) (explaining the potential inability of a legal judgment to address the underlying issues which prompted the legal dispute).

12. For purposes of this article, the IDR system includes institutions and other providers of methods used to prevent, manage, and resolve international disputes by means of negotiation as well as third-party methods, which include adjudication (judicial settlement and arbitration) and other methods (conciliation, facilitation, and mediation). *See* Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PA. J. INT'L L. 1, 8–9 (2010) (defining the architecture of the IDR system).

13. *See, e.g.*, Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.), Judgment, 2008 I.C.J. 12, ¶ 102 (May 23) (where the disputant States engaged in negotiations prior to referring the case to the ICJ). *See generally* Spain, *supra* note 12 (introducing the concept of integrated IDR through "multiple" and "mixed" IDR methods).

Integration can occur sequentially through the use of multiple methods (for example, negotiations may precede adjudication or mediation may follow) or in a mixed-manner that allows different aspects of IDR methods to be combined into one cohesive process.[14]

Understanding IDR as a system of methods that can be integrated in their use creates new opportunities for international courts in their role as dispute resolvers. At a minimum, international courts can enhance international dispute resolution capacity by recognizing the benefits of non-judicial methods.[15] Recognition is becoming more necessary as these methods proliferate in use and form.[16] It will allow international courts to be more responsive in recognizing their role in relation to other actors in the IDR system.[17] Second, some courts can appropriately play a more active role by referring the parties to other forms of IDR before or after a court undertakes judicial settlement. Third, there is an institutional void that certain international judicial bodies might fill. International courts might serve as institutional coordinators, much like the "Multi-Door Courthouse" concept pioneered by Frank Sander in 1979 that has become commonplace in the United States.[18] Though this model is not an exact fit because international courts face challenges that domestic courts do not,[19] it does, nonetheless, embody the concept that courts can provide the leadership necessary to coordinate the application of various IDR methods in order to enhance the effectiveness of international dispute resolution.

In summary, this article argues that in addition to engaging in effective judicial discourse, issuing judgments, and providing judicial settlement, international courts should exercise their influence in ways

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14. Spain, *supra* note 12, at 31.

15. *Id.* at 33.

16. *Id.* at 3.

17. *See id.* at 45–46.

18. *See generally* Frank E.A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979) (Harvard Law Professor Frank Sander introduced the concept of the Multi-Door Courthouse at the 1976 Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, also known as the "Pound Conference," proposing that courts in the U.S. should offer more than one "door" or method of dispute resolution. As a result, many courts now refer disputing parties to mediation, facilitation, and other forms of nonjudicial dispute resolution).

19. *See generally* Karin Oellers-Fraham, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction—Problems and Possible Solutions*, *in* MAX PLANCK Y.B. UNITED NATIONS L. 67 (2001) (discussing the unique problems international courts face, which are not associated with domestic courts).

that enhance IDR.[20] This is a normative claim that asserts that international courts do have a responsibility to promote global peace and security. To achieve this, international courts must understand their role as adjudicators within the larger IDR system. There is not sufficient space here to identify the actions that specific international courts might take in this regard. This article does suggest, however, that courts should recognize the value of other IDR methods and, when appropriate, refer disputing parties to engage in them. International courts should also determine how they might better coordinate with other dispute resolution providers and how they might support methods, such as mediation, that lack adequate institutional support at the international level.[21]

Centered in this context, the following definitional understandings apply. First, the term "international courts" refers to those institutions created by international agreement for the purpose of adjudicating disputes. These institutions include global courts (the ICJ, etc.), arbitration institutions (the PCA, etc.), international criminal adjudicative bodies (the International Criminal Court (ICC), etc.), and human rights courts.[22] Though each court operates within its own mandate and authority, it does not operate in an isolated space. The actions of one court can affect other courts and exert a sphere of influence on the international judicial system as a whole. Each institution is unique in its form and function, and this article does not seek to evaluate them separately or in depth. Instead, this article presumes that these institutions share the common goal of providing the international judicial function through dispute settlement and in certain instances, through peacemaking. Second, the terms "settlement," "peacemaking," and "resolution" are used here to give a nuanced understanding to the posited goal that each method seeks to achieve. Resolution implies that the underlying circumstances giving rise to the dispute have been satisfactorily addressed so that they no longer exist, whereas settlement implies that the parties have reached a binding agreement, whether or not underlying issues remain. In addition, an

20. *See, e.g.*, HIGHEST COURTS AND GLOBALISATION (Sam Muller & Sidney Richards eds., 2011) (for essays discussing transjudicial dialogue, judicial cooperation, legal unity, and other theories of multiplicity in the international judicial system).

21. Spain, *supra* note 12, at 19. *See also* Anne Peters, *International Dispute Settlement: A Network of Cooperational Duties*, 14 EUR. J. INT'L L. 1, 3, 5, 9 (2003).

22. Sands, *supra* note 1, at v–vi (classifying international adjudicative bodies into these categories).

international court may use its adjudicative powers to provide a peacemaking function to assist the parties in bringing about an end to armed conflict. Third, international legal disputes often arise out of or occur concurrently with international conflicts involving armed or violent contact. This includes intrastate conflicts that, through spillover effects or other circumstances, pose a threat to global peace and security.[23]

This article proceeds as follows. Part I considers the dispute settlement function of international courts. Part II examines international courts as peacemakers and analyzes how the doctrines of justiciability and litispendence influence this function. Part III introduces a framework for understanding the judicial function of international courts as one of dispute resolution. It argues that international courts can enhance their judicial function by appreciating how different IDR processes contribute to effective dispute resolution. The article concludes by proposing how international courts might contribute to international dispute resolution and promote peace and security as a component of the broader IDR system.

I. COURTS AS DISPUTE SETTLERS

International courts settle disputes through judicial settlement or arbitration.[24] Adjudication by either method produces a binding decision based on international law.[25] The benefits of this process are many. Above all, adjudication provides parties with a certainty of process and an outcome that enjoys the authority and legitimacy of international law.[26]

Although modern dispute settlement, which emerged in the late 19th century with the *Alabama* claims as the seminal case, was largely *ad hoc*, today it enjoys a number of established forums.[27] In addition to

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23. *See* MEREDITH REID SARKEES & FRANK WHELON WAYMAN, RESORT TO WAR 1816–2007, 46–60 (2010) (defining armed conflict by context including interstate, intrastate (civil and internal), extrastate, and non-State. The international component of a given conflict has generally been understood as occurring between States, but also applies to intrastate and non-State events that present a threat to international peace and security due to spillover effects, the presence of international crimes, and other factors.)

24. J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 91 (4th ed. 2005) (providing definitions that distinguish one form from the other).

25. *Id.*

26. *See* Bilder, *supra* note 11, at 2–3.

27. 1 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 495 (John Basset Moore ed., 1898) (detailing the *Alabama* claims); JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL

the ICJ, parties may seek dispute settlement through the International Tribunal for the Law of the Sea (ITLOS) or the Dispute Settlement System of the World Trade Organization (WTO), and may seek arbitration through the PCA or International Centre for Settlement of Investment Disputes (ICSID).[28] The ICC, *ad hoc* tribunals, and hybrid tribunals are available for international criminal matters.[29] There are also courts that specialize in human rights, including the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Commission on Human Rights. Together, these courts and tribunals form the basis of the international judicial system.[30]

Given the diversity of judicial bodies, their differences, and specializations, this article does not try to analyze the specific or unique international judicial functions of each. The users of international courts, the judges, and the courts themselves all hold perspectives about what the judicial function is and should be. How a court performs its functions necessarily depends on the context: the actors involved, the type of case, the judicial institution as well as the external circumstances surrounding the dispute.[31] However, what is common among international courts is that they are all judicial organs that function according to the same parameters of the international legal system.[32] Given this, it is helpful to analyze the international judicial function of dispute resolution from a contextual perspective, taking into account historical influences as well as the environment in which courts operate today.

The question this article considers is not whether the international judicial function is one of dispute settlement—it is clear that it is—but whether this is all the international judicial function should be. There are several arguments in favor of limiting the international judicial

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LAW 32–33 (1999) (describing the origins of modern arbitration dating back to the Treaty of Amity, Commerce and Navigation (the "Jay Treaty") and the transition from diplomacy to decisions based on legal reasoning that occurred in the arbitration of the *Alabama* claims).

28. Sands, *supra* note 1, at ix–x (defining global courts as institutions that are potentially available to all States and/or enjoy unlimited subject-matter jurisdiction).

29. *Id.* at v–vi, ix–xvii, 68.

30. *See* Sir Robert Y. Jennings, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers*, *in* 9 AMERICAN SOCIETY OF INTERNATIONAL LAW BULLETIN 2, 3 (Laurence Boisson de Chazournes et al. eds., 1995). *See also* Sands, *supra* note 1 at xi.

31. Georges Abi-Saab, *The Normalization of International Adjudication: Convergence and Divergencies*, 43 N.Y.U. J. INT'L L. & POL. 1, 9–10 (2010).

32. *See id.* (arguing that the concept of judicial function is not generic in nature but influenced by particulars such as the structure of the international legal system).

function to dispute settlement rather than the more expansive function of peacekeeping.

First, the historical nexus between the evolution of courts and international conflict does not automatically justify establishing peacemaking as a function of international courts today. States' motivations for pursuing adjudication should not be conflated with the goal of pursuing peace.[33]

Second, judicial settlement is what courts are authorized to do.[34] Most adjudicative institutions are formed by a mandate that authorizes their role in pacific settlement of disputes and no more.[35] Though some institutions, such as the WTO, ITLOS, and ICSID, offer conciliation and other methods in addition to judicial settlement, they are clear that their role is an apolitical and functional one, not a mandate to intervene in matters of peace and security.[36] The view is that their role is to provide the requisite legal and technical expertise needed to perform the function of dispute settlement.[37] By maintaining a narrow and specialized focus, international courts, such as the ICSID and the WTO, for example, enhance their expertise in a particular subject matter.[38]

Furthermore, some courts lack the capacity to do more.[39] While the ICJ is a court of general jurisdiction over all UN member States, other courts have more limited jurisdiction.[40] In addition, all courts are limited

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33. *See* Jennings, *supra* note 30, at 7 (criticizing the "pacific" title in the Hague Convention and arguing that the act of States resorting to adjudication as opposed to war is not to be conflated with the distinction between pacific and non-pacific); David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4, 17 (2000) (noting that the founders of the Permanent Court of International Justice argued that judges should not serve a diplomatic function).

34. Abi-Saab, *supra* note 31, at 2.

35. *See id.* at 10.

36. *Id.* at 2; Jennings, *supra* note 30, at 7.

37. *See* Abi-Saab, *supra* note 31, at 14.

38. Jennings, *supra* note 30, at 3–4.

39. J.G. Merrills, *The Role and Limits of International Adjudication*, INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM 169, 169–81 (W. E. Butler ed., 1987) (exploring "why adjudication as a process is capable of dealing with some disputes and not with others"); G. Shinkaretskaya, *The Present and Future Role of International Adjudication as a Means for Peacefully Settling Disputes*, 29 INDIAN J. INT'L L. 87, 88–90 (1989) (suggesting that an international court cannot play a role in avoiding armed conflict because the court has "no powers to act independently and possess[es] very limited opportunities for influencing the political conduct of State Parties to a dispute"); Rosalyn Higgins, *Remedies and the International Court of Justice: An Introduction*, REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA, 1, 2–5 (Malcolm D. Evans ed. 1998) (describing how the ICJ lacks the capacity to hear all of the cases submitted to it in a timely manner).

40. Shinkaretskaya, *supra* note 39, at 88–90.

in their ability to involve non-State stakeholders in the judicial process.[41] Courts are not designed to adjudicate extra-legal issues and, therefore, are at a disadvantage when treating political, economic, social, and cultural issues that arise in international disputes.[42]

Third, extending the international judicial function beyond judicial settlement poses certain risks. It could compromise the legitimacy of a court or of the judges themselves.[43] If judges consider *post hoc* effects of their judgment, they may be unduly influenced to decide the matter differently. Furthermore, allowing international courts to decide matters of vital State interest takes away a State's role as the "ultimate judge of disputed legal rights in its controversies with other States."[44]

Though all of these reasons are worthy arguments in favor of restricting the international judicial function to dispute settlement, they fail to overcome a fundamental need to have international institutions, including courts, help humanity pursue the goal, however aspirational, of global peace.[45] In reality many international legal disputes, particularly those that arise in the context of an armed conflict, are also political. It is true that judges should not be unduly influenced by politics, but it would be unreasonable and impractical to ask them to remain insulated from global affairs. If a judge knows that the outcome of a case will influence whether or not violence continues, should that not be a factor worthy of consideration? As Judge Corstends, President of the Dutch Supreme Court, recommends "[p]erhaps one of the most important lessons to learn for today's highest courts is that they are not isolated, that their problems are unlikely to be peculiar to their own jurisdictions[.]"[46] The answer is not to turn a blind eye to these influences but to determine how they might enhance, not impede, the international judicial function of dispute resolution.

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41. *See* Rosalyn Higgins, *The ICJ, the ECJ and the Integrity of International Law*, 52 INT'L & COMP. L.Q. 1, 12 (2003) (describing both the increasing importance of non-State entities in today's global arena and the lack of legal jurisdiction over these entities).

42. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 4, 6–7 (1933).

43. Abi-Saab, *supra* note 31, at 10.

44. *See* LAUTERPACHT, *supra* note 42, at 6–7.

45. Merrills, *supra* note 39, at 175.

46. Judge Geert Corstens, *Foreward to* HIGHEST COURTS AND GLOBALISATION, *supra* note 20, at vi.

II. COURTS AS PEACEMAKERS

An alternative way of understanding the international judicial function is to conceptualize international courts as peacemakers. There is a historical nexus between the development of the international judicial function of dispute resolution and the international community's efforts to ensure peace. Early forms of arbitration used a third State to broker peace between two disputing States through *ad hoc* processes that much resemble the forms we refer to today as good offices and facilitation.[47] Later attempts to formalize dispute resolution, such as the creation of the PCA, coincided with a burgeoning peace movement and contributed to the institutional development of courts as peacemakers.[48] The First Hague Peace Conference of 1899 was convened by Czar Nicholas II of Russia "with the object of seeking the most effective means of ensuring all peoples the benefits of a real and lasting peace and, above all, of limiting the progressive development of existing armaments."[49]

After World War II, the international community considered the question of responsibility for world peace and set up a framework for preserving peace through the UN Charter.[50] Article 92 established the ICJ as "the principal judicial organ of the United Nations"[51] responsible for deciding legal disputes of an international nature.[52] The Charter also put additional IDR machinery into place with Article 2 calling upon all nations to refrain from the threat or use of force.[53] Article 33 requires that "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or

47. Caron, *supra* note 33, at 4. *See generally* Abi-Saab, *supra* note 31 (discussing *ad hoc* processes).

48. Caron, *supra* note 33, at 4.

49. *Russian Circular Note Proposing the Program of the First Conference*, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 xvi (James Brown Scott ed., 1915).

50. U.N. Charter, *supra* note 7, pmbl. ("We the Peoples of the United Nations Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . .").

51. *Id.* art. 92.

52. ICJ STATUTE arts. 2 and 36, respectively; Statute of the International Court of Justice, 59 Stat. 1031 (1945).

53. *See* U.N. Charter, *supra* note 7, art. 2 ¶ 4 (calling for nations to refrain from the threat or use of force).

arrangements, or other peaceful means of their own choice."[54] Article 24 establishes the mandate for the UN Security Council (UNSC) as bearing the "primary responsibility for the maintenance of international peace and security" and the UN General Assembly's (UNGA) role, respectively.[55]

The seminal example of an international court as peacemaker is the ICJ. The ICJ Statute sets up the Court as the "principal judicial organ of the United Nations"[56] to serve as the primary court of general jurisdiction for adjudicating disputes arising under international law.[57] As an organ of the UN, the purpose of the ICJ is to assist in the contribution of global peace and security by providing States with a peaceful mechanism for resolving their differences. This historical context establishes the international judicial function as a central component of a system designed to ensure global peace.[58] But providing this role is not without its challenges. This article examines two: justiciability and litispendence.

A. Justiciability

The question of justiciability presents a challenge for international courts on several grounds. States have long sought clear criteria to delineate the scope of judicial review for international courts.[59] The former U.S. Secretary of State, Dean Acheson, for example, criticized the ICJ for its lack of clear criteria on the question of justiciability.[60] He argued that after the Cuban Missile Crisis there were certain political-

54. *Id.* art. 33, ¶ 1 (urging member nations to seek peaceful resolutions to international disputes).

55. *Id.* arts. 10–22, 24.

56. ICJ STATUTE, art. 1. Statute of the International Court of Justice, art. 1, Oct. 24, 1945, 59 Stat. 1031.

57. *See* Christine Chinkin, *Increasing the Use and Appeal of the Court*, *in* INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE: PROCEEDINGS OF THE ICJ/UNITAR COLLOQUIUM TO CELEBRATE THE 50TH ANNIVERSARY OF THE COURT 56 (Connie Peck & Roy S. Lee eds., 1997).

58. U.N. Charter pmbl.

59. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 238 (June 27) (dissenting opinion of Judge Oda) (discussing how the *trauvaux preparatoires* of the ICJ Statute and applicable State practice suggest that, in accepting the ICJ Statutes, States did not intend to submit themselves to judicial settlement over political disputes).

60. Dean Acheson, *Remarks by the Honorable Dean Acheson*, 57 AM. SOC'Y INT'L L. PROC. 13, 13–14 (1968).

legal situations that were so central to a State's vital interests that the ICJ should not interfere.[61]

Indeed, States evaluate the competency of international courts in part based on the court's ability to clarify what kinds of disputes are justiciable.[62] The doctrine of justiciability that provides this clarification has traditionally been determined by making the distinction between disputes that are fundamentally legal in nature and those that are political.[63] Justiciability has been defined according to several criteria: whether the judicial process can adequately address a dispute; whether the dispute is sufficiently legal in nature; whether the dispute is over rights or interests; and, whether, in deciding the dispute, a court would have to interfere with a political act or question (e.g., regarding national security, defense, foreign affairs, etc.).[64]

Lauterpacht, an early critic of using such dichotomies between juridical and non-juridical issues as a basis for determining whether or not a dispute is justiciable, suggests two important frames for examining this problem.[65] First, when States pursue judicial settlement through an international court, the dispute is political. This is because all international disputes are political if we define political as being of importance to the State involved in the dispute.[66] Beyond interstate disputes, other kinds of international disputes may also be inherently political if they implicate international interests, such as global peace and security.[67] Second, all international disputes may also be defined as legal if we understand that to mean that the dispute can be addressed through the application of international law.[68] Furthermore, Lauterpacht questions States' assertion of nonjusticiability and believes that such actions result from States' preference to resolve matters through other means.[69] And indeed, States prefer mediation and other forms of non-

61. *Id. See also* EUGENE ROSTOW, *Dispute Involving the Inherent Right of Self-Defense, in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 264, 264 (Lori Fisler Damrosch ed., 1987).

62. LAUTERPACHT, *supra* note 42, at 4, 6–7, 21, 42–45, 153–54, 158, 163–65.

63. *Id.* at 4.

64. *Id.* at 4, 19.

65. *Id.* at 158.

66. *Id.* at vii, 153 (understanding international disputes, at that time, as interstate disputes).

67. *See id.* at 11.

68. LAUTERPACHT, *supra* note 42, at 158.

69. *Id.* at 163–65.

judicial IDR to adjudication to resolve international disputes that arise from armed conflict.[70]

Higgins proposes an alternative approach to analyzing justiciability based on two dominant and opposing frameworks. The British approach adopts a formalistic view that international courts are prohibited from addressing political disputes.[71] The American approach adopts a view that judicial decision making necessarily involves making political and social judgments; the two cannot be separated.[72] Higgins argues that the distinction provided by the terms "political dispute" and "legal dispute" is valuable not because it describes the nature of the dispute but because it describes the nature of the process by which the dispute is to be resolved.[73]

A third approach to determine the justiciability of disputes is to clarify whether they are over rights or interests. Understood as the doctrine of 'inherent limitations' of the judicial function in international law, conflicts of rights are justiciable, whereas conflicts of interests are not.[74] The ICJ Statute merely requires that disputes include "any question of international law" and thus, does not speak to the rights/interests distinction.[75] In practice, the ICJ has decided many cases involving political interests including *Nicaragua*,[76] *Certain Expenses*,[77]

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70. *See* JACOB BERCOVITCH & JUDITH FRETTER, REGIONAL GUIDE TO INTERNATIONAL CONFLICT AND MANAGEMENT FROM 1945 TO 2003, 29 (2004) (illustrating that in a study of 343 international conflicts, 59.3% used mediation, 32.2% used negotiation, 3.6% were referred to international organizations, 3% used multilateral conferences, 1.3% had no management, and only 0.6% resorted to arbitration); Derrick V. Frazier & William J. Dixon, *Third-Party Intermediaries and Negotiated Settlements, 1946-2000*, 32 INT'L INTERACTIONS 395 (2006) (using a dataset documenting conflict management of militarized interstate disputes occurring from 1946 to 2000 and finding that mediation was the most preferred IDR method, and adjudication was among the least preferred).

71. Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, *in* THEMES AND THEORIES 21–23, 34 (2009).

72. *Id*. at 22–23. *See also* R. P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT'L & COMP. L.Q. 55, 56, 66, 73 (1966) (arguing that third world States may generally subscribe to a view of international law located somewhere between the British and American views and newly independent States are reluctant to accept ICJ jurisdiction in disputes with former colonial powers, fearing that the ICJ will enforce the "established legal rights" of former colonizers. These States are otherwise accepting of the international legal system, viewing it as sufficiently objective to protect them from more powerful States).

73. Higgins, *supra* note 71, at 34.

74. LAUTERPACHT, *supra* note 42, at 42–45.

75. Statute of the International Court of Justice, art. 36, Oct. 24, 1945, 59 Stat. 1031.

76. *See generally Nicaragua*, 1986 I.C.J. 14 (sustaining Nicaragua's claims that U.S. support of insurrectionary forces in Nicaragua was an unlawful use of armed force and an impermissible intervention in Nicaragua's internal affairs).

and *Nuclear Weapons*.[78] There are also cases, such as *Anglo Iranian Oil Co.*, where the parties involved were reluctant to pursue judicial settlement because conflicts over interests were at issue and they believed that the ICJ's judicial function should be to enforce existing legal rights.[79]

As a practical matter, it is difficult to establish clear criteria by which to distinguish what is legal from what is political. In part, this is because the legal and political natures of a dispute are vitally interconnected. Though certain issues are political questions, which are not justiciable (e.g., intra-governmental conflicts, claims attacking the legitimacy of a State's political authority, questions concerning the source of legal power),[80] the political angles that arise in the context of international disputes are not so clearly defined. Many international disputes are multifaceted and naturally involve both legal and extra-legal issues.[81] Moreover, legal issues are difficult to identify and treat independently of the larger context of the conflict in which they might occur.

The *Nicaragua* case illustrates several difficulties that have arisen around these questions. *Nicaragua* was the first case in which the ICJ was called upon to adjudicate the legality of a State's use of force during an ongoing conflict. Nicaragua claimed that U.S. support of the Contras amounted to illegal intervention into its internal affairs, a breach of international law involving both a clear legal dispute as well as a political one.[82] The United States argued that because the issues before the Court were part of an ongoing, armed conflict they were inherently political in nature and were therefore nonjusticiable.[83] The

77. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, at 8 (July 20).

78. *Nicaragua*, 1986 I.C.J. 14; Legality of the Threat or Use of Nuclear Weapons, Order, 1995 I.C.J. 3 (Feb. 1).

79. *See* Anglo-Iranian Oil Co. (U.K. v. Iran), Preliminary Objection, 1952 I.C.J. 5, at 8–10 (July 22) (outlining Iran's arguments for why the ICJ lacked jurisdiction).

80. EDWARD MCWHINNEY, JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 40 (1991) (describing the legal category of "political questions" as a tool of judicial self-restraint and deference to executive or legislative power).

81. *See* Hermann Mosler, *Problems and Tasks of International Judicial and Arbitral Settlement*, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES (Mosler and Bernhardt, eds., 1974) at 10 (arguing that defining the legal nature of a dispute by linking it to an underlying right as established by international law is an unhelpful distinction).

82. *Nicaragua*, 1986 I.C.J at 27, 37.

83. For further explanation of the U.S. position, see an article by then Deputy Agent for the United States in the Nicaragua proceedings Patrick M. Norton, *The Nicaragua Case: Political Questions Before the International Court of Justice*, 27 VA. J. INT'L L. 459 (1987).

United States stated its view that the ICJ "was never intended to resolve issues of collective security and self-defense and is patently unsuited for such a role."[84]

This reasoning is not new. States object to judicial interference in political matters on the grounds that it interferes with their sovereign rights, that the issues are too complex for the Court to address, that the decision implicates broader public interests outside the purview of the Court, and that the Court ought to restrain its activities in accordance with the roles of other institutions such as the UNGA and the UNSC.[85] Ultimately, the ICJ found that it had jurisdiction to consider Nicaragua's claims against the U.S. on the merits and decided in favor of Nicaragua.[86]

As *Nicaragua* suggests, the doctrine of justiciability is not a strong limitation on the exercise of international judicial power.[87] Absent objective criteria, distinguishing political from legal becomes a matter of preference and philosophy.[88] Furthermore, international courts today recognize that international disputes are often a mix of political and legal dimensions.[89] Thus, it is helpful to understand justiciable disputes as those that the judicial process is best designed to address. Identifying when and why adjudication is the superior method for resolving a dispute is pragmatic and emphasizes the need to base valuation of adjudication on its effectiveness as a tool for dispute resolution.[90]

Nonetheless, the doctrine of justiciability remains relevant.[91] Justiciability provides States with a means, however modest, by which

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84. *Statement of the Department of State on U.S. Withdrawal from Nicaragua Proceedings, 19 January 1985*, 79 AM. J. INT'L L. 438, 439 (1985).

85. *See, e.g.*, *Western Sahara*, ICJ Reports 1975 ¶¶ 46–47 (where the ICJ was challenged by the lack of factual sources and their competency to engage in problem solving in this context).

86. Norton, *supra* note 83, at 525; The ICJ found it had jurisdiction by 11-to-4 vote, per the ICJ Statute, to hear the substantive issues of the case and decided in its June 1986; Judgment to uphold the Nicaraguan claims against the United States. *Nicaragua*, 1986 I.C.J. ¶ 292; Statute of the International Court of Justice, art. 36(2), (5), Oct. 24, 1945, 59 Stat. 1031.

87. Norton, *supra* note 83, at 525.

88. *See* MCWHINNEY, *supra* note 80, at 45 (describing the political dimension to defining justiciability, specifically how the distinction between justiciable and nonjusticiable cases shifts in relation to the ICJ's efforts to cooperate with other institutions).

89. Norton, *supra* note 83, at 499.

90. For literature advocating this approach, see Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L. & COMP. L. Q. 58, 74 (1968); MCWHINNEY, *supra* note 80, at 44–45 (suggesting that this distinction is pragmatic in nature for determining when judicial intervention would provide a benefit to an already political problem).

91. "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any

to limit the exercise of judicial power and control the nature and scope of the international judicial function. Until the international community grapples with States' discomfort with judicial power, this doctrine will continue to serve as a measure of when and in what capacity judicial intervention is appropriate.

B. Litispendence

If international courts are to serve as peacemakers, what is their appropriate role and how should they interact with other IDR institutions? This question is one of coordination. The doctrine of litispendence addresses this problem by articulating a standard that aims to avoid conflicts over jurisdiction.[92] The doctrine of litispendence is a plea that can be raised when there is "(i) an identical matter, (ii) pending between the same parties, (iii) before organs possessing similar jurisdiction," for the purpose of barring one institution from handling the case.[93]

In the context of promoting peace in the face of armed conflict, jurisdictional conflicts most commonly occur between the ICJ and the UNSC.[94] The UN Charter established both institutions in the pursuit of global peace and security,[95] but they have different emphases. The UNSC is charged with the primary responsibility of maintaining international peace and security,[96] while the ICJ is charged with settling international legal disputes.[97] The UNSC is a political body comprised of States whereas the ICJ is a judicial body, which purports to be independent from individual States and represents the interests of the international community as a whole.[98] So what is the appropriate action when both institutions seek to address the same international dispute?

This question arose in the *Lockerbie* case where the ICJ had to determine two legal disputes: whether Libya had an international

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other kind of pacific settlement." Eastern Carelia (Fin v. Russ.) 1923 P.C.I.J. (ser. B) No. 5, at 27 (July 23).

92. ELSEN, *supra* note 10, at 1.

93. DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER 217 (Kluwer Law Int'l ed., 2001). *See also* ELSEN, *supra* note 10, at 1.

94. ELSEN, *supra* note 10, at 1.

95. U.N. Charter, *supra* note 7, art. 7.

96. *Id.* art. 24.

97. *Id.* art. 92 ("the ICJ shall be the principle judicial organ of the UN"). *See also* Statute of the International Court of Justice, 59 Stat. 1031 (1945) (giving the ICJ the power to "settle all legal disputes concerning a) the interpretation of a treaty and b) any question of international law").

98. U.N. Charter arts. 4, 92.

obligation to extradite its nationals, and whether the United States and the United Kingdom had a claim that Libya should be implicated in terrorism.[99] After the claims were filed, the UNSC called upon Libya in Resolution 748 to extradite its nationals.[100] Under Article 39 of the UN Charter the UNSC has the authority to determine "the existence of any threat to peace . . . and to maintain or restore international peace and security."[101] While the ICJ recognized the UNSC's preeminence, the Court had to determine whether this frustrated its judicial function of settling legal disputes.[102] As stated by ICJ Judge Alejandro Alvarez in his dissent, "If a case submitted to the Court should constitute a threat to world peace, the Security Council may seise itself of the case and put an end to the Court's jurisdiction."[103] In *Lockerbie*, the ICJ initially deferred to the UNSC's resolution when considering interim measures regarding protection.[104] But later, during the merits phase, the ICJ determined it possessed the authority and jurisdiction to decide the matters before it.[105]

Lockerbie may suggest that although the ICJ respects the role of the UNSC, it does not find itself restricted by UNSC resolutions on the basis of the political doctrine question.[106] Similarly, in *Kanyabashi*, the International Criminal Tribunal for Rwanda found that the political

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99. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Provisional Measures, 1992 I.C.J. 132, 132–34 (Apr. 14) (declaration of Judge Ni).

100. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Provisional Measures, 1992 I.C.J. 129, 129 (Apr. 14) (declaration of Acting President Oda) [hereinafter Declaration of Acting President Oda].

101. U.N. Charter art. 39.

102. Declaration of Acting President Oda, *supra* note 100, at 129 ("Whatever might have been the previous position, resolution 748 (1992) or the Security Council leaves the Court with no conclusion other than that to which it has come."). Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Provisional Measures, 1992 I.C.J. 199, 207 (Apr. 14) (dissenting opinion of Judge El-Kosheri) (opining that UNSC Resolution 748 should not interfere with the pending proceedings before the ICJ).

103. Anglo-Iranian Oil Case (U.K. v. Iran), 1952 I.C.J. 93, 45 (July 22) (dissenting opinion of Judge Alejandro Alvarez).

104. SCHWEIGMAN, *supra* note 93, at 256–58.

105. *Id.* at 258–60 (there have been three cases where the ICJ deferred to the UNSC). *See also* Mark Weller, *The Lockerbie Case: A Premature End to the 'New World Order'?*, 4 AFR. J. INT'L & COMP. L. 303, 324 (1992) (arguing that UNSC decisions carry a presumption of lawfulness that enhances States obligations to comply with the ICJ's decision, even if the State considers that decision to be ultra vires).

106. Weller, *supra* note 105, at 324.

question doctrine did not bar their jurisdiction for judicial review.[107] In *Tadic*, the International Criminal Tribunal for the former Yugoslavia Trial Chamber applied the political question doctrine in determining that it could not review UNSC's decision justifying the creation of the Tribunal.[108] However, the Appeals Chamber reversed, finding that the political question doctrine was antiquated and that the Court had a duty to take jurisdiction over cases that turn on a legal question capable of a legal answer, regardless of the political context.[109]

III. COURTS AS DISPUTE RESOLVERS

This section introduces a third way to understand the international judicial function of international courts that appreciates the functional purpose of dispute settlement alongside the normative purpose of peacemaking. As dispute resolvers, international courts can serve both aims. Adopting this perspective of the international judicial function of international courts enhances understanding about their multiplicity, complexity, and value in today's world.

A. The Changing Nature of International Disputes

After the Peace of Westphalia, States created an international order in which they were the dominant actors.[110] The doctrine of sovereignty afforded each nation the right to rule its territory and its subjects without external interference.[111] These foundations influenced States as they developed interstate arbitration forums and, later, courts.[112] In addition, since most wars at that time were interstate, there was little incentive to develop international judicial institutions that involved non-

107. *See* Prosecutor v. Joseph Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, ¶ 22 (June 18, 1997), http://www.unictr.org/Portals/0/Case/English/Kanyabashi/decisions/180697.pdf.

108. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 24 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

109. *Id.*

110. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS VOL. II 33–50 (1925) (trans. Francis W. Kelsey) *and* Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L. L. 1, 1–54 (1946) (both discussing the Peace of Westphalia and its influence on the international legal order).

111. STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 20–25 (1999) (defining Westphalian sovereignty as the legal and political authority a State has to rule based on the principles of territoriality and nonintervention into a State's internal affairs).

112. *See* STÉPHANE BEAULAC, THE POWER OF LANGUAGE IN THE MAKING OF INTERNATIONAL LAW 69 (2004).

State actors. Instead, the assumption was that their States would represent these actors at the interstate level.[113] As Lauterpacht stated, "A wrong done to the individual is a wrong done to his State."[114]

The changing nature of international disputes is challenging the historical assumptions that justified a State-centric international dispute resolution system. Over the past several decades, armed conflict has shifted from interstate to intrastate, and most wars today are intrastate.[115] Intrastate disputes involve the rights and interests of individuals, communities, and other non-State actors.

Resolving these disputes necessarily requires involving the key stakeholders and considering the core issues. This is a challenge for most international courts, which, for example, lack jurisdiction over non-State actors and extralegal issues. Furthermore, it can be challenging for courts to access the relevant stakeholders or confirm the essential facts.[116] Another challenge facing international courts in this context is that States are often reluctant to participate in a process that equalizes the power of non-State parties.[117]

These challenges require reevaluating the role and function of international courts in today's world. Prioritizing international dispute resolution as a normative aim requires international courts to address their strengths and weaknesses. It also raises important questions about how open and accessible international legal processes should be.[118]

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113. *See id.* at 179.

114. LAUTERPACHT, *supra* note 42, at 154.

115. *See* SARKEES & WAYMAN, *supra* note 23, at 6, 562, 566 fig. 7.6 (explaining that the Correlates of War (COW) Project, founded by J. David Singer in 1936, categorized armed conflicts resulting in at least 1000 deaths and defined them as either interstate, extrastate, civil, intrastate, and non-State conflicts. The 2010 COW study identified 655 wars between 1816 and 2007 and found a general constancy in the incidence of war onsets overall, while intrastate wars are a growing percentage of the whole since WWII. The 2003 COW study of 401 wars between 1816 and 1997 also indicated a "negative correlation between extrastate and intrastate war onsets"). *See also* J. Joseph Hewitt, *Trends in Global Conflict, 1946–2007*, *in* PEACE AND CONFLICT 2010 27, 27 (2009) (noting a similar trend and graphically depicting the negative correlation between extrastate and intrastate war onsets. "At the beginning of 2008 . . . [all armed conflicts worldwide] were civil conflicts between the government of a state, on the one hand, and at least one internal group on the other.").

116. *See* Spain, *supra* note 12, at 16–17.

117. *Id.* at 53.

118. For literature addressing these concerns in international law, see generally Thomas M. Franck, *U.S. Withdrawal from Proceedings Initiated by Nicaragua*, 86 AM. J. INT'L L. 46 (1985) (observing that democracy is on the way to becoming a global entitlement); Samantha Besson, *Deliberative Demoi-cracy in the European Union*, *in* DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS 181 (Samantha Besson & Jose Luis Marti eds., 2006) (examining the territorial

B. IDR as a System

One response to these challenges is to understand the international judicial function as a component of a larger IDR system. IDR has commonly been characterized as a spectrum of single-method options.[119] The choice of IDR method is often conflated with the institution that provides it. International courts and tribunals offer judicial methods of dispute resolution. Commissions, organizations, and *ad hoc* groups offer non-judicial methods of dispute resolution. Though exceptions exist, such as the PCA's offering of arbitration, conciliation, fact-finding and inquiry, the prevailing perception remains that the choice of IDR method is concordant with the institution that provides it.[120] This promotes methodological and institutional fragmentation, which can foster a false perception that parties must choose between "legal" or "diplomatic" IDR methods.

However, given the complexity of international disputes today, dispute resolution often requires the use of more than one method. This is why it is important to understand how various IDR methods and the institutions that provide them operate alongside each other as a comprehensive system. Collectively, each part of the system plays its part and strengthens the overall objective. By appreciating how different IDR processes contribute to effective dispute resolution, international courts can enhance their ability to resolve disputes.

C. Integrating Judicial and Non-Judicial IDR

An important benefit that flows from understanding IDR as a system is the practice of integrating judicial and non-judicial IDR methods.[121] The following cases illustrate integrated IDR (in either a sequential or a mixed manner) and how such approaches have led to the successful resolution of international disputes.

Sequential use of IDR occurs when parties apply multiple methods to a dispute. For example, in the *Red Sea Islands* dispute between Eritrea and Yemen, negotiation, mediation, and arbitration were applied

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nature of subjects and how political communities engage in decision-making and other democratic processes).

119. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 36 (1996) (discussing how mediation falls between formal litigation and informal discussions on the spectrum of dispute resolution methods).

120. Spain, *supra* note 12, at 34, 44.

121. For a full description of integration in IDR, see Spain, *supra* note 12, at 30–44.

in a sequential manner.[122] Armed conflict broke out after both nations claimed rights to the Greater Hanish Islands, in part due to the mineral and fishing resources located there. After engaging in mediation efforts with Ethiopia, Egypt, the UN Secretary-General Boutros-Ghali, and finally France, an agreement was reached that led the parties to submit the matter to the PCA.[123] The PCA issued two awards that delimited maritime boundaries and clarified fishing privileges.[124] The use of multiple forms of IDR in a sequential process ultimately led to a resolution of the dispute with Eritrea acknowledging that this outcome would "pave the way for a harmonious relationship between the littoral States of the Red Sea"[125] and Yemen noting that the PCA award was the "culmination of a great diplomatic effort."[126]

In the *Pedra Branca* dispute between Malaysia and Singapore, both countries engaged in negotiations prior to and after referring the case to adjudication before the ICJ.[127] The use of judicial settlement at the ICJ and mediation with local stakeholders in the *Frontier Dispute* case helped the governments of Mali and Burkina Faso reach a cease-fire and work to resolve their underlying resource disputes.[128] In the

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122. For literature describing the dispute and the various IDR methods applied, see Jeffrey Lefebvre, *Red Sea Security and the Geopolitical-Economy of the Hanish Islands Dispute*, 52 MIDDLE E. J. 367, 373–76 (1998) (detailing the roots of the conflict); B.G. Ramcharan, *Preventing War between Eritrea and Yemen over the Hanish Islands*, *in* CONFLICT PREVENTION IN PRACTICE: ESSAYS IN HONOUR OF JIM SUTTERLIN 157, 157–68 (Martinus Nijhoff Publishers 2005) (tracking the progression of mediation methods utilized to prevent armed conflict between Yemen and Eritrea); Daniel J. Dzurek, *Eritrea-Yemen Dispute over the Hanish Islands*, 4 INT'L BOUNDARIES RES. UNIT BOUNDARY & SEC. BULL. 70, 73 (1996) (providing an example of Eritrea's attempts at IDR).

123. Dzurek, *supra* note 124, at 73.

124. Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Eri. v. Yemen), ¶ 103 (Perm. Ct. Arb. 1999), http://untreaty.un.org/cod/riaa/cases/vol_XXII/335-410.pdf, and Award of the Arbitral Tribunal in the First Stage of the Proceedings (Eri. v. Yemen), ¶ 526 (Perm. Ct. Arb. 1998), http://untreaty.un.org/cod/riaa/cases/vol_XXII/209-332.pdf.

125. Barbara Kwiatkowska, *The Eritrea/Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation*, 8 INT'L BOUNDARIES RES. UNIT BOUNDARY & SEC. BULL. 66, 67 (2000).

126. *Id.*

127. The countries agreed to submit the dispute to the ICJ through a negotiated Special Agreement. *See* S. JAYAKUMAR & TOMMY KOH, PEDRA BRANCA: THE ROAD TO THE WORLD COURT 35 (2009) (detailing the negotiations leading up to the resolution by the ICJ); Tan Hsien-Li, *Case Concerning Sovereignty over Pedra Branca/Palau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, 12 SING. Y.B. INT'L L. 257, 258 (2008) (describing the territorial dispute in detail); Coalter G. Lathrop, *Sovereignty over Pedra Branca/Palau Batu Puteh, Middle Rocks and South Ledge*, 102 AM. J. INT'L L. 828, 828 (2008) (examining the ICJ's treatment of the dispute and its resolution).

128. Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, 562.

Thailand-Philippines dispute before the WTO, the parties engaged in facilitation and mediation.[129]

The use of integrated IDR can also occur in a mixed manner, defined as combining parts of different IDR methods into one cohesive process. For example, in the *Malaysia-Singapore* case, the ITLOS integrated fact-finding and facilitation into its judicial approach by calling for "the establishment of a group of independent experts to study the land reclamation issues" and make recommendations.[130]

D. New Roles for International Courts

Enhancing the international judicial function of dispute resolution through integrated IDR can only occur if international courts embrace new roles.[131] This article suggests three.

First, courts should recognize how non-judicial IDR can contribute to the resolution of international disputes. To do so, international courts need to understand the value of non-judicial IDR methods. These methods are collaborative, interest-based, voluntary, non-binding, and *ad hoc* in nature. They have benefits that judicial processes do not, such as encouraging parties to address emotional and psychological factors that are contributing to their dispute.[132] Interest-based IDR methods help the parties adopt shared norms and expectations, which enhances the legitimacy of the outcomes.[133] Mediation, for example, offers States full participation in and some control over the process, the ability to address the full range of issues and stakeholders, and offers face-saving political aspects.[134] This may explain why States prefer mediation to judicial

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129. Request for Mediation by the Philippines, Thailand and the European Communities, *Communication from the Director-General*, ¶ 5, WT/GC/66 (Oct. 16, 2002); Nilaratna Xuto, *Thailand: Conciliating a Dispute on Tuna Exports to the EC*, *in* MANAGING THE CHALLENGES OF WTO PARTICIPATION, 45 CASE STUDIES 555, 560 (Peter Gallagher et al. eds., 2005) (detailing the agreement by the parties to submit to mediation, should the consultations fail).

130. Sands, *supra* note 1, at 68.

131. *See* FRANCISCO ORREGO VICUNA, INTERNATIONAL DISPUTE SETTLEMENT IN AN EVOLVING GLOBAL SOCIETY: CONSTITUTIONALIZATION, ACCESSIBILITY, PRIVATIZATION 22 (2004) (discussing how globalization makes new demands of international courts and the importance of nonjudicial IDR methods).

132. *See* Herbert C. Kelman, *Socio-Psychological Dimensions of International Conflict*, *in* PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES 61, 63 (I. William Zartman & J. Lewis Rasmussen eds., 1997) (discussing the emotional and psychological underpinnings of international conflict).

133. For literature discussing the use and value of non-judicial IDR, see JACOB BERCOVITCH AND RICHARD JACKSON, CONFLICT RESOLUTION IN THE TWENTY-FIRST CENTURY: PRINCIPLES, METHODS, AND APPROACHES (2009).

134. BERCOVITCH & FRETTER, *supra* note 70, at 29 fig. 2.

settlement as a method of addressing international disputes that arise in the context of armed conflict.[135]

Beyond recognition, international courts should also engage in referral, when appropriate. Just as domestic courts refer cases to settlement talks or mediation, international courts can do the same.[136] The ICJ has stated that:

> the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; . . . consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement.[137]

In *Tunisia/Libya Continental Shelf* and *Gabcikovo-Nagymaros Project*, the ICJ has called upon, encouraged, and even ordered parties to engage in other forms of IDR.[138] In *North Sea Continental Shelf*, the ICJ required the parties to utilize a conciliation commission to continue negotiation about the delimitation of the maritime boundary.[139] The ICJ discussed several criteria for the negotiation but left it to the parties to determine the result.[140] In *Qatar v. Bahrain*, the ICJ required the parties to negotiate prior to submitting the case after Saudi Arabia had attempted to resolve the matter through mediation.[141] The ICJ also ordered the parties to undertake negotiation in good faith for an equitable solution of their differences in *Fisheries Jurisdiction*.[142] There, the Court stated:

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135. *Id. See also* Patrick M. Norton, *The Nicaragua Case: Political Questions Before the International Court of Justice*, 27 VA. J. INT'L L. 459 (1987) ("States generally prefer means of dispute resolution other than adjudication. This preference is attributable to the risks of adjudication generally, the potential for bias in adjudication in international disputes, and the inherent inability of the judicial process to fashion durable solutions to complex international problems.").

136. Gabcikovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 3 (Feb. 5).

137. *See* Aerial Incident of 10 August 1999 (Pak. v. India), Judgment, 2000 I.C.J. 2, ¶ 52 (June 21) (citing Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.), Order, 1929 P.C.I.J. (ser. A) No. 22, at 13 (Aug. 19)).

138. Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1985 I.C.J. 13, 24 (June 3); *Gabcikovo-Nagymaros Project*, 1997 I.C.J. 30.

139. North Sea Continental Shelf (Ger. v. Den.; Ger. v Neth.), Judgment, 1969 I.C.J. 3, ¶ 28 (Feb. 20).

140. *Id.*

141. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 1994 I.C.J. 112 (July 1) and Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 1995 I.C.J. 6 (Feb. 15).

142. Fisheries Jurisdiction (U.K. v. Ice.), Merits, Judgment, 1974 I.C.J. 3, 32 ¶¶ 74–75, 79(3) & (4), (July 25); (declaration by Judge Ignacio-Pinto and dissenting opinion of Judge Petrén).

> It is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights . . . . The obligation to negotiate thus flows from the very nature of the respective rights of the Parties: to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the principals and provisions of the Charter of the United Nations concerning peaceful settlement of disputes.[143]

In these cases, the ICJ referred the parties to interest-based dispute resolution methods in addition to providing them with the rights-based process of adjudication.[144]

The PCA has also engaged in referral in the *Abyei Arbitration*, where, in determining the boundaries of the Ngok Dinka chiefdoms, the PCA called upon the parties to take the next step to executing the final arbitration award, noting the need to develop a "survey team to demarcate the Abyei Area as delimited by this Award,"[145] and issuing its hopes "that the spirit of reconciliation and cooperation visible throughout these proceedings . . . will continue to animate the Parties on this matter."[146]

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143. Fisheries Jurisdiction, 1974 I.C.J. at 32, ¶¶ 74–75. *But see* Dissent, Judge Ignacio-Pinto (the ICJ's role is to make decisions based on law) and Dissent, Judge Petren (there is no obligation to negotiate absent a common agreement between the parties).

144. Special Agreement between Denmark and the FRG (Feb. 2, 1967), http://www.icj-cij.org/docket/files/51/9329.pdf and Special Agreement between the FRG and the Netherlands, 1967 I.C.J. ¶ 2 (Feb. 2), http://www.icj-cij.org/docket/files/51/9329.pdf; Special Agreement between Tunisia and Libya, art. 2 (June 10, 1977), http://www.icj-cij.org/docket/files/63/9511.pdf; Special Agreement between Hungary and Slovakia, art. 5, ¶ 2 (Apr. 7, 1993), http://www.icj-cij.org/docket/files/92/10835.pdf. *See also* YASUHIRO SHIGETA, INTERNATIONAL JUDICIAL CONTROL OF ENVIRONMENTAL PROTECTION: STANDARD SETTING, COMPLIANCE CONTROL AND THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW 44–48 (2010) (discussing the ICJ's decisions in the *Fisheries* cases).

145. *Delimiting Abyei Area*, Final Award, *supra* note 8, ¶ 769.

146. *Id.* (settling the dispute over the Abyei Area by resolving conflicts over the boundary lines); *see* Hans, Abyei Arbitration Award, *Abyei Arbitration Award*, PEACE PALACE LIBRARY (July 22, 2009, 3:18 PM), http://peacepalacelibrary-weekly.blogspot.com/2009/07/abyei-arbitration-award.html (summarizing the key elements of the final award of the Abyei Arbitration). The Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army signed the Arbitration Agreement on July 7, 2008, authorizing the referral of the dispute to the PCA for final and binding arbitration. At issue was whether or not the Abyei Boundaries Commission (ABC), established by the Comprehensive Peace Agreement (CPA), exceeded its mandate under the CPA to delimit and demarcate an area identified as the nine Ngok Dinka chiefdoms. The parties agreed in the Arbitration Agreement to authorize the PCA, upon a finding that the ABC did exceed its mandate to delimit and demarcate the area in dispute. The PCA determined that the ABC did exceed its mandate in part. Comprehensive Peace Agreement Between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, Government Sudan-

The practice of referral raises questions that international courts will need to address. Should referral, for example, be based on what is in the best interest of the parties or what a court deems necessary to achieve resolution? What is the appropriate order of applying different forms of IDR? If international courts engage in referral, how might this jeopardize their judicial settlement function?[147] While considering important questions such as these, international courts should strive to normalize the practice of referring parties to non-judicial IDR, when appropriate, as a part of the judicial function. Through referral, international courts can promote the use of integrated IDR and support the development of adequate institutional capacity for non-judicial methods.

A third and more intensive role for international courts is that of a coordinator of IDR methods.[148] The international judiciary might advance the resolution of international disputes by serving as a "Multi-Door Courthouse" of sorts, which informs and encourages disputing parties to engage in IDR methods beyond judicial settlement. By engaging in this role, international courts will be able to promote systematic integration of IDR methods across institutions, while also insulating their primary function as dispute settlers. They will also contribute to the development of a coherent and functional structure that

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Sudan People's Liberation Movement/Sudan People's Liberation Army, Jan. 9, 2005, http://www.smallarmssurveysudan.org/pdfs/HSBA-Docs-CPA-1.pdf (outlining the terms of the comprehensive peace agreement established by the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army on Jan. 9, 2005). *But see generally* Delimiting Abyei Area (Sudan v. The Sudan People's Liberation Movement/Army) Dissenting Opinion of Judge Awn Shawkat Al-Khasawneh (Perm. Ct. Arb. 2009) http://www.pca-cpa.org/showfile.asp?fil_id=1242 (criticizing the Court for not doing enough to resolve the dispute, although subsequent to the decision both parties announced that they would accept and abide by the PCA's ruling).

147. For example, there is a concern that adding additional IDR methods might contribute to the existing problem of fragmentation in the international judicial system, as described in Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Int'l Law Comm'n, 58th sess., May 1-June 9, July 3-Aug. 11, 2006, ¶ 24, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

148. *See* Higgins, *supra* note 39, at 15–20 (suggesting that the ICJ can help prompt integration between judicial and other dispute resolution forums across regions and cultures but should not aim to replace them as a supranational body); Paul S. Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1155–56 (2007) (introducing the idea that countries should embrace multiple ways of resolving conflict because of the insights the various actors can provide); Tomer Broude, *Fragmentation(s) of International Law: On Normative Integration as Authority Allocation*, *in* The SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 99, 99–100 (Tomer Broude & Yuval Shany eds., 2008).

clarifies the relational web among methods. Doing so will create a space for the development of complex integrated IDR approaches that can contribute to the resolution of international disputes.

CONCLUSION

This article has argued that international courts exist to serve a functional purpose of settling international disputes as well as a normative one of promoting global peace and security. As an alternative to the dichotomy of viewing international courts as dispute settlers or as peacemakers, the article has proposed an alternative framework for understanding the international judicial function as one of dispute resolution. As dispute resolvers, international courts exist alongside other institutions in an IDR system. International courts can enhance their ability to contribute to dispute resolution by recognizing the value of other IDR methods and referring parties to engage in such methods when appropriate. Furthermore, international courts can provide institutional support integrating judicial and other dispute resolution methods. By embracing these new roles, international courts will enhance their ability to resolve disputes and promote a more peaceful and secure world.