

INTEGRATION MATTERS: RETHINKING THE ARCHITECTURE OF INTERNATIONAL DISPUTE RESOLUTION

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ABSTRACT

International law promotes global peace and security by providing mechanisms for the pacific settlement of international disputes. This Article examines these mechanisms and their place in the architecture of the international dispute resolution (“IDR”) system. The Article identifies three core deficiencies of the IDR system that limit its effectiveness and capacity. First, the international legal system has prioritized the development of adjudication over other forms of dispute resolution; the judicialization of international disputes and the proliferation of courts and tribunals evidence this. However, adjudication is limited in its capacity to resolve disputes that involve non-state parties and extra-legal issues. This is concerning because empirical studies show that international conflict is increasingly intra-state, and involves non-state actors and extra-legal issues. Second, states prefer mediation to adjudication as a method for resolving disputes that occur in the context of inter-state conflict. Yet the role and value of mediation have been underappreciated, and it lacks institutional support under international law. Third, the current architecture of the IDR system promotes single method approaches, which can foster fragmented IDR approaches that separate legal issues from extra-legal ones, despite their interconnected nature. It also fails to structurally incorporate emerging, hybrid IDR approaches that enhance IDR capacity. In

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response to these limitations, this Article argues that there is a need to restructure the IDR system to create a framework for understanding how to systematically integrate IDR methods across forums. The Article concludes by considering several challenges that this approach presents to the state-centric foundations of the international legal system.

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1. INTRODUCTION

For much of its history, international law has served to promote peace and security by providing for the pacific resolution of disputes between nations.¹ Traditionally, this aim has been

¹ See generally U.N. Charter pmb., para. 1 (noting peace and international security as a common goal of participating states); U.N. Charter art. 2 (“All Members shall settle their international disputes by peaceful means”); U.N. Charter art. 33, para. 1 (mandating that parties to a dispute first seek a resolution through peaceful means).

served through the establishment of courts and tribunals set up for the purpose of settling legal disputes. However, the evolving nature of conflict is changing the character of international dispute resolution. Today's conflicts are increasingly intra-state and involve non-state actors and extra-legal issues. In response, dispute resolution methods and the institutions that provide them have evolved and multiplied. Innovative dispute resolution mechanisms that extend beyond traditional legal forms into political and social dimensions have emerged.² Despite the benefits of these approaches, they have been met with resistance by international law traditionalists who hold fundamentally different views about the purpose and role of dispute resolution under international law.³ Furthermore, while the growth and diversification of international dispute resolution has provided many benefits, it has also led to the lack of a coherent and effective system.

This Article critiques the architecture of the existing IDR⁴ system and argues that it should be restructured to provide a framework for integrating different dispute resolution methods and the institutions that provide them. It also explores some important questions about the relationship between the international legal system and the system of international dispute resolution and how one both influences and is influenced by the other. The central question, to borrow from James Crawford, is "can the superstructure change the foundations?"⁵ This Article examines how the foundations of international law impact the structure of the IDR system in ways that limit its efficacy and

² See generally JACOB BERCOVITCH & RICHARD JACKSON, *CONFLICT RESOLUTION IN THE TWENTY-FIRST CENTURY: PRINCIPLES, METHODS, AND APPROACHES* (2009) (discussing new methods for the resolution or management of international conflicts).

³ See generally ROSALYN HIGGINS, *Policy Considerations and the International Judicial Process*, reprinted in *THEMES AND THEORIES: SELECTED ESSAYS, SPEECHES, AND WRITINGS IN INTERNATIONAL LAW* 19, 19-43 (2009) (discussing the tensions between different viewpoints over legal and political aspects of the international judicial process).

⁴ For purposes of this Article, International Dispute Resolution is defined as methods used for assessing, preventing, managing, or resolving inter-state or other international disputes and conflicts. This Article primarily considers the following forms of third-party IDR: adjudication (judicial settlement and arbitration), mediation and conciliation.

⁵ JAMES CRAWFORD, *International Law as an Open System*, in *INTERNATIONAL LAW AS AN OPEN SYSTEM: SELECTED ESSAYS* 17, 18 (2002).

capacity. The Article then extends this analysis to consider how international dispute resolution—through new approaches—is also affecting the foundations of international law.

There are three central deficiencies with the current IDR system. First, international law prioritizes the use of adjudication, which is limited in its capacity to provide effective dispute resolution. Although the U.N. Charter provides for a variety of IDR methods,⁶ the international legal system has primarily advanced the institutionalization of regimes that support arbitration and judicial settlement. The recent proliferation of courts and tribunals and the judicialization of dispute resolution, particularly in the areas of trade, investment, and commercial disputes, illustrate this development.⁷

At once, the primacy of adjudication makes sense, given that state sovereignty is foundational to international law. The basis for authority in adjudication reinforces this state-centric view. For states, adjudication offers a dispute resolution process that promises familiarity, enjoys enforcement mechanisms, and clarifies rules for future behavior.⁸ However, the primacy of adjudication is misplaced because it is limited in its capacity to resolve disputes that involve non-state parties and extra-legal issues. Judicial settlement before the International Court of Justice (“ICJ”), for

⁶ See U.N. Charter art. 33, para. 1 (“The 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 arrangements, or other peaceful means of their own choice.”).

⁷ See Philippe Sands, *Introduction to RUTH MACKENZIE ET AL., THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS*, at ix, xi–xiii (2d ed. 2010) (describing the proliferation of international adjudicatory bodies as evidence of the growing trend toward third-party adjudication of international disputes); 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). See generally Andrea Kupfer Schneider, *Not Quite a World Without Trials: Why International Dispute Resolution is Increasingly Judicialized*, 2006 J. DISP. RESOL. 119 (2006) (discussing the increase in the use of trials to resolve international legal disputes).

⁸ See Richard B. Bilder, *Adjudication: International Arbitral Tribunals and Courts*, in *PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS & TECHNIQUES* 155, 174 (I. William Zartman & J. Lewis Rasmussen eds., 1997) (discussing the benefits and advantages of adjudication).

instance, is only available to states for contentious cases and to states and U.N. organs for advisory opinions.⁹

This is a problem in light of empirical studies that show that the nature of conflict is changing. During the 19th and 20th centuries, the main form of international conflict¹⁰ was inter-state.¹¹ At that time, it made sense to emphasize state-centric IDR practices because resolving disputes between nations minimized the need for them to send their militaries to war.¹² However, since World War II (“WWII”), the number of inter-state armed conflicts has decreased, while the number of intra-state armed conflicts has increased.¹³ Non-state armed conflict, occurring between two or more non-state organized armed groups, has emerged as well.¹⁴ Thus, the nature of international conflict in the 21st century increasingly involves non-state actors and complex extra-legal disputes. These changes suggest that an effective IDR system requires the capacity to: (1) provide for the full participation of non-state actors; and (2) address the full-spectrum of issues in a dispute.

⁹ See Statute of the International Court of Justice art. 34, para. 1, June 26, 1945, 59 Stat. 1055 (stating that “[o]nly states may be parties in cases before the Court”); *id.* art. 65, para. 1 (stating that the court may give an opinion to a legal question presented by any body authorized by Charter of the United Nations); see also *How the Court Works*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1&p2=6> (last visited Oct. 22, 2010) (discussing how the International Court of Justice entertains contentious cases and advisory proceedings).

¹⁰ See discussion *infra* Part 2 (providing a detailed explanation of international conflict, but referring generally to inter-state armed conflicts and intra-state, non-state, or other forms of armed conflict that become internationalized by presenting a threat to global peace and security).

¹¹ See MEREDITH REID SARKEES & FRANK WHELON WAYMAN, *RESORT TO WAR 1816–2007*, at 562–65 (2010) (providing an empirical study of the onset of wars by type over time); see also ROBERT A. HINDE, *BENDING THE RULES: MORALITY IN THE MODERN WORLD—FROM RELATIONSHIPS TO POLITICS AND WAR 199–224* (2007) (providing a historical account of inter-state wars from an ethics-based perspective).

¹² This Article acknowledges the definitional distinctions between these two terms and defines conflict as an ongoing multi-issue event that results in violence or the loss of life whereas a dispute is a nonviolent specific matter, by subject or time, or both. However, there are cases that can be classified as both a dispute and a conflict where the terms are used interchangeably. See BERCOVITCH & JACKSON, *supra* note 2, at 19–20 (providing a broad definition of the term “conflict”).

¹³ See SARKEES & WAYMAN, *supra* note 11, at 562 (stating that intra-state wars began to rise by the mid-1960s).

¹⁴ See *id.* at 70 (defining and describing non-state war).

Second, the international legal community has not given adequate attention to the role or value of non-judicial IDR methods. Two empirical studies on international conflict management suggest that states prefer mediation to adjudication for resolving disputes that arise in the context of armed inter-state conflict.¹⁵ This might seem counterintuitive given the growth of adjudication capacity and use, but there are several explanations for this. Mediation allows states to maintain control over the process and provides other benefits that adjudication does not.¹⁶ However, the precise use and value of mediation in the international context is not well developed in international legal scholarship. Furthermore, mediation lacks the necessary institutional capacity to adequately respond to the volume and array of international disputes.

Third, the architecture of the IDR system is structured in a manner that promotes the use of single method approaches and fosters institutional fragmentation. International dispute resolution is commonly described as a menu of single method approaches (negotiation, adjudication, mediation, conciliation, and inquiry), defined according to classifications (binding/nonbinding, and legal/diplomatic).¹⁷ This description presents IDR as a set of

¹⁵ See JACOB BERCOVITCH & JUDITH FRETTER, REGIONAL GUIDE TO INTERNATIONAL CONFLICT AND MANAGEMENT FROM 1945 TO 2003, at 29 fig.2 (2004) (surveying the choice of conflict management approaches for 343 international conflicts and finding that states used mediation in 59.3% of all cases, negotiation in 32.2%, and arbitration in 0.6%).

¹⁶ See *id.* at 29 (arguing that mediation is frequently used because it has a high chance of success and permits states to retain some control over the process). See also Jacob Bercovitch & Scott Sigmund Gartner, *Is There Method in the Madness of Mediation? Some Lessons for Mediators from Quantitative Studies of Mediation*, 32 INT'L INTERACTIONS 329, 331-33 (2006) (studying factors that impact the effectiveness of mediation in resolving international disputes); Derrick V. Frazier & William J. Dixon, *Third-Party Intermediaries and Negotiated Settlements, 1946-2000*, 32 INT'L INTERACTIONS 385, 395 tbl.3 (2006) (measuring the frequency of use of various mediation techniques in an attempt to assess their effectiveness in resolving international disputes).

¹⁷ For examples of scholarly works that assess the application of adjudication, mediation, and other IDR methods as applied in international disputes, see generally JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES* (1999) (providing a broad overview of the main processes of IDR); RUTH MACKENZIE ET AL., *THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* (2d ed. 2010) (tracing the development of international courts and tribunals); J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* (4th ed. 2005) (offering a comprehensive overview of international dispute resolution, including the relevant techniques and institutions involved).

fragmented processes that separate legal issues from extra-legal ones, despite their interconnected nature. It also fails to recognize emerging hybrid approaches and their place in the system. As case studies and a review of IDR institutions demonstrate, these hybrid approaches—defined as multiple (the use of two or more IDR methods applied sequentially) and mixed (integrating aspects of different methods into a single process)—offer important contributions that should be recognized. For example, in the ICJ *Frontier Dispute* case, the governments of Mali and Burkina Faso reached a cease-fire and worked to resolve their underlying disputes through judicial settlement by the ICJ and a mediation-like process that involved local stakeholders.¹⁸ This combination of rights-based and interest-based methods brought an end to the armed conflict and the ongoing disputes.

In response to these limitations, this Article argues that there is a need to restructure the IDR system to create a framework for understanding how to systematically integrate IDR methods across forums. Doing so provides an accurate descriptive account of the system's capacity for dispute resolution. It also enhances IDR by identifying how to integrate methods and institutions in a manner that promotes a coherent and effective system. However, rethinking international dispute resolution as an integrated system challenges the state-centric foundations of the international legal system and raises questions about who the system seeks to serve.

This Article proceeds in the following manner. Part 2 provides definitional and historical context for international dispute resolution and its role in promoting global peace and security. Part 3 presents three areas of deficiency in the IDR system: prioritizing adjudication, overlooking mediation, and structural fragmentation. Part 4 explores the use of hybrid approaches—multiple methods and mixed methods—in international dispute resolution, and examines their unique contributions to IDR capacity. Part 5 explains why it is important to restructure the architecture of the IDR system to promote the integration of methods and institutions. Part 6 considers how conceiving of international dispute resolution in this manner affects traditional notions concerning the purpose and scope of international law.

¹⁸ *Frontier Dispute (Burk. Faso/Mali)*, 1986 I.C.J. 554 (Dec. 22).

2. THE ARCHITECTURE OF INTERNATIONAL DISPUTE RESOLUTION

Promoting global peace and security has long been a fundamental purpose of international law. The modern international community of states operationalized this purpose in the United Nations Charter in the wake of WWII.¹⁹ Article 33 of the U.N. Charter 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 arrangements, or other peaceful means of their own choice.”²⁰ Putting this principle into practice has required institutionalizing IDR by developing and promoting norms, creating methods, and establishing capacity through institutions. These methods, along with their theories and practices, have evolved into a regime of “decision-making procedures”²¹ that, beyond preventing conflict, also provide the international community with a venue for solving collective problems.²² This Part provides a historical overview of the main methods of international dispute resolution in order to offer necessary definitions and context for the Article.²³

¹⁹ See U.N. Charter art. 33, paras. 1-2 (urging member nations to seek peaceful resolutions to international disputes); see also *id.* art. 2, para. 4 (calling for nations to refrain from the threat or use of force).

²⁰ *Id.* art. 33, para. 1.

²¹ See Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 185 (1982) (offering a comprehensive discussion of international regimes and the influence that changes in structure, norms, and decision-making can have on them).

²² See generally HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982) (providing substantive information regarding the complexities of negotiation and mediation).

²³ Note that the methods covered are referred to collectively as alternative dispute resolution (“ADR”) in the United States, Great Britain, and other countries. This term refers to practices evolving out of the search for alternatives to litigation in municipal courts. For more information regarding the origins of ADR in the United States, see generally LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (2d ed. 1997) (discussing the role of lawyers in preventing and resolving conflicts); Frank E. A. Sander, Professor of Law, Harvard Univ., *Varieties of Dispute Processing* (Apr. 8, 1976), in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 65 (A. Leo Levin & Russell R. Wheeler eds., 1979) (advocating for the use of alternative methods in dispute resolution, such as arbitration and mediation).

IDR methods have traditionally been grouped by type (diplomatic, legal, political), aim (prevention, management, resolution), and enforcement status (binding or nonbinding).²⁴ Negotiation is often the first IDR method employed in a dispute. Defined as direct communication between disputing parties for the purpose of reaching agreements that will settle or resolve a dispute, the practice of negotiation is historically pervasive.²⁵ Negotiation is commonly categorized as a diplomatic form of IDR.

The forms of IDR considered in this Article are third-party approaches. Legal methods involve the settlement of a dispute through a decision based on a rule that is binding on the parties.²⁶ Adjudication is a legal method that is fundamentally a rights-based process administered through judicial settlement or arbitration that addresses claims composed of grievances over an injury coupled with an expectation of redress.²⁷ Traditionally, state use of arbitration occurred through ad hoc bodies.²⁸ At the Hague Peace Conference of 1899, 28 states adopted the Convention for the Pacific Settlement of International Disputes in order to “insure the pacific settlement of international differences.”²⁹ They institutionalized this principle with the establishment of The Permanent Court of Arbitration (“PCA”).³⁰ The Convention

²⁴ See COLLIER & LOWE, *supra* note 17, at 19–41 (discussing methods of settlement in international disputes).

²⁵ See BERCOVITCH & JACKSON, *supra* note 2, at 19–31 (discussing the basic principles and frameworks for international negotiation); MERRILLS, *supra* note 17, at 1–2 (discussing negotiation in international disputes).

²⁶ See BERCOVITCH & JACKSON, *supra* note 2, at 47–48 (discussing international arbitration and judicial settlement in binding third parties to a proposed resolution); MERRILLS, *supra* note 17, at 91 (discussing arbitration in international disputes).

²⁷ See Richard B. Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 VA. J. INT'L L. 1, 11 (1982) (questioning how international disputes arise and the appropriateness of adjudication as a means of dispute resolution).

²⁸ See DANIEL TERRIS ET AL., *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* 1–4 (2007) (providing a historical account of the development of international arbitration); *see also* Sands, *supra* note 7, at x–xi (describing four phases of the development of international adjudication).

²⁹ Convention for the Pacific Settlement of International Disputes, art. 1, July 29, 1899, 32 Stat. 1779; *see* Sands, *supra* note 7, at ix (noting that the Convention “marked a turning point in favour of international adjudication before standing bodies”).

³⁰ See TERRIS ET AL., *supra* note 28, at 2–3 (describing the creation of the PCA and the structure of the PCA).

organized the PCA as a locus for international adjudication to ensure that these nations had alternatives to war.³¹ The PCA was empowered with the ability to conduct arbitration, conciliation and fact-finding. After World War II, the importance of having a standing body with permanent judges led to a shift toward judicial settlement through the ICJ.³² Thus, international adjudication was institutionalized through the creation of two prominent forums offering distinct but related methods. The purpose of creating these institutions was, in part, to enhance effective dispute settlement between nations in order to reduce the probability that they would resort to war as a means for settling differences. Since then, international courts and tribunals have proliferated in number and variety.³³ The International Criminal Court ("ICC") and the International Tribunal for the Law of the Sea ("ITLOS") are two recent examples. Additional examples will be discussed in Part 3.

Non-judicial forms of third-party IDR include mediation, conciliation, and fact-finding/inquiry. Mediation is a form of third-party intervention by which an unbiased party convenes disputing parties, facilitates a process for communicating positions and underlying interests, and promotes agreement formation.³⁴ Mediation outcomes, absent other arrangements, are nonbinding. Mediation provides "direct positive contributions" such as agenda setting and problem solving and "weakens constraints on the primary parties."³⁵ One benefit of mediation in the international context is its inclusive and cross-cultural approach to problem

³¹ See Sands, *supra* note 7, at ix (describing the formation of the PCA as the first standing body for international adjudication).

³² See MACKENZIE ET AL., *supra* note 17, at 4-5 (discussing the formation and organizational structure of the ICJ).

³³ See Sands, *supra* note 7, at ix (discussing a comprehensive treatment of international courts and tribunals); see also CESARE P.R. ROMANO & THE PROJECT ON COURTS AND TRIBUNALS, THE INTERNATIONAL JUDICIARY IN CONTEXT: A SYNOPTIC CHART, available at http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf (providing a graphic and textual overview of the expansion of international courts, tribunals, and other judicial bodies).

³⁴ See BERCOVITCH & JACKSON, *supra* note 2, at 32-46 (defining and discussing mediation as a method of international dispute resolution); MERRILLS, *supra* note 17, at 28-44 (discussing the use and structure of mediation in international disputes).

³⁵ MICHAEL BRECHER & JONATHAN WILKENFELD, A STUDY OF CRISIS 185 (2000).

solving.³⁶ Mediation emerged as a field of scholarly study in the 1980s, influenced by the rise of the practice of mediation as an alternative to litigation.³⁷

Conciliation operates by having an institutionalized third-party, usually a commission, provide an impartial examination of the dispute and suggest settlement terms.³⁸ The process is nonbinding. The first documented adoption of conciliation in an inter-state context occurred in a 1920 treaty between Sweden and Chile and, since then, it has been included as a dispute resolution option in numerous treaties.³⁹ Dispute resolution bodies have codified procedural rules, such as the United Nations Commission on International Trade Law's ("UNCITRAL") Model Law on International Commercial Conciliation, which uses the terms "mediation" and "conciliation" interchangeably.⁴⁰ However, the use of conciliation is minimal, which is explained by its inherent restrictions, including limited subject matter and the expense of setting up a commission.⁴¹

Fact-finding and inquiry are two processes often combined to develop an impartial account of the facts of a particular case in order to establish a foundation for negotiations, mediation, or another process.⁴² The practice of inquiry varies widely from true

³⁶ See NADJA ALEXANDER, *INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES* 48 (2009) (discussing how mediation is a flexible process with potential to accommodate a cross-cultural approach).

³⁷ See Louis Kriesberg, *The Development of the Conflict Resolution Field*, in *PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS & TECHNIQUES* 51, 51-63 (I. William Zartman & J. Lewis Rasmussen eds., 1997) (providing a comprehensive overview of the development of conflict resolution from 1914-1995).

³⁸ See MERRILLS, *supra* note 17, at 64 (discussing the method and history of the process of conciliation).

³⁹ See *id.* at 64-67 (noting the adoption of conciliation by the Belgian-Danish Commission, the East African Community, and the Chaco Commission, among others).

⁴⁰ See U.N. COMM. ON INT'L TRADE L., *MODEL LAW ON CONCILIATION WITH GUIDE TO ENACTMENT AND USE*, at 1, U.N. Sales No. E.05.V.4 (2002) (noting the definitions of "conciliation" and "mediation" as interchangeable).

⁴¹ See MERRILLS, *supra* note 17, at 87-88 (discussing the reasons for the infrequent use of conciliation, which including the restrictive nature of treaty obligations and the expense of convening and operating a commission); see also BERCOVITCH & FRETTER, *supra* note 15, at 25 (arguing that conciliation may be inappropriate for minor conflicts because it is too elaborate, but similarly may be insufficient for major conflicts because it is void of political authority).

⁴² See MERRILLS, *supra* note 17, at 45-46 (noting the use of inquiry in resolving a disputed issue of fact).

fact-finding to activities that mirror arbitration.⁴³ Other forms of third-party IDR include peacekeeping, humanitarian intervention, and peacebuilding.⁴⁴ Although these forms are outside the scope of this Article, they are important methods worthy of further study and analysis.⁴⁵ Together, these methods, along with the variety of institutions and venues that provide them, make up the IDR system.

In addition to creating rules and institutions, international law has proliferated norms that advance the use of dispute resolution mechanisms. The ILC's Report on State Responsibility promotes the use of dispute resolution mechanisms for addressing wrongful acts by one nation against another.⁴⁶ In the transnational arena, parties have developed specialized dispute resolution services to help manage differences.⁴⁷ In the treaty-making realm, nations proactively include provisions governing dispute settlement in agreements,⁴⁸ which have been repeatedly noted in U.N. General

⁴³ See *id.* at 59–61 (discussing the valuable and varied methods of inquiry).

⁴⁴ See BERCOVITCH & JACKSON, *supra* note 2, at 76–168 (noting general strategies to peacekeeping, humanitarian intervention, and peacebuilding).

⁴⁵ See *id.* (discussing a comprehensive review of the definitions and use of these IDR methods).

⁴⁶ See Rep. of the Int'l Law Comm'n, 53rd sess, Apr. 23–June 1, July 2–Aug. 10, 2001, at 294, art. 42, U.N. Doc. A/56/10; GAOR 56th sess., Supp. No. 10 (Dec. 12, 2001), available at <http://www.un.org/documents/ga/docs/56/a5610.pdf> (discussing the benefits of a compulsory dispute settlement mechanism); see also Rep. of the Int'l Law Comm'n, 48th sess., May 6–July 26, 1996, at 64–65, arts. 54–60, U.N. Doc. A/51/10; GAOR 51st sess., Supp. No. 10 (1996), available at http://untreaty.un.org/ilc/reports/english/A_51_10.pdf (governing the settlement of international disputes through negotiation, conciliation, and arbitration).

⁴⁷ See generally MIREILLE DELMAS-MARTY, ORDERING PLURALISM: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE TRANSNATIONAL LEGAL WORLD (Naomi Norberg trans., 2009) (exploring ways to counter transnational pluralism and other problems associated with the increasing interconnectedness of national economies and institutions).

⁴⁸ See, e.g., United Nations Framework Convention on Climate Change art. 14, May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107, amended by Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 19, opened for signature Mar. 16, 1998, 2303 U.N.T.S. 148 (entered into force Feb. 16, 2005) (“In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.”); United Nations Convention on the Law of the Sea arts. 187–88, Dec. 10, 1982, 1833 U.N.T.S. 397 (setting forth the jurisdiction of the Seabed Disputes Chamber); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter arts. 10–11, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120 (governing the development of “procedures for the assessment of liability and

Assembly Resolutions.⁴⁹ IDR provisions in treaties have become so commonplace that some states have argued against their inclusion in treaties on the grounds that the international legal requirement is of such an obvious nature it does not require restatement.⁵⁰

3. DEFICIENCIES IN THE INTERNATIONAL DISPUTE RESOLUTION SYSTEM

This Part argues that the existing IDR system suffers from three critical limitations that affect its effectiveness and capacity. First, the system emphasizes adjudication, which is not well suited to resolve disputes involving non-state actors or extra-legal issues. Second, it overlooks the value and institutional development of mediation, despite states' preference for mediation in certain contexts. Third, the architecture of the IDR system fails to offer a framework for understanding how to integrate methods and consequently fosters institutional fragmentation.

3.1. *The Primacy of Adjudication*

Adjudication is generally recognized as the central form of dispute resolution under international law.⁵¹ Its primary use has been to settle inter-state claims over areas of disputed territory, state responsibility, trade, investment, and more recently, the environment, human rights, and international crimes arising from armed conflict. The focus on developing adjudication has emerged in two ways. First, institutions that provide adjudication have

the settlement of disputes regarding dumping"); *see also* Dominique Alheritiere, *Settlement of Public International Disputes on Shared Resources: Elements of a Comparative Study of International Instruments*, 25 NAT. RESOURCES J. 701, 703-05 (1985) (discussing various international conventions that include provisions governing the pacific settlement of disputes).

⁴⁹ *See* Alheritiere, *supra* note 48, at 704-05 (describing the General Assembly's repeated decisions to "take note" of the United Nations Environment Programme's draft principles on resource dispute settlement, which included a provision urging member nations to seek peaceful resolutions of disputes).

⁵⁰ *See id.* (noting several nation's objections to the inclusion of a provision urging the pacific settlement of disputes in the United Nations Environmental Programme's draft principles on resource dispute settlement, on the grounds that the repetition of such an "obvious and . . . accepted" premise of international law would only serve to weaken it).

⁵¹ *See generally* Sands, *supra* note 7, at ix-xviii (discussing the emergence of adjudication as the primary form of IDR, the rise of international adjudicatory bodies, the increasing roles of non-state actors in international disputes, and the corresponding increase in international litigation).

proliferated in recent years. In addition to the ICJ and PCA, standing forums presently include the International Centre for the Settlement of Investment Disputes ("ICSID"), the International Tribunal for the Law of the Sea, The World Trade Organization's Dispute Settlement Body ("WTO DSB"), and the International Criminal Court. Additionally, the creation of treaty-based forums has become more pervasive.⁵² Second, scholars claim that there is a trend toward compulsory jurisdiction and binding decision-making in international adjudicatory forums.⁵³ The normalization of adjudication suggests that "disputes are more likely than ever to be resolved through a trial or adjudicatory method."⁵⁴

States use adjudication because it offers certainty of process and a binding outcome that enjoys the promise of compliance under international law.⁵⁵ International courts assist states in developing a common understanding of facts and law that promotes dispute resolution by clarifying substantive rules of law.⁵⁶ Adjudication also extends the state-centric foundations of international law by treating states as the primary actors with authority to allow for the participation of non-state actors.

However, from the perspective of enhancing capacity to resolve international disputes, there is a compelling argument against solely emphasizing adjudication above other forms of IDR.

⁵² See *id.* at xiii (noting the trend toward inclusion of binding dispute resolution methods in treaties, e.g. the 1982 U.N. Convention on the Law of the Sea and the 1994 World Trade Organization Dispute Settlement Understanding).

⁵³ See Romano, *supra* note 7, at 803-16 (discussing the shift in international adjudication from consensual jurisdiction and the option clause to the rise of compulsory jurisdiction).

⁵⁴ Andrea K. Schneider, *Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT'L. L. & POL. 789, 793 (2009). See also Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 201 (2007) ("The prevalence of arbitration provisions and the apparent structural inclination towards arbitration indicate a presumption that arbitration is the 'best' mechanism for resolving treaty disputes.") (footnote omitted); Christopher Shen, *International Arbitration and Enforcement in China: Historical Perspectives and Current Trends*, 14 CURRENTS: INT'L TRADE L.J. 69, 70 (2005) (characterizing arbitration as the "preferred method of international dispute resolution").

⁵⁵ See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979) (discussing the complex relationship between nations and international law and finding that most states obey most international law most of the time).

⁵⁶ See ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 51-53 (2008) (discussing the role that international courts play as an "information mechanism").

The nature of international disputes is changing in ways that require approaches to dispute resolution not offered by adjudication. Empirical studies on the onset of wars over time indicate that inter-state armed conflict is declining, while intra-state cases are increasing. The first study was conducted by the Correlates of War (“COW”) Project, founded by J. David Singer in 1936. This study categorized armed conflicts resulting in at least 1000 deaths⁵⁷ and defined them as either inter-state, extra-state, civil, or—more recently— intra-state and non-state conflicts.⁵⁸ The 2010 COW study identified 655 wars between 1816 and 2007, and found a general constancy in the incidence of war onsets overall.⁵⁹ However, the data suggests that intra-state wars are a growing percentage of the whole since WWII. Regionally, Asia, Africa, and the Western Hemisphere are the most war-prone regions, followed by the Middle East, Europe, and Oceania.⁶⁰ An earlier 2003 COW study of 401 wars between 1816 and 1997 found a “negative correlation between extra-state and intra-state war onsets.”⁶¹ The University of Maryland’s Peace and Conflict 2010 report by Hewitt, Wilkenfeld, and Gurr found a similar trend, and noted that intra-state conflict is rising.⁶² A third study of 121 conflicts between 1989

⁵⁷ SARKEES & WAYMAN, *supra* note 11, at 6.

⁵⁸ See *id.* (defining inter-state conflicts as armed conflicts between “States or members of the interstate system”; extra-state conflicts as armed conflicts between a state and a non-state entity outside of the state’s borders; and civil conflicts as conflicts between the government of a state and other groups within that state’s borders); *id.* at 337 (“[I]ntra-state war involves sustain combat between or among organized armed forces that takes place within the territorial boundaries of a state system member”); *id.* at 485 (defining non-state wars, which consists of two distinct classifications: “wars between . . . nonstate entities that take place in nonstate territory . . . and wars between [nonstate armed groups] that take place across state borders”). The definition of “intra-state” conflict has evolved, and now refers to conflicts taking place within a state’s territory, including—but not limited to—civil wars and, most recently, conflicts between or among non-state entities.

⁵⁹ *Id.* at 562.

⁶⁰ *Id.* at 566 fig.7.6.

⁶¹ *Id.* at 562.

⁶² See J. Joseph Hewitt, *Trends in Global Conflict, 1946–2007*, in PEACE AND CONFLICT 27, 27 (J. Joseph Hewitt et al. eds., 2010) (graphically demonstrating the negative correlation between extra-state and intra-state war onsets and noting that “[a]t 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”).

and 2005 identified 90 as intra-state and seven as inter-state.⁶³ In 2005, all 31 ongoing conflicts were intra-state, with six of them internationalized (indicating the presence of a second state's armed forces).⁶⁴ As of early 2008, there were 26 active armed conflicts in the world and all were classified as intra-state, occurring between a government and one or more internal groups.⁶⁵

These studies suggest that intra-state conflicts are on the rise while onsets of inter-state conflict are declining. This is significant because adjudication is primarily designed to serve state actors. Most adjudicatory forums lack jurisdiction over non-state actors that are important stakeholders in such disputes.⁶⁶ Stakeholders that lack standing or that fall outside of the forum's jurisdiction can be excluded from the process.⁶⁷ Non-state actors have no recourse to bring a claim before the ICJ in contentious cases and only U.N. organs and agencies may seek recourse from the ICJ in the form of advisory opinions. While the PCA permits cases involving state-controlled entities or international organizations, the second party must be a state.⁶⁸ Adjudicatory bodies that derive jurisdiction through treaties are typically limited to states that have become subject to the treaty. Without the capacity to increase non-state actor participation in adjudicatory proceedings, this form of IDR is not well equipped to resolve disputes that arise in the context of intra-state conflict and, given the data, this is an emerging problem.

A second limitation is that adjudication is not designed to address extra-legal issues. Its limited justiciability makes adjudication poorly equipped to resolve complex, multi-issue disputes involving political, social, environmental, and ethical

⁶³ Lotta Harbom et al., *Armed Conflict and Peace Agreements*, 43 J. PEACE RES. 617, 618 tbl.2 (2006).

⁶⁴ *Id.*

⁶⁵ Hewitt, *supra* note 62, at 27.

⁶⁶ 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).

⁶⁷ See, e.g., PATRICIA BIRNIE ET AL., *INTERNATIONAL LAW & THE ENVIRONMENT* 252-53 (3d ed. 2009) (showing that judicial proceedings and arbitration tend not to cater to the multilateral nature of certain environmental issues).

⁶⁸ See *Rules of Procedure*, PERM. COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1188 (last visited Oct. 26, 2010) (listing the Permanent Court of Arbitration's Optional Rules for Arbitration).

interests.⁶⁹ Often a court will issue an opinion that fails to resolve key issues in the case. For example, despite the ICJ's decision regarding Slovakia and Hungary's dispute over a project to build barrages in the Danube River,⁷⁰ the matter remains unresolved.⁷¹ In the *Nuclear Tests* cases, and other cases,⁷² the ICJ was heavily criticized for leaving the question of legality of nuclear testing, a politicized matter, undecided, and for failing to identify legal principles upon which environmental protection could be based.⁷³

⁶⁹ See R. P. ANAND, *STUDIES IN INTERNATIONAL ADJUDICATION* (1969) (discussing the challenges and limitations of adjudication in various international contexts, including the fact that the ICJ is "hedged in by the sacrosanct limits of consent and curbed by the absence of any execution machinery"); 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 primary, often unrelated, issues which prompted the legal matter); J. G. Merrills, *The Role and Limits of International Adjudication*, in *INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM* 169, 169-82 (William E. Butler ed., 1987) (exploring the justiciability of international disputes and specifically, the question "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 (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 States Parties to a dispute").

⁷⁰ *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25).

⁷¹ See Salman M.A. Salman, *Good Offices and Mediation and International Water Disputes*, in *RESOLUTION OF INTERNATIONAL WATER DISPUTES* 155, 162-64 (The Int'l Bureau of the Permanent Court of Arbitration ed., 2002) (pointing out that, despite adjudication, the Gabcikovo-Nagymaros dispute and many other water disputes remain unresolved).

⁷² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 266 (July 8) (deciding "[t]here is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons" but not reaching the issue of nuclear testing); *Certain Phosphate Lands in Nauru* (*Nauru v. Austl.*), Preliminary Objections, Judgment, 1992 I.C.J. 240 (June 26) (avoiding ruling upon the substantive legal issues before the court); *Nuclear Tests Case* (*N.Z. v. Fr.*), Judgment, 1974 I.C.J. 457 (Dec. 20) (declining to rule upon the illegality of atmospheric nuclear weapon testing); see also Press Release, Int'l Court of Justice, *New Zealand's Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's 1974 Judgment in the Nuclear Tests Case* (*New Zealand v. France*) I.C.J. Press Release 95/29 (Sept. 22, 1995) (denying New Zealand's request for special procedure filed subsequent to the *Nuclear Tests Case* decision).

⁷³ See *Nuclear Tests* (*N.Z. v. Fr.*), Judgment, 1974 I.C.J. 457 (Dec. 20) (declining to rule upon the illegality of atmospheric nuclear weapon testing); *Nuclear Tests* (*N.Z. v. Fr.*), Interim Protection Order, 1973 I.C.J. 135 (June 22) (encouraging France to avoid nuclear testing barring resolution of the dispute); see

Dispute resolution mechanisms under treaties are generally limited to the subject matter governed by the applicable treaty, thus making complex substantive cases, such as the *Shrimp-Turtle* cases, difficult to resolve.⁷⁴ One critique of the increased judicialization of the WTO argues that the contentious nature of adjudication can lead to heightened hostility between nations as compared to negotiation or conciliation, and may undermine negotiation by making it more difficult to resume talks if a party refuses to accept a final judicial decision.⁷⁵

Other limitations also affect adjudication. Adjudication is slow and costly. Court judgments may take years, during which time the nature of the dispute will have undoubtedly changed. This makes implementing judgments challenging.⁷⁶ Many countries and non-state actors view courts as a place for Westernized justice and concerns about the lack of diversity of judges and court bias persist.⁷⁷ Finally, there are capacity limitations. The ICJ, for example, lacks the capacity to consider all potential disputes over which it could assume jurisdiction. From 1946 to 1996, the ICJ assumed jurisdiction over 75 contentious cases and issued 39 judgments on the merits and 22 advisory cases and opinions.⁷⁸

also Laura Horn, *The Role of Mediation in International Environmental Law*, 4 AUSTL. DISP. RESOL. J. 16 (1993).

⁷⁴ The *Shrimp-Turtle* cases involved a dispute over a trade measure implemented by the United States to prohibit the import of shrimp from countries that were not using turtle excluder devices, which was challenged as inconsistent with GATT. See TIM STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION 326-31 (2009) (explaining the basis for the WTO Appellate Body's decisions in the *Shrimp-Turtles* cases). See generally Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and . . ."*, 96 AM. J. INT'L L. 77, 89-90 (2002) (discussing the difficulties arising from the "horizontal allocation of prescriptive jurisdiction" in situations where it is unclear which international organization has jurisdiction over a specific matter).

⁷⁵ See Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349, 396-97 (1994) (examining critical arguments that "a propensity . . . to accentuate adjudication may bring about the opposite of its intended effect").

⁷⁶ See GARY C. BRYNER, FROM PROMISES TO PERFORMANCE: ACHIEVING GLOBAL ENVIRONMENTAL GOALS 96-97 (1997) (describing challenges surrounding the implementation of a decision in the context of a perpetually changing environment).

⁷⁷ See MICHELLE L. BURGIS, BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE: MAPPING ARGUMENTS IN ARAB TERRITORIAL DISPUTES 19-37 (2009) (characterizing the PCIJ's jurisprudence treated "Third World states as *objects*, and not *subjects*, of international law") (emphasis in original).

⁷⁸ *Introduction*, 51 INT'L CT. JUST. Y.B. 1, 3-7 (1996-1997).

Since 1996, the number of cases submitted to the ICJ has grown in size, scope and complexity. As of August 1, 2010, there were fifteen contentious cases and one advisory case pending before the ICJ.⁷⁹ These critiques of adjudication highlight its central limitations and challenge its placement as the prominent IDR method.

3.2. *Overlooking Mediation*

A second critique of the international dispute resolution system is related to the first. Just as adjudication has been the focus of IDR, mediation has been undervalued and overlooked.⁸⁰ There is a lack of institutional capacity at the international level for mediation. There is no standing body equivalent to the ICJ to provide mediation services to states for international disputes. Although the PCA and the ICSID provide conciliation, they do not offer mediation. The use of mediation for international disputes, in both the legal and armed conflict contexts, remains ad hoc.⁸¹ Mediation lacks formal enforcement mechanisms under international law, so compliance is voluntary or coerced through political pressure and other means. Without proper recognition in the architecture of the IDR system, mediation lacks the power and institutional support associated with adjudicatory forums that have a place in the international legal regime.⁸² Furthermore, there are no universally accepted procedural rules governing the use and practice of mediation. Private mediation providers such as the American Arbitration Association and the International Mediation Institute have developed protocols for certifying mediators in the

⁷⁹ See *Pending Cases*, INT'L COURT OF JUSTICE, <http://www.icj-cij.org/docket/index.php?p1=3&p2=1> (last visited Oct. 26, 2010).

⁸⁰ See CESARE P. R. ROMANO, *THE PEACEFUL SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES: A PRAGMATIC APPROACH* 46-64 (2000) (detailing treatment of the use of negotiation, consultation, good offices, mediation, inquiry, and conciliation in international environmental disputes).

⁸¹ Christine Chinkin, *Alternative Dispute Resolution Under International Law*, in *REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA* 123, 124-25 (Malcolm D. Evans ed., 1998) (stating that mediation and other forms of dispute resolution were used for the most part on an ad hoc basis, resulting in underutilization during the Cold War).

⁸² See generally Edward N. Luttwak, *Give War A Chance*, 78 *FOREIGN AFF.* 36 (1999) (arguing that dispute settlement prevents lasting peace by interrupting wars between minor powers, which should be allowed to run their course).

practice of international mediation.⁸³ But, to date, there is no venue for determining standards or qualifying international mediators that is generally accepted by the international community or recognized under international law.

This is important because states prefer mediation to adjudication for resolving disputes that arise in the context of interstate armed conflicts. Two empirical studies support this claim. The first study conducted by Bercovitch and Fretter surveyed the use of dispute resolution methods in 343 international conflicts occurring between 1945 and 2003, and found that states' preference for mediation was the highest, followed by negotiation, with arbitration coming in last.⁸⁴ A second empirical study supports these findings, showing that mediation, categorized as a diplomatic method, is the most prevalent form of third-party conflict management. The other methods, by category, include verbal expressions (negotiations, demands), diplomacy (inquiry/fact-finding, good offices, conciliation), legal processes (arbitration, judicial settlement, war crimes tribunal), civil administration (humanitarian assistance), and military involvement (demobilizations, peacekeeping).⁸⁵ Judicial settlement at the ICJ remains the method of last resort for state actors.⁸⁶ Therefore, there is tension between the IDR method states prefer in this context and the capacity presently provided for by the IDR system.

⁸³ See, e.g., *How to become IMI Certified*, INT'L MEDIATION INST., <http://www.imimediation.org/how-to-become-imi-certified> (last visited Oct. 25, 2010) (providing general information on International Mediation Institute certification).

⁸⁴ See BERCOVITCH & FRETTER, *supra* note 15, at 29 fig. 2 (illustrating that in a study of 343 registered conflicts, 59.3% used mediation while only 0.6% resorted to arbitration).

⁸⁵ See Frazier & Dixon, *supra* note 16, at 394–96 (using a dataset documenting conflict management of militarized inter-state disputes occurring from 1946 to 2000); *id.* at 400 (noting that mediation is an effective technique to produce settlements but arguing that military intermediary actions, such as peacekeeping, are more useful).

⁸⁶ See BERCOVITCH & FRETTER, *supra* note 15, at 27–28 (suggesting that the costly, slow, and retroactive nature of judicial settlement is often unsatisfactory in cases where harms with irreversible effects were not prevented); see also BURGIS, *supra* note 77 (discussing the historical reluctance of developing countries to use the ICJ due to concerns about bias and lack of diversity); ROMANO, *supra* note 80, at 92 (stating that it is “an indisputable fact that . . . litigation in international law is a matter of last resort”).

The following critiques of international mediation have contributed to perceptions about its lack of value. First, while the United Nations is the most recognized provider of mediation for international conflict, there are criticisms about the United Nation's effectiveness in this role. Historically, the U.N. Secretary-General has offered good offices to states on the brink of, or engaged in, war. In addition, the U.N. Department of Political Affairs houses the U.N. Mediation Support Unit, a center that provides educational and operational support for mediation.⁸⁷ In 2008, a five-person Mediation Support Standby Team was developed to allow for the deployment of mediators to conflict areas on short notice to lend expertise in areas including power sharing, constitution formation, security, human rights and justice.⁸⁸ Yet, arguably, this is not the best institution to provide mediation. The U.N. lacks the human and financial capacity to meet demands for mediation services in international conflicts.⁸⁹ States often seek assistance from the U.N. for the most difficult cases and at the stage when the conflict is least capable of being resolved.⁹⁰ Notable mediation failures include the efforts of U.N. missions to prevent new conflicts in Darfur (2007), Afghanistan (2006) and Georgia (1994).⁹¹ An empirical study of 295 conflicts between 1945 and

⁸⁷ See *Peacemaking*, U.N. DEP'T OF POLITICAL AFFAIRS, www.un.org/depts/dpa/peace.html (last visited Oct. 25, 2010) (discussing the role of U.N. peacekeeping and the various entities that support peacekeeping functions); see also Press Release, Dep't of Pub. Info., United Nations Announces New 'On-Call' Mediation Team to Advise Peace Envoys in Field, U.N. Press Release PA/1 (Mar. 5, 2008), available at <http://www.un.org/News/Press/docs/2008/pa1.doc.htm> (announcing the formation of a new Standby Team of Mediation Experts in an effort to build up capacity for preventive diplomacy).

⁸⁸ See UN: Norway Supported "On Call" Mediation Team is a Valuable Resource, NORWAY: MISSION TO THE UN, www.norway-un.org/News/News-2009/110609_MSU (last visited Oct. 25, 2010) (noting that the team is administered by the Norwegian Refugee Council on behalf of the MSU); *id.* (noting that team members serve one-year terms and were first deployed to Kenya in March 2008 during the post-election conflict).

⁸⁹ See *Peacemaking*, *supra* note 87 (outlining steps that are being taken in an effort to increase the U.N.'s capacity to handle international disputes); see also Press Release, *supra* note 87 (considering a \$21 million proposal to sustain and enhance U.N. peacemaking activities).

⁹⁰ See Saadia Touval, *Why the UN Fails*, 73 FOREIGN AFF. 44, 46-48 (1994) (characterizing the U.N. as a "last-ditch, last resort affair" and noting that it is not surprising that the organization is often blamed for its failure to solve problems).

⁹¹ See Greg Mills & Terence McNamee, *Mission Improbable: International Interventions, the United Nations, and the Challenge of Conflict Resolution*, in

1995 showed that mediation by the U.N. resulted in a 35.7% success rate. Both regional organizations and mediation provided by a mix of institutions had higher success rates (44.8% and 40% respectively).⁹² This suggests that efforts to develop mediation capacity at the international level must consider the appropriate institutional level and perhaps reconsider the role of the U.N..

Beyond skepticism about the role of the U.N., there are concerns about the dangers of mediation in general that are not well developed and lead to concerns about its efficacy. One critique is that in encouraging parties to be forward-looking, the mediation process does not treat the need to establish facts and determine attribution for past harms.⁹³ Without adequate safeguards, mediation may fail to deal with important power imbalances and intensify a conflict. The mediation effort in Rwanda prior to the 1994 genocide is one costly example of this.⁹⁴ Mediation can empower spoilers in cases where one or more parties are not participating in good faith. In prioritizing the interests of the parties present, there is a concern that mediation agreements that violate interests of public importance may be permitted and may inhibit long-term peace. For example, when parties in mediation prioritize short-term security goals⁹⁵ or the mediator pursues a cease-fire agreement, these priorities often detract from, or ignore altogether, underlying causes of the dispute.⁹⁶ It may be the case that mediation is not effective in certain contexts. Failure rates linked to geographic indicators

CONUNDRUM 57, 57-64 (Brett D. Schaefer ed., 2009) (discussing the failure of conflict resolution in Afghanistan, Georgia, and Sudan).

⁹² BERCOVITCH & JACKSON, *supra* note 2, at 67 tbl.2.

⁹³ See Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7 (2004) (identifying the different components necessary for successful dispute resolution).

⁹⁴ See Melanie Greenberg, *Mediating Massacres: When "Neutral, Low-Power" Models of Mediation Cannot and Should Not Work*, 19 OHIO ST. J. DISP. RESOL. 185, 200-05 (2003) (explaining the failure of mediation prior to the ethnic cleansing that occurred in Rwanda in 1994).

⁹⁵ See JEROME DELLI PRISCOLI & AARON T. WOLF, *MANAGING AND TRANSFORMING WATER CONFLICTS* 33-49 (2009) (discussing alternative dispute resolution in the context of water resources disputes).

⁹⁶ See E. Franklin Dukes, *What We Know About Environmental Conflict Resolution: An Analysis Based on Research*, 22 CONFLICT RESOL. Q. 191, 192-93 (2004) (analyzing and comparing the characteristics of environmental conflict resolution with other procedures).

illustrate that efforts to mediate regional conflicts in Latin America have generally not been successful.⁹⁷

Finally, the ad hoc and confidential nature of mediation makes documenting its use and lessons learned difficult. The absence of empirical information about international mediation discredits its validity as a field of scholarly study. Until recently, most sources on the subject came from narrative accounts of individual success stories.⁹⁸ This provides context-specific data but not information about the use of the method as a whole. Because mediation is confidential, detailed information about what happened during the process, why parties made certain decisions, etc., is generally not publicly available. Accounts remain largely firsthand, as an individual who was present writes about the case, typically long after the mediation concluded. Without an institution to keep track of lessons learned, there is limited evidence for establishing what works, when it works, and why it works. The lack of data contributes to an underdeveloped body of work on mediation in international legal scholarship as well. Yet, mediation's secrecy makes it attractive to states because confidentiality can limit political risks associated with resolving disputes.⁹⁹

Given these critiques, understanding how mediation is used and the criteria that contribute to its success may help to elevate its value as a form of IDR. Mediation is commonly understood to be a form of third-party dispute resolution that is voluntary, confidential, non-binding, ad hoc, and informal in nature. The practice of mediation in the international context is varied.¹⁰⁰ For example, scholars define mediation as non-coercive and facilitative, but in practice coercive and directive mediation styles

⁹⁷ See Carolyn M. Shaw, *Conflict Management in Latin America*, in REGIONAL CONFLICT MANAGEMENT 123, 149 (Paul F. Diehl & Joseph Lepgold eds., 2003) (“[T]he guerrilla insurgencies and drug war in Colombia and Peru . . . are far from ideal for achieving a diplomatic settlement.”).

⁹⁸ See Jacob Bercovitch, *Introduction: Putting Mediation in Context*, in STUDIES IN INTERNATIONAL MEDIATION 3, 22 (Jacob Bercovitch ed., 2002) (stating that until recent decades, scholarly research into human conflict and their manner of resolution was rare and marginal).

⁹⁹ See G. Shinkaretskaya, *supra* note 69, at 90 (discussing the advantages of non-judicial methods including their ability to allow the parties to find political compromises).

¹⁰⁰ See Carrie Menkel-Meadow, *The Trouble with the Advisory System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 36-38 (1996) (discussing how mediation falls between formal litigation and informal discussions on the spectrum of dispute resolution methods).

are employed.¹⁰¹ Mediation can be used proactively and is procedurally open to a variety of stakeholders. Mediators use process-based skills to elicit interests, identify zones of agreement and facilitate resolution. The mediation process engages parties in setting an agenda and addressing timing issues.¹⁰² Mediation helps adjust disputants' expectations by promoting conformity¹⁰³ and problem-solving behavior that, in turn, enhance the formation of legitimate outcomes by exerting normative restraints when participants adopt shared expectations.¹⁰⁴ It can also abate constraints, which prevent parties from reaching resolution by lowering political costs through face-saving and promoting flexible bargaining.¹⁰⁵ Mediation can prevent escalation while addressing the entire range of issues involved in the dispute.¹⁰⁶ Because mediation is nonbinding, it provides states with problem-solving opportunities that do not infringe on sovereignty.

Scholars have developed criteria for measuring the effectiveness of international mediation. Mediation success is influenced by the nature and timing of the dispute, the skill and status of the mediator, strategy, and conflict history.¹⁰⁷ Parties may need to recognize that they have a low probability of getting what

¹⁰¹ See William Zartman & Saadia Touval, *International Mediation in the Post-Cold War Era*, in *MANAGING GLOBAL CHAOS* 445, 445-61 (Chester A. Crocker et al. eds., 1996) (analyzing various participants' motives in mediation during international conflicts).

¹⁰² See BRECHER & WILKENFELD, *supra* note 35, at 185-86 (2000) (discussing the effects of third-party intervention in an international crisis).

¹⁰³ See Lon L. Fuller, *Mediation—Its Forms and Functions*, in *ALTERNATIVE DISPUTE RESOLUTION* 115, 117-19 (Michael Freeman ed., 1995) (proposing that one of mediation's objectives is to have disputants conform to and accept social norms).

¹⁰⁴ See generally JOAQUIN TACSAN, *THE DYNAMICS OF INTERNATIONAL LAW IN CONFLICT RESOLUTION* (1992) (studying the effectiveness of international law in conflict resolution through the International Legal Dynamics framework and the expectations participants derive through legal reasoning).

¹⁰⁵ See *id.* (analyzing the benefits political disputants can receive by engaging in mediation during an international conflict).

¹⁰⁶ See Charles Kegley & Gregory Raymond, *Third Party Mediation and International Norms: A Test of Two Models*, 9 *CONFLICT MGMT. & PEACE SCI.* 33, 37 (1985) ("[M]ediation . . . deals with the entire political context of a dispute rather than with narrow legal technicalities.").

¹⁰⁷ See SAM KAGEL & KATHY KELLY, *THE ANATOMY OF MEDIATION: WHAT MAKES IT WORK* 114-15 (1989) (discussing preference for different meeting styles at different phases of mediation); Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 *PEPP. L. REV.* S5, S16 (1989) (discussing the various steps and factors involved in mediation).

they want through unilateral action before they engage third-party assistance.¹⁰⁸ Furthermore, mediation style affects outcome. Directive strategies are more effective for high intensity conflict; “[P]rocedural strategies and regional mediators are effective in resolving low intensity conflicts”¹⁰⁹ International mediators who have resources, prestige, and physical distance from the dispute are the most effective for high intensity, while regional mediators or those with local contextual understanding are most effective for low intensity disputes.¹¹⁰ Thus, it is important to assess the intensity level of situation. A mediator’s power also affects outcome. Mediators exert power through coercion, persuasion, and acculturation. Sources of mediator power include reputation (i.e., credibility and prior track-record), the backing of a powerful entity such as a nation or the U.N., and the ability to access resources. The perceived lack of power in mediation is that mediators cannot force agreements or enforce outcomes, although this makes assumptions about authoritarian approaches to resolving conflict.¹¹¹

Mediation has been used successfully in a variety of international conflicts and disputes. For example, in the Amur River Dispute between China and Russia, the underlying issue was an unclear boundary demarcation along a portion of the Amur River and several islands.¹¹² Russia claimed that ownership rights were granted under the 1858 Treaty of Adigun and the 1860 Peking Treaty. Although seemingly a legal matter, the parties resolved the dispute through a joint field-mapping exercise of the disputed area where they agreed to divide the islands in half. The process, which involved mediation, worked so well that they followed a similar arrangement in the Argun River Dispute.¹¹³ Other notable

¹⁰⁸ See Lawrence Susskind & Eileen Babbitt, *Overcoming Obstacles to Effective Mediation of International Disputes*, in *MEDIATION IN INTERNATIONAL RELATIONS* 30, 48 (Jacob Bercovitch & Jeffrey Z. Rubin eds., 1992) (offering five criteria for effective international mediation).

¹⁰⁹ Jacob Bercovitch & Scott S. Gartner, *Is There Method in the Madness of Mediation? Some Lessons for Mediators from Quantitative Studies of Mediation*, 32 *INT’L INTERACTIONS* 329, 329 (2006).

¹¹⁰ See *id.* at 351. (explaining the qualities of the best mediators for different types of conflicts).

¹¹¹ See Fuller, *supra* note 103, at 315 (discussing the role of authority in mediation).

¹¹² See RONGXING GUO, *TERRITORIAL DISPUTES AND RESOURCES MANAGEMENT: A GLOBAL HANDBOOK*, 45–47 (2007) (describing the dispute over the Amur River).

¹¹³ See *id.* at 50–51 (detailing the dispute surrounding the Argun River).

examples of mediation success in the international context include a series of IDR efforts, including mediation by the World Bank that took place between India and Pakistan resulting in the 1960 Indus Waters Treaty that addressed conflict over water rights pertaining to the Indus River.¹¹⁴ Another example is the Vatican's mediation of the 1981 Beagle Channel dispute between Argentina and Chile, which took place after direct negotiations, a referral to the ICJ and arbitration by a British panel failed.¹¹⁵ Also noteworthy were George Mitchell's efforts in bringing an end to active armed conflict in Northern Ireland.¹¹⁶

The context in which mediation is offered and accepted is important. One study that analyzed empirical data on the variations in the offer and acceptance of mediation in intra-state vs. inter-state militarized conflict occurring between 1946 and 1999 suggests that there are important mediation differences between inter-state and intra-state armed conflicts. States are more likely to accept mediation (by state mediators) in an intra-state context than an inter-state context.¹¹⁷ Mediation (by states) is more likely to be

¹¹⁴ See S. M. A. Salman, *Good Offices and Mediation and International Water Disputes*, in RESOLUTION OF INTERNATIONAL WATER DISPUTES 155, 183-92 (The Int'l Bureau of the Permanent Court of Arbitration ed., 2003) (presenting a case study of the World Bank's mediation efforts and attributing its success to: continued involvement at the highest level, flexibility, successful use of pressure and concessions, ability to secure adequate funding, and active engagement in implementation).

¹¹⁵ See THOMAS PRINCEN, INTERMEDIARIES IN INTERNATIONAL CONFLICT 135-85 (1992) (offering a detailed account of the Vatican's six-year mediation efforts and noting that Argentina's transition in 1983 to a democratic government may have been paramount to the outcome); James L. Garrett, *The Beagle Channel Dispute: Confrontation and Negotiation in the Southern Cone*, J. INTERAMERICAN STUD. & WORLD AFF. 81, 81 (1985) (discussing the history and importance of the Beagle Channel dispute); M. C. Mirow, *International Law and Religion in Latin America: The Beagle Channel Dispute*, 28 SUFFOLK TRANSNAT'L L. REV. 1, 15-27 (2004) (discussing the role played by the Vatican as a religious institution).

¹¹⁶ See generally GEORGE J. MITCHELL, MAKING PEACE (1999) (discussing the history of Northern Ireland's end to armed conflict); Daniel Curran & James K. Sebenius, *The Mediator as Coalition Builder: George Mitchell in Northern Ireland*, 8 INT'L NEGOTIATION 111, 111 (2003) (analyzing George Mitchell's approach to mediation in Northern Ireland as a way of understanding mediation more generally).

¹¹⁷ See Molly M. Melin & Isak Svensson, *Incentives for Talking: Accepting Mediation in International and Civil Wars*, 35 INT'L INTERACTIONS 249, 261 (2009) (noting that acceptance rate for mediation is 86% for civil wars and 66% for inter-state conflicts, however mediation is also more likely to be offered in civil wars). Table 1 describes that 14% of militarized intra-state conflicts received an offer of mediation compared to 1% of militarized inter-state conflicts. *Id.* at 260-61. The acceptance rate of mediation for intra-state conflicts was 86% compared to 66% for

offered in intra-state conflicts than inter-state conflicts. Duration of the conflict increases the likelihood of mediation acceptance in intra-state cases, but not inter-state ones.¹¹⁸ State mediators with a history of conflict management are more likely to offer mediation.¹¹⁹ State offers to mediate intra-state conflicts are dependent upon expectations of acceptance, thereby indicating the presence of selection bias.¹²⁰ Mediation is more likely to occur in international military rivalries.¹²¹ International disputes characterized as highly complex, intense and of long duration; and in cases in which the parties have not been willing to reach an agreement.¹²²

In conclusion, the value of mediation as a means for resolving international disputes in all contexts is worthy of further study. Beyond scholarship, it is important to build additional capacity at the international institutional level for mediation and develop a more complex understanding about how it contributes to the overall value of the IDR system.

3.3. *Structural Fragmentation*

The third critique is that the architecture of the IDR system is designed around a framework that understands IDR as a collection of single method approaches. This is descriptively inaccurate because it fails to account for the full spectrum of IDR practices that extends beyond single approach methods, which are

inter-state conflict. *Id.* Factors that increase the acceptance rate of an offer to mediate include historical or colonial ties; alliances and trade interests; history of conflict management on the behalf of the state mediator; and duration of the conflict for intra-state wars. *Id.* at 262–64.

¹¹⁸ See *id.* at 263–64 (noting that in civil wars duration increases likelihood of successful mediation, but duration is ineffective in inter-state conflicts).

¹¹⁹ See *id.* at 263 (recognizing that mediators with previous experience in conflict mediation are more successful).

¹²⁰ See *id.* at 256 (discussing a study of third-party intervention by states into militarized inter-state disputes and civil conflict data sets between 1946-1999. This study did not include data about international organizations providing third-party intervention).

¹²¹ See Jacob Bercovitch & Paul F. Diehl, *Conflict Management of Enduring Rivalries: The Frequency, Timing and Short-Term Impact of Mediation*, 22 INT'L INTERACTIONS 299, 299 (1997) (exploring “how often mediation actually occur in the context of enduring rivalries and . . . at what phase(s) mediation efforts are undertaken”).

¹²² See BERCOVITCH & JACKSON, *supra* note 2, at 32–46 (discussing typical characteristics of mediation and international conflict resolution).

examined in Part 4. This Part focuses on a second critique. By promoting single method approaches, the structure of the IDR system fosters fragmentation between methods and the institutions that provide them.

Scholars have traditionally categorized the IDR system as a menu of single method approaches that range from negotiation to non-binding, third-party intervention to legal approaches.¹²³ Defining the system in this manner presents methods in ways that divide and separate.¹²⁴ Process selection is based on dichotomies such as binding or nonbinding; legal or diplomatic; settlement or resolution. Legal disputes are often tracked to adjudication, while disputes considered to be high-intensity and political in nature are tracked to diplomatic methods. But this is antithetical to the interconnected nature of international disputes that involve legal, political, social, cultural, and economic issues. Furthermore, these distinctions can be illusory because it is often difficult to accurately assess and separate legal and political dimensions of a dispute at the onset of the situation. These factors contribute to fragmentation between IDR methods when parties frame their choices as binary, electing one form of IDR over all others.

The descriptive framework of the IDR system also conflates the choice of method with achieving a particular objective instead of understanding them as tools that can be used to achieve a variety of aims. It supports assumptions that particular methods work for certain categories of cases but does not foster careful and nuanced assessment of the dispute before selecting or designing an appropriate process. Rigid understandings promote value judgments and promote the tendency to substitute one method's

¹²³ See generally PROJECT ON INTERNATIONAL COURTS & TRIBUNALS, <http://www.pict-pcti.org> (last visited Oct. 25, 2010) (providing examples of this descriptive approach. The menu could be extended to include political methods and various forms of military intervention such as peacekeeping or humanitarian intervention).

¹²⁴ See Geir Ulfstein, *Institutions and Competences*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 45, 67-68 (Jan Klabbers et al. eds., 2009) (noting analogous concerns in the arena of international institutions: the relationship between institutions is characterized by functional differentiation, and fragmentation causes wasted resources and conflicting objectives); Cesare P. R. Romano, *Deciphering the Grammar of the International Jurisprudential Dialogue*, 41 N.Y.U. J. INT'L L. & POL. 755, 755 (2009) (discussing how international court jurisprudence is interrelated).

evaluative criteria for another.¹²⁵ For example, if the value of IDR methods is based on criteria specific to adjudication—its ability to enforce outcomes through a legally binding process—then this de-emphasizes the value of other options. When measured against this criterion, voluntary, nonbinding IDR methods are perceived as less valuable.¹²⁶ Meanwhile, the value of mediation is in its ability to compel outcomes based on the power of persuasion and acculturation, not coercion. Measuring mediation against criteria developed for adjudication ignores the important benefits mediation provides, such as its ability to create new norms, not merely persuade parties to conform to existing ones,¹²⁷ which makes mediation preferable in situations where the long-term relationship between parties must stay intact.

Third, there is no framework for understanding how to systematically integrate the use of different and multiple methods across forums. This deficiency obscures the reality that many international conflicts and disputes are addressed through multiple processes. But there is no place in the current IDR system to classify approaches that use multiple IDR methods sequentially, or approaches that integrate aspects of different methods into one process. Thus, they remain categorized as ad hoc methods.

Fourth, this deficiency also fosters fragmentation between institutions within the IDR system. The International Law Commission (“ILC”) considered the impact of diversification and fragmentation on international law in its 2006 report.¹²⁸ While it did not focus specifically on procedural or institutional fragmentation, other scholars have.¹²⁹ One concern is that the

¹²⁵ See Fuller, *supra* note 103, at 115 (discussing the function of mediation in facilitating negotiation in collective bargaining relationships).

¹²⁶ See generally Chinkin, *supra* note 81 (providing examples that further display the decreased value of mediation when measured against adjudication specific criteria).

¹²⁷ See Fuller, *supra* note 103, at 307–08 (noting that mediation both forces awareness of current social norms and contributes to the formulation of innovative norms).

¹²⁸ See generally Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Rep. of the Int’l Law Comm’n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter ILC Report] (report of the study group detailing the complications arising from the increasing diversity of international law tribunals).

¹²⁹ See, e.g., STEPHENS, *supra* note 74, at 304–42 (looking at the fragmentary effects of multiple international courts on international environmental law); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 117 (1998) (exploring the fragmentary

proliferation of international courts and the judicialization of international disputes have led to a multiplicity of dispute resolution options that are uncoordinated. If courts provide different opinions on similar matters, this may lead to fragmented jurisprudence and judicial practices.¹³⁰ This concern is multiplied when considering other forms of IDR. For example, the ICJ could address a legal aspect of a dispute while mediation is being used to resolve extra-legal issues without either group recognizing or coordinating with the efforts of the other. If the legal question is adjudicated and the political interests are mediated, how should these outcomes be integrated to achieve common goals, such as violence reduction or stable governance? Answering questions such as this demands developing a more accurate descriptive understanding of the relationships between the methods and institutions of the IDR system.

4. RECOGNIZING HYBRID APPROACHES TO IDR: MULTIPLE METHODS AND MIXED METHODS

The benefits of IDR extend beyond single method approaches but the system fails to provide a framework for understanding

effects of a high number of tribunals on international law); Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 849 (2004) (detailing the upside and downside of procedural and institutional fragmentation in international law); Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*, 40 N.Y.U. J. INT'L L. & POL. 259, 271 (2007) (proposing an institutional hierarchy as a possible solution to the problem of fragmentation in international law).

¹³⁰ See generally STEPHENS, *supra* note 74, at 304-42 (detailing the lack of uniformity in the application of international environmental law caused by the proliferation of ruling bodies); Pierre-Marie Dupuy, *The Unity of Application of International Law at the Global Level and the Responsibility of Judges*, 1 EUR. J. LEGAL STUD. 1 (2007) (proposing an institutional hierarchy and uniform judicial application of law as solutions to the lack of unity in the enforcement of international law); Rosalyn Higgins, *supra* note 66, at 1 (2003) (detailing the detrimental effects on coherent human rights protection in Europe stemming from the disparate rulings of different tribunals); Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT'L L. 265 (2009) (exploring the challenges posed by the proliferation of international tribunals and courts). *But see* Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 1 (2007) (viewing international law not as a true legal system in the national sense and not subject to the same concerns about fragmentation); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 553 (2002) (suggesting that concerns regarding the fragmentation of international law may be exaggerated).

what these options are or how they fit into the overall structure. This Part examines the use of IDR beyond single method approaches and identifies two additional categories: (1) multiple method approaches, defined here as the use of more than one IDR method in the same case, in sequential order;¹³¹ and (2) mixed method approaches, defined here as the integration of more than one IDR method into a hybrid process where different methods are used at the same time. This Part begins by analyzing the application of multiple method approaches in a variety of cases and identifies the current institutional capacity for its use. The Part further considers a case study that illustrates a mixed method approach. I conclude by considering how these hybrid approaches can extend the practice of IDR in innovative ways that mitigate the limitations identified in Part 3.

4.1. The Use of Multiple Methods in IDR

This Part explores how multiple methods have been used sequentially in the course of addressing the same dispute. First, parties use negotiation or mediation to reach an agreement to submit the dispute to adjudication. For example, in the *Pedra Branca* dispute between Malaysia and Singapore, both countries engaged in negotiations prior to referring the case to adjudication before the ICJ.¹³² Moreover, they also used these methods after adjudication to achieve further cooperation. After the ICJ determined that Singapore possessed sovereignty over Pedra Branca and Malaysia had sovereignty over Middle Rocks,¹³³ the

¹³¹ See Frank E. A. Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 65 (A. Leo Levin & Russell R. Wheeler eds., 1979) (describing examples of multiple method approaches in the United States such as the combination of litigation and mediation in multi-door courthouses).

¹³² The nations negotiated the terms of the Special Agreement to submit the dispute to the ICJ. 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). See generally Tan Hsien-Li, *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, 12 *SING. Y.B. INT'L L. & CONTRIBUTORS* 257 (2008) (describing the territorial dispute in detail); Coalter G. Lathrop, *International Decisions: Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, 102 *AM. J. INT'L L.* 828 (2008) (examining the dispute in the ICJ, its resolution, and the parties' acquiescence).

¹³³ See *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.)*, Judgment, 2008 *I.C.J.* 12, 102 (May 23) (providing a factual basis to support its conclusion that Pedro Branca belongs to Singapore).

countries developed a joint technical commission to delimit the maritime boundary in the area.¹³⁴

Second, parties use mediation to resolve a dispute when other approaches have failed. For example, in the *Thailand-Philippines* dispute over tuna exports, the parties agreed to submit the dispute to mediation if consultations facilitated by the EU Trade Commissioner failed to produce a settlement.¹³⁵ On September 4, 2002, the parties submitted a letter to the WTO Secretary-General requesting mediation; on October 16, 2002, WTO Deputy Director-General Rufus Yerxa was appointed mediator¹³⁶ pursuant to Article 5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").¹³⁷ Yerxa issued an advisory opinion on December 20, 2002, which called for the European Community ("EC") to establish a quota and tariff rates; and on June 5, 2003, after months of lobbying by Thailand and the Philippines, the EC adopted Yerxa's recommendation in EU Council Regulation No. 975/2003.¹³⁸ The use of mediation in this context was directive, with Yerxa offering his own solution to the parties.

In other cases, non-judicial forms of IDR are used after adjudication to facilitate implementation of the award and/or resolve outstanding issues. For example, PCA awards have

¹³⁴ See generally Li Xueying, *Navigating the Rocks Ahead May Be Tricky: But Experts Confident Any Unresolved Issues Will Be Ironed Out*, STRAITS TIMES, May 24, 2008, available at http://www.malaysianbar.org.my/legal/general_news/pedra_branca_belongs_to_singapore.html (explaining the issues facing the joint technical commission); ICJ Awards *Pedra Branca's Sovereignty to Singapore*, CHANNELNEWSASIA.COM, http://www.channelnewsasia.com/stories/singapore_localnews/view/349592/1.html (last visited Oct. 30, 2010) (detailing the judgment of the ICJ and the creation of the joint technical commission).

¹³⁵ 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), available at www.wto.org/english/res_e/booksp_e/casestudies_e/case40_e.htm (detailing the agreement by the parties to submit to mediation, should the consultations fail).

¹³⁶ Request for Mediation by the Philippines, Thailand and the European Communities, *Communication from the Director-General*, para. 5, WT/GC/66 (Oct. 16, 2002).

¹³⁷ See *id.* para. 4 (providing that the appointed mediator will follow guidelines set by the DSU). See generally Faizel Ismail, *The Role of the Chair in the WTO Negotiations from the Potsdam Collapse in June 2007-June 2008*, 43 J. WORLD TRADE 1145, 1149-50 (2009) (noting the positive contribution the chair served in agenda management and brokerage during the negotiations.)

¹³⁸ See Xuto, *supra* note 135, at 563 (outlining how the parties approached mediation as an alternative should traditional trade negotiations fail).

acknowledged the value of using such approaches, in addition to adjudication, to address extra-legal aspects of a case¹³⁹ and have promoted the additional use of non-judicial IDR in order to support decisions. This was the case in the Abyei arbitration between the Government of Sudan and the People's Liberation Army of Sudan.¹⁴⁰ At issue was a dispute about boundary demarcation, oil, water, and grazing rights. The PCA addressed the dispute by dividing the territory between the two parties.

The process of arbitrating this dispute unfolded in the following way. The parties 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"),¹⁴¹ 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 Commission did exceed its mandate to delimit and demarcate the area in dispute. The PCA determined that the ABC did exceed its mandate in part. The PCA redrew the boundaries and in doing so, reduced the Abyei areas and demarcated the oil fields to the territory belonging to the North. In its decision, the PCA determined that it is now up to the Parties to take the next step, noting the need to develop a "survey team to demarcate the Abyei Area as delimited by this Award," and issuing its hopes "that the spirit of reconciliation and cooperation visible throughout these proceedings, particularly during the oral pleadings last April,

¹³⁹ See Nejb Jibril, Note, *The Binding Dilemma: From Bakassi to Badme—Making States Comply with Territorial Decisions of International Judicial Bodies*, 19 AM. U. INT'L L. REV. 633, 662-67 (2004) (concluding that pressure and involvement from the international community are needed to create binding arbitration agreements).

¹⁴⁰ See Gov't Sudan v. Sudan People's Liberation Movement/Army (Abyei Arb.), Final Award (Perm. Ct. Arb. 2009), http://www.pca-cpa.org/showpage.asp?pag_id=1306 (settling the dispute over the Abyei Area by resolving conflicts over the boundary lines).

¹⁴¹ See The Comprehensive Peace Agreement Between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, Gov't Sudan-Sudan People's Liberation Movement/Sudan People's Liberation Army, Jan. 9, 2005, available at www.aec-sudan.org/docs/cpa/cpa-en.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).

will continue to animate the Parties on this matter.”¹⁴² Despite the concerns raised in Judge Awn Shawkat Al-Khasawneh’s dissenting opinion, both parties announced that they would accept and abide by the PCA’s ruling.¹⁴³

The Abyei arbitration illustrates how a legal process allocated ownership rights, demarcated territory, and imparted responsibility on the parties for pursuing additional methods toward reconciliation. However, the Tribunal recognized that the Award was a “distinct stage in the peace process,” and, by implication, not the only phase.¹⁴⁴ The precise nature and timing of these additional methods remains unspecified. Thus, the Presidency of the Republic Sudan remains obligated to implement the Award and address outstanding issues.¹⁴⁵

The Pedra Branca dispute, Thailand-Philippines dispute, and the Abyei arbitration show how different IDR methods were used in a sequential manner. These cases demonstrate that multiple method IDR is being used in mediation.

4.2. *Procedural and Institutional Capacity for Multiple Method IDR*

There are several IDR venues that have the institutional capacity to provide multiple method approaches. As Part 3 identified, the institutional capacity for international mediation is limited so this Part will focus on forums that provide a mix of judicial settlement, arbitration, conciliation, other IDR methods or a combination of any of these fora.

The PCA provides arbitration, conciliation, and fact-finding.¹⁴⁶ Only states, their entities, and international organizations may

¹⁴² Gov’t Sudan v. Sudan People’s Liberation Movement/Army, Final Award, para. 266 (Perm. Ct. Arb. 2009), http://www.pca-cpa.org/showpage.asp?pag_id=1306 (final award in the Abyei arbitration); *see also* Hans, *Abyei Arbitration Award*, PEACE PALACE LIBRARY BLOG (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).

¹⁴³ *See* Hans, *supra* note 142, para. 7 (noting that the parties announced they would abide by the award).

¹⁴⁴ Gov’t Sudan v. Sudan People’s Liberation Movement/Army, Final Award, para. 768 (Perm. Ct. Arb. 2009), http://www.pca-cpa.org/showpage.asp?pag_id=1306 (final award in the Abyei arbitration).

¹⁴⁵ *See id.* para. 769 (noting that it is the responsibility of the President of the Republic of Sudan to ensure execution of the award).

¹⁴⁶ *See* PERMANENT CT. OF ARB. OPTIONAL CONCILIATION RULES, *available at* <http://www.pca-cpa.org/upload/files/CONCENG.pdf> [hereinafter PCA

access these.¹⁴⁷ The PCA's conciliation and fact-finding services are governed by the 1907 Hague Convention, the Rules of Conciliation, and the 1997 Optional Rules for Fact-finding Commissions of Inquiry.¹⁴⁸ PCA conciliation panels consist of one to three conciliators who "attempt to reach an amicable settlement" in any manner appropriate, taking into account the wishes of the parties, including proposing terms for settlement.¹⁴⁹ While the PCA has the capacity to offer all three of these IDR methods, it is less apparent how they have been used in a sequential manner.

ITLOS operates as an independent international judicial body, established by the 1982 United Nations Convention on the Law of the Sea ("UNCLOS").¹⁵⁰ Unlike other forums, ITLOS is accessible in certain circumstances to private individuals and corporations in addition to states, their entities, and international organizations.¹⁵¹ ITLOS provides arbitration and conciliation, as well as provisional measures that offer creative approaches to dispute resolution.¹⁵² For example, in the *Malaysia-Singapore* case, the Tribunal embraced a dispute-management approach by calling for "the establishment

OPTIONAL CONCILIATION RULES] ("The purpose of these Rules is to provide a convenient basis for mutual agreement of parties on practical procedures that are useful in the conciliation process."); PERMANENT CT. OF ARB. OPTIONAL RULES FOR FACT-FINDING COMMISSIONS OF INQUIRY, available at <http://www.pca-cpa.org/upload/files/INQENG.pdf> (establishing optional rules of fact-finding which parties may adopt at their discretion); 1907 Convention for the Pacific Settlement of Int'l Disputes arts. 9, 15, Oct. 18 1907, <http://www.pca-cpa.org/upload/files/1907ENG.pdf> [hereinafter 1907 Hague Convention] (providing that the PCA may provide fact-finding to assist the Commission of Inquiry and that the PCA "shall place its offices and staff at the disposal of the Contracting Powers for the use of the Commission of Inquiry").

¹⁴⁷ See MACKENZIE ET AL., *supra* note 17, at 105-20 (detailing the institutional and procedural aspects of arbitration before the PCA).

¹⁴⁸ See 1907 Hague Convention, *supra* note 146, ch. 2 (establishing the PCA and its procedure); see also MERRILLS, *supra* note 17, at 72-77 (providing a general overview of the fact-finding and conciliation process).

¹⁴⁹ See PCA OPTIONAL CONCILIATION RULES, *supra* note 146, arts. 3, 7 (indicating that between one to three conciliators may be employed and that "[t]he conciliator assists the parties . . . in their attempt to reach an amicable settlement of their dispute.").

¹⁵⁰ See United Nations Convention on the Law of the Sea, *supra* note 48, art. 284 (describing procedures for conciliation by a State Party).

¹⁵¹ *Id.* annex VI, art. 20 para. 1 ("The Tribunal shall be open to States Parties.").

¹⁵² See generally MERRILLS, *supra* note 17, at 190-203 (describing the conciliation and arbitration framework established by UNCLOS and the establishment of ITLOS).

of a group of independent experts to study the land reclamation issues" and make recommendations.¹⁵³

The WTO DSB is a political entity responsible for providing WTO members with dispute settlement, supervising consultations between disputing parties, adopting Appellate Body panel reports, and supervising implementation of awards.¹⁵⁴ The goal of the WTO DSB is to protect established rights of WTO members and provide a predictable and secure method for achieving decisions regarding WTO disputes.¹⁵⁵ The governing rules and procedures provide disputing parties with the option of engaging in direct consultations.¹⁵⁶ In addition, parties may elect to pursue third-party intervention procedures of good offices, conciliation, and mediation as an option between consultations and legally binding decision-making by the ad hoc panel.¹⁵⁷ These have proven particularly satisfactory in disputes where there is a power imbalance—whether perceived or real—between the nations involved.¹⁵⁸ The novelty of the WTO DSB as an IDR process is that it blends "diplomacy, negotiation, mediation, arbitration, and adjudication."¹⁵⁹

ICSID provides arbitration and conciliation for investment disputes among members to the Convention, which includes states as well as their nationals (both individuals and companies).¹⁶⁰

¹⁵³ MACKENZIE ET AL., *supra* note 17, at 68.

¹⁵⁴ *See id.* at 73–74 (outlining the general responsibilities of the WTO DSB).

¹⁵⁵ *See id.* at 72–73 (commenting on the motivation for establishing the WTO dispute settlement system).

¹⁵⁶ *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] (outlining the rules and procedures for initiation of a consultation).

¹⁵⁷ *See id.* art. 5 (outlining the rules and procedures for good offices, conciliation, and mediation).

¹⁵⁸ *See* Xuto, *supra* note 135, at 563 ("This case is a good example of how developing country members were able to use their WTO rights to secure more equitable treatment from a developed country trading partner."); *see also* DSU, *supra* note 156, art. 24(2) (requiring that the Director-General or Chairman of the DSB offer good offices, conciliation, and mediation upon the request of "a least-developed country").

¹⁵⁹ Surya P. Subedi, *The WTO Dispute Settlement Mechanism as a New Technique for Settling Disputes in International Law*, in INTERNATIONAL LAW AND DISPUTE SETTLEMENT 173, 173 (Duncan French et al. eds., 2010).

¹⁶⁰ *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, arts. 25(1)–(2), Mar. 18, 1965, 575 U.N.T.S. 159 (outlining the scope of the ICSID's jurisdiction). The Additional Facility Rules also allow for cases involving parties not contracted to the Convention or cases

Typically, arbitration occurs through a tribunal while conciliation occurs through a commission that is convened through the agreement of the disputing parties and in accordance with ICSID Convention provisions.¹⁶¹ The use of conciliation is minimal in comparison to arbitration. As of December 31, 2009, ICSID had completed six conciliation cases, representing 2% of its total caseload.¹⁶² However, the ability to blend arbitration and conciliation has been suggested in at least two ways. First, parties are not prevented from resorting to arbitration if they choose to use conciliation and it fails.¹⁶³ Second, the parties may request that an arbitrator assist them by serving a conciliation role.¹⁶⁴

While this review is not a comprehensive identification of the entirety of institutional capacity for multiple method IDR, it provides an introduction to the venues capable of providing this approach.

4.3. *Mixing Methods? The Case of The Red Sea Islands Dispute*

In addition to the multiple method approaches described above, IDR methods can be combined in a more complex manner. The following case study of the *Red Sea Islands Dispute* provides

involving non-investment issues. See RULES GOVERNING THE ADDITIONAL FACILITY FOR THE ADMIN. OF PROCEEDINGS BY THE SECRETARIAT OF THE INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES art. 2, available at, http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf (granting ICSID jurisdiction over certain additional parties).

¹⁶¹ See Nassib G. Ziadé, *ICSID Conciliation*, 13 NEWS FROM ICSID 3, 5–6 (describing ICSID conciliation as having similar procedures as arbitration from the initiation stage through the constitution of the Commission, after which the proceedings differ because the process is non-adversarial in character and the Conciliation Commission has no power to impose a decision on the parties, but serves “to clarify the issues in dispute . . . and to endeavor to bring about agreement between them upon mutually acceptable terms” under Article 34(1) of the ICSID Convention).

¹⁶² See INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, THE ICSID CASELOAD—STATISTICS, 8 (2010) (indicating the breakdown of the type of proceedings registered under the ICSID Convention and Additional Facility Rules: 285, 89%, were arbitration cases; 28, 9%, were additional facility arbitration cases; and 6, 2%, were conciliation cases); see also MACKENZIE ET AL., *supra* note 17, at 128 (stating that as of September 30, 2009, 6 of 177 completed ICSID cases were conciliation cases).

¹⁶³ Ziadé, *supra* note 161, at 3 (stating that the ICSID does not prevent parties from agreeing to first resort to conciliation and to subsequently arbitrate).

¹⁶⁴ *Id.* at 7 (stating that parties sometimes seek help of arbitrators to “facilitate an early amicable settlement”). Conversely, ICSID Arbitration Rule 1(4) prevents a formal conciliator from being appointed to the Arbitral Tribunal.

one illustrative example. Yemen and Eritrea had a dispute over three groups of islands located in the Red Sea: Greater Hanish, Mohabbakah, and Haycock. The Greater Hanish island group was home to Yemeni fishing communities. Eritrea's armed forces stationed on the island during its conflict with Ethiopia remained. In November of 1995, Eritrea ordered all Yemeni nationals to leave the islands in response to their claim that Yemen had sent armed forces to the area. On December 15, a low-level armed conflict broke out and Eritrean forces took Yemeni POWs. At issue were questions of sovereignty, access, and rights to tourism, fishing, and minerals.¹⁶⁵ On December 17, 1995, a cease-fire was reached by the presidents of both nations with each nation claiming control of the islands.

Various forms of IDR were initially tried with some attempts occurring simultaneously.¹⁶⁶ Eritrea suggested that they submit the matter to the ICJ for decision while engaging in simultaneous troop withdrawal.¹⁶⁷ Yemen sought the return of its POWs and Eritrean withdrawal as pre-conditions to negotiations, which Eritrea rejected.¹⁶⁸ Ethiopia's Foreign Minister visited the islands on December 21, 1995 and later proposed the following agreement: return of the POWs, mutual withdrawal of troops monitored by a neutral party and submission of the dispute to the ICJ.¹⁶⁹ After Eritrea returned Yemeni POWs, Yemen refused the proposal to conduct simultaneous troop withdrawal. The parties could not agree on which side would be the first to withdraw.¹⁷⁰ On December 23, Egypt began mediation and suggested that both

¹⁶⁵ 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).

¹⁶⁶ See B.G. Ramcharan, *Preventing War between Eritrea and Yemen over the Hanish Islands (1996)*, in CONFLICT PREVENTION IN PRACTICE: ESSAYS IN HONOUR OF JIM SUTTERLIN 157, 157-68 (B.G. Ramcharan ed., 2005) (tracking the progression of mediation methods utilized to prevent armed conflict between Yemen and Eritrea).

¹⁶⁷ See Daniel J. Dzurek, *Eritrea-Yemen Dispute over the Hanish Islands*, 1996 IBRU BOUNDARY & SEC. BULL. 70, 73 (providing an example of Eritrea's attempts at IDR).

¹⁶⁸ See *id.* at 72-73 (explaining the respective demands of Yemen and Eritrea during their failed attempts at mediation).

¹⁶⁹ See *id.* at 73 (documenting Ethiopian involvement in mediations between Yemen and Eritrea).

¹⁷⁰ *Id.*

countries participate in a summit to resolve the conflict; Yemen rejected this proposal.¹⁷¹

Meanwhile, after the armed conflict, U.N. Secretary-General Boutros-Ghali sent personal letters to the presidents of both nations urging diplomacy and military restraint. On December 29, 1995, he went to Yemen to mediate.¹⁷² Under Secretary-General Ismat Kittani met with representatives from both countries and France. The President of the Security Council also held meetings urging support for French mediation efforts.¹⁷³ The selection of the mediator was a complex process involving a variety of regional groups.¹⁷⁴ These efforts persuaded both nations to accept French mediation, which, under the direction of French Ambassador Gutmann, monitored and observed the situation and created a reliable record of events.¹⁷⁵ A mediated agreement was reached on May 21, 1996, though it was soon threatened when Eritrean forces reoccupied the Greater Hanish islands that August.¹⁷⁶ One of the outstanding issues was the scope of the dispute. Eritrea claimed that all the island groups were in dispute while Yemen maintained that the issue was limited to the presence of Eritrean force located on the Greater Hanish islands group.¹⁷⁷ There were five additional rounds of mediation after this event that eventually led to a second agreement on October 3, 1996¹⁷⁸ when, at the suggestion of the

¹⁷¹ See *id.* at 74 (noting that Yemen preferred the mediation proposal presented by the French).

¹⁷² See *416 Red Sea Islands (1995)*, ICB DATA VIEWER, www.cidcm.umd.edu/icb/dataviewer (open the drop-down menu entitled "select a crisis"; then select "416 - Red Sea Islands - 1995") (last visited Oct. 24, 2010) (analyzing the involvement of U.N. General-Secretary Boutros Boutros-Ghali).

¹⁷³ See Ramcharan, *supra* note 166, at 167 (explaining the Security Council's concern over a continued Yemen-Eritrea conflict).

¹⁷⁴ See Lefebvre, *supra* note 165, at 376-78 (noting that the League of Arab States, the Organization of African Unity, Egypt, and allegedly Israel were involved in trying to influence the mediation process).

¹⁷⁵ See Ramcharan, *supra* note 166, at 168 (noting that French mediation attempts eventually led to a peaceful resolution of the dispute).

¹⁷⁶ See Lefebvre, *supra* note 165, at 381 (documenting the steps taken by Francis Gutmann, the French diplomat, to mediate the dispute).

¹⁷⁷ See Dzurek, *supra* note 167, at 74 (concluding that Eritrea and Yemen were simply "talking past one another").

¹⁷⁸ See Lefebvre, *supra* note 165, at 381 (analyzing the hostile environment present just before Yemen and Eritrea agreed to submit their dispute to an international tribunal).

French, Yemen and Eritrea decided to submit the dispute to arbitration at the PCA.¹⁷⁹

In 1998, the PCA issued its first Award, *The 1998 Eritrea/Yemen Territorial Sovereignty and Scope of the Dispute Award (Phase I)*, where it awarded the Mohabbakah and Haycock island groups to Eritrea and the Hanish Islands to Yemen.¹⁸⁰ This decision confirmed the “preeminence of evidence of actual and effective occupation as a source of title to territory over claims of historic title.”¹⁸¹ The Award states: “[i]n the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men,” thus noting the need to preserve shared interests despite legal rights to sovereignty.¹⁸² In 1999, the PCA issued a second award, *The 1999 Eritrea/Yemen Maritime Delimitation Award (Phase II)*, delimiting maritime boundaries and clarifying the fishing privileges provided for in the first Award. The Award states that “[t]he traditional fishing regime is not an entitlement in common to resources nor is it a shared right in them. Rather, it entitles both Eritrean and Yemeni fishermen to engage in artisanal fishing around the islands which, in its Award on Sovereignty, the Tribunal attributed to Yemen.”¹⁸³ Eritrea and Yemen accepted the findings of the arbitral panel with Eritrea stating that the award will “pave the way for a harmonious relationship between the littoral states of the Red Sea,” while Yemen called the Award the “culmination of a great diplomatic effort.”¹⁸⁴ As a practical matter, it remains to be

¹⁷⁹ See *id.* at 379–80 (noting that this dispute occurred within the context of Yemen’s border dispute with Saudi Arabia and the Eritrean government facing increased opposition by internal groups).

¹⁸⁰ See *Eritrea v. Yemen*, Award Phase 1, (Perm. Ct. Arb. 1998) [http://www.pca-cpa.org/upload/files/EY_Phase I.pdf](http://www.pca-cpa.org/upload/files/EY_Phase_I.pdf) (awarding territorial sovereignty to Yemen).

¹⁸¹ Barbara Kwiatkowska, *The Eritrea/Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation*, 2000 IBRU BOUNDARY & SEC. BULL. 66, 78.

¹⁸² *Eritrea v. Yemen*, Award Phase 1, para. 526 (Perm. Ct. Arb. 1998) [http://www.pca-cpa.org/upload/files/EY_Phase I.pdf](http://www.pca-cpa.org/upload/files/EY_Phase_I.pdf).

¹⁸³ *Eritrea v. Yemen*, Award Phase 2, at para. 103 (Perm. Ct. Arb. 1999) [http://www.pca-cpa.org/upload/files/EY_Phase II.pdf](http://www.pca-cpa.org/upload/files/EY_Phase_II.pdf).

¹⁸⁴ See Kwiatkowska, *supra* note 181, at 67 (quoting Eritrean Foreign Minister Haile Woldense and the Yemeni Vice-Minister of Foreign Affairs Abdulla Mohammed Al-Saidi, respectively).

determined what specific steps Eritrea and Yemen will employ in order to achieve such collaborative relations.

4.4. *Defining and Valuing Mixed Methods*

The *Red Sea Islands Dispute* illustrates the complexities involved when IDR methods are employed in an integrated manner that goes beyond single method and multiple method approaches. While defining mixed methods is difficult, conceptually, it is an IDR approach that blends more than one method, or aspects of different methods, into a single process.¹⁸⁵

There are several approaches in other fields that clarify the concept of mixed methods. In alternative dispute resolution ("ADR"), mediation and arbitration have been combined into hybrid processes now recognized as "med-arb" and "arb-med."¹⁸⁶ These processes, which developed out of necessity when third-party neutrals were called upon to provide both arbitration and mediation services during a dispute, have evolved from ad hoc practices into a recognized form of dispute resolution.¹⁸⁷ In the international context, the United Nations Compensation Commission ("UNCC"), which was established by the U.N. Security Council to determine and process claims to the victims of Iraq's invasion into Kuwait, provides a variety of IDR functions.¹⁸⁸ The Panels of Commissioners provided quasi-judicial services in making determinations about which parties were entitled to compensation. The Secretariat has served in both fact-finding and mediation capacities to assist in the formation of agreements between members of the Governing Council.¹⁸⁹ In the area of

¹⁸⁵ This is a working definition and I look forward to additional comments.

¹⁸⁶ See generally Barry C. Bartel, Comment, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661 (1991) (explaining how these processes come about and are implemented).

¹⁸⁷ For articles exploring med-arb and arb-med, see generally William H. Ross & Donald E. Conlon, Note, *Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration*, 25 ACAD. MGMT. REV. 416 (2000) and Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997).

¹⁸⁸ For additional information about the form and function of the UNCC, see generally JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 424-28 (2005) and UNITED NATIONS COMP. COMM'N, <http://www.uncc.ch> (last visited Oct. 24, 2010).

¹⁸⁹ See *The Secretariat*, UNITED NATIONS COMP. COMM'N <http://www.uncc.ch/secretar.htm> (last visited Oct. 24, 2010) (explaining the role of the secretariat within the UNCC).

international criminal law, the mixing of judicial settlement with transformative IDR methods has been employed. For example, Gacaca Courts in post-conflict Rwanda that directly involved local communities were utilized alongside national courts and an international tribunal to serve the collective goal of achieving justice and reconciliation.¹⁹⁰ While these examples embody the concept of integrating different methods into one hybrid process, the IDR field needs to track where and how mixed method approaches are being employed in order to further define the concept.¹⁹¹

Despite the need to develop a generally accepted conceptual framework, it is worth considering the value of mixed method IDR. First, mixed methods are capable of providing benefits that single methods cannot. If methods are combined in a complementary manner that enhances the strengths of different processes and mitigates weaknesses, this may offer superior capacity.¹⁹² One critique identified in Part 3 was that mediation lacks the institutional framework and financial support that adjudication enjoys. Yet, the two processes need not be mutually exclusive. The ICJ can enhance the problem-solving qualities of mediation by providing the institutional capacity of a powerful framework that establishes a protective environment as parties engage in the cooperative, and sometimes vulnerable, venture of problem solving. At the same time, mediation can pick up where legal settlement stops by assisting parties in resolving matters that extend beyond legal questions into political, environmental and social matters. Such approaches can enhance the complementary dynamics of power and cooperation. Furthermore, the concept of combining substructures to create “mutually supportive” legal

¹⁹⁰ See Rosemary Nagy, *Traditional Justice and Legal Pluralism in Transitional Context: The Case of Rwanda's Gacaca Courts*, in RECONCILIATION(S): TRANSITIONAL JUSTICE IN POSTCONFLICT SOCIETIES 86, 86-87 (Joanna R. Quinn ed., 2009) (describing how the Gacaca Courts operated in Rwanda and noting the use of similar participatory processes in post-conflict Sierra Leone and East Timor).

¹⁹¹ See Schneider, *supra* note 54, at 796 (noting examples of mixed processes at the Iran Claims Tribunal, Swiss Claims Tribunal, and Eritrea-Ethiopia boundary claims commission and arguing that “the international community . . . has focused on balancing diplomacy with the need for trials”).

¹⁹² See Dukes, *supra* note 96, at 194 (identifying the benefits and weaknesses of environmental conflict resolution processes used in the United States and citing a case study by Kloppenberg (2002) analyzing the management and outcome of 75 environmental cases in the U.S. District Court for the District of Oregon which illustrate the reasons why isolated processes cause ineffective, poor results).

systems is not new.¹⁹³ It has been employed in environmental law, trade¹⁹⁴ and international criminal law.¹⁹⁵

Second, mixed method IDR is particularly useful for international conflicts because they are typically complex in their involvement of legal, economic, cultural, and political disputes and because they involve a diverse set of stakeholders. Given the critiques of the limitations of adjudication and mediation presented in Part 3, neither process is typically capable of providing adequate recourse on its own. Adjudication provides legal settlement that parties generally consider to be legitimate and fair. However, the ICJ and other bodies often address narrow legal arguments, but rarely opine on more complex disputes because they lack the authority to decide non-legal matters. Mediation is capable of addressing the full array of issues that are present in resource disputes but lacks the power, institutional capacity, and authority to constrain state behavior and enforce outcomes over the long term. Integrating aspects of these and other IDR processes like joint fact-finding and agenda setting into one process has the potential to provide a multi-faceted approach capable of responding to the more complex cases of international conflict and disputes.

These implications are a starting point for additional research. Scholars need to better assess how each IDR process addresses aspects of a dispute and when processes should be combined.

¹⁹³ As understood in the context of determining jurisdictional complementarity in international criminal law, particularly regarding the balance between the ICC and national courts, combining substructures is not new. See Jennifer S. Easterday, *Deciding the Fate of Complementarity: A Colombian Case Study*, 26 ARIZ. J. INT'L & COMP. L. 49, 52-53 (2002) (noting, as an example of complementarity, that a case will not be admissible before the ICC if a national court system is willing and able to hear it); see generally Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869 (2002) (addressing the application of complementarity in various legal contexts including within the ICC and the U.N. Security Council).

¹⁹⁴ See generally Marie-Claire Cordonier Segger, *Effective Implementation of Intersecting Public International Regimes: Environment, Development and Trade Law*, in PUBLIC INTEREST RULES OF INTERNATIONAL LAW: TOWARDS EFFECTIVE IMPLEMENTATION 213 (Teruo Komori & Karel Wellens eds., 2009) (noting how "mutually supportive" legal regimes can increase effectiveness in environmental and trade law).

¹⁹⁵ See generally Shuichi Furuya, *The Principle of Complementarity in Reality: Who Actually Applies It and in What Way under the ICC System?*, in PUBLIC INTEREST RULES OF INTERNATIONAL LAW: TOWARDS EFFECTIVE IMPLEMENTATION, *supra* note 194, at 293 (discussing how the ICC system complements national jurisdiction and noting some of the system's failures).

Hybrid approaches are not always appropriate and the benefits of adjudication or mediation as distinct processes remain. Developing understanding about the use and impact of the hybrid approaches identified in this Part remains the task of future scholarship.

5. WHY INTEGRATION MATTERS IN RETHINKING THE ARCHITECTURE OF IDR

This Article has argued that there are three core challenges to the rationale behind the existing architecture of the IDR system. The justification for prioritizing state-centric adjudication practices and forums is challenged by the fact that conflicts posing a threat to international peace and security increasingly involve non-state actors and extra-legal issues. The failure to develop mediation capacity at the international level is in tension with states' preference for it among IDR options. The IDR system is structured in a manner that fosters process and institutional fragmentation and fails to incorporate hybrid approaches into the framework. In response, this Part argues that the IDR system should be restructured to promote the integration of IDR methods and institutions in order to increase capacity, mitigate fragmentation, and conform to the broader paradigm shift that is taking place in this field.

5.1. Addressing Multiplicity and Fragmentation

This Article has identified the multiplicity of IDR methods and institutions including new approaches that go beyond the use of a single method. However, these forms have yet to be organized into a coherent and functional structure that clarifies the relational web between them. This level of knowledge is necessary in order to understand why approaches succeed or fail. For example, there is no framework for understanding why, in the *Laguna del Desierto Dispute* (Argentina v. Chile), the ICJ's opinion led to a negotiated settlement¹⁹⁶ but in the *Land, Island and Maritime Frontier Dispute* (Honduras v. El Salvador), referral of the dispute to the ICJ temporarily led to the escalation of tensions while the case was

¹⁹⁶ See GUO, *supra* note 112, at 14–16 (noting that an ICJ decision facilitated settlement of the *Laguna del Desierto Dispute*).

pending.¹⁹⁷ Absent some form of coordination, the relationships between IDR methods will remain ill defined and ambiguous, making it difficult to incorporate complex IDR approaches into the international legal framework.¹⁹⁸

The lack of an adequate framework results in institutional fragmentation in IDR. Fragmentation in international law has been considered as a substantive problem¹⁹⁹ as well as an institutional one.²⁰⁰ One critique that this Article makes is that the use of mediation, multiple methods, and mixed methods is largely ad hoc and may be occurring in a way that is contributing to a fragmented system. Absent comprehensive research about the IDR system, there is currently no way to systematically track IDR use across methods and institutions in order to determine if fragmentation is a real problem.

In order for a system to be coherent and functional, its substructures need to be organized and coordinated.²⁰¹ For IDR, this means developing a framework that comprehensively identifies methods, their strengths and limits, as well as the institutions that provide them. It also requires a structure that allows for integration to occur between methods and institutions.²⁰²

¹⁹⁷ See *id.* at 16 (citing M. Orozco, *Boundary Disputes in Central America: Past Trends and Present Developments*, 14 PENSAMIENTO PROPIO 99 (2001)) (noting that the ICJ judgment “raised the stakes . . . of the bilateral dispute” and strained bilateral relations “while the definitive delimitation on the ground was still pending”).

¹⁹⁸ See generally Bilder, *supra* note 27, at 10–11 (exploring the complexities of IDR by posing various questions that may arise in an international dispute).

¹⁹⁹ See ILC Report, *supra* note 128, para. 487 (discussing the lack of substantive international law and arguing that international law should be structured to better harmonize the coordination and organization of varying autonomous international legal rules and institutions).

²⁰⁰ See generally sources cited *supra* note 129 (discussing, among other topics, institutional fragmentation in international law).

²⁰¹ See Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 INT'L & COMP. L. Q. 279, 285 (2005) (discussing potential difficulties that may result from a fragmented international system where various obligations often conflict with one another). See generally Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 903 (2004) (arguing for recognition of the overlap between fragmented bodies of international law and promotion of a more unified system where individual international legal bodies take account of the laws and precedents of other international legal bodies).

²⁰² See Ulfstein, *supra* note 124, at 67–71 (discussing the benefits and limitations of an integrated institutional framework).

This concept—developing integrated frameworks—has been presented as a solution to the problem of fragmentation in international law.²⁰³ ICJ Judge Rosalyn Higgins proposes the idea of integration through information sharing—a preferable alternative to pluralistic legal approaches²⁰⁴—as a solution for fragmentation in international courts.²⁰⁵ Other scholars share similar ideas. Zaring has identified how the interlinkage of international institutions, in order to understand the entire system in addition to its parts, increases the effectiveness of international governance.²⁰⁶ Berman argues that there is a need to embrace multiple ways to mediate conflicts, reconcile competing norms and allow hybrid forms because this provides a more accurate description of the world and potentially provides useful alternative approaches.²⁰⁷ The literature on Dispute Systems Design (“DSD”)²⁰⁸ suggests that integrated approaches informed by an

²⁰³ See Higgins, *supra* note 66, 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).

²⁰⁴ For prominent literature on global legalism and related topics, see HENKIN, *supra* note 55 for a discussion of how international law and global legalism affect the behavior of nations. See also ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 71-79 (2009) (positing that global legalism is a faith—a belief that states follow international law as a matter of practice—but not in theory); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2623 (1997) (describing the view of “international law as a set of rules promulgated by a pluralistic community of states”); David Zaring, *International Institutional Performance in Crisis*, 10 *CHI. J. INT’L L.* 475, 503 (2010) (suggesting that cohesiveness between international institutions can broaden the scope with which to view problems, thus making international governance more effective).

²⁰⁵ See HIGGINS, *supra* note 3 (making the case for legal integration of international judicial bodies but not addressing mediation or other non-judicial dispute resolution methods, and arguing against global legal pluralism due to the practical lack of capacity to achieve it and its effect on discouraging diverse legal practices).

²⁰⁶ See, e.g., Zaring, *supra* note 204, at 502-04 (stating that international institutions such as the WTO might—through the procedural tool of interlinkage—foster greater confidence in the effectiveness of the international system).

²⁰⁷ E.g., 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).

²⁰⁸ DSD is a framework for the selection of dispute resolution methods that fosters systematic dispute resolution practices in the context of a larger conflict organization or system. See Carrie Menkel-Meadow, *Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 13, 23 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (explaining

assessment of the situation and an evaluation of the effectiveness of proposed methods lead to better outcomes.²⁰⁹ The use of DSD approaches has been considered in the context of resolving international investment disputes,²¹⁰ and dispute resolution by the United Nations²¹¹ and shows that they can increase effectiveness, efficiency and legitimacy.²¹² These examples suggest a sensible rationale for considering an integrated approach for the architecture of the IDR system.

5.2. *Paradigm Shift*

Shifts in the practice and discipline of conflict resolution suggest that there is a trend toward integrated approaches. After World War II and during the Cold War, efforts to address conflict followed a management approach where states tried to stabilize

DSD as a new field which aids parties to create tailored dispute processes, especially for complex or repetitive disputes).

²⁰⁹ See CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* 96-116 (1996) (emphasizing the importance of organizational assessment in designing effective conflict management systems); WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 41-64 (1988) (exploring how to efficiently design dispute resolution systems); see also Chris Carlson, *Convening*, in *THE CONSENSUS BUILDING HANDBOOK* 169-97 (Lawrence Susskind et al. eds., 1999) (detailing the steps entailed in a successful convening process); SCHEINMAN INST. ON CONFLICT RESOLUTION, *DESIGNING INTEGRATED CONFLICT MANAGEMENT SYSTEMS: GUIDELINES FOR PRACTITIONERS AND DECISIONMAKERS IN ORGANIZATIONS* (2001) (exploring the evolution of dispute resolution and the increased emphasis on creating integrated conflict management systems); Lawrence Susskind & Jennifer Thomas-Larmer, *Conducting a Conflict Assessment*, in *THE CONSENSUS BUILDING HANDBOOK* 99, 99-136 (Lawrence Susskind et al. eds., 1999) (describing the role conflict assessment plays in DSD).

²¹⁰ See Franck, *supra* note 54, at 180-81 (arguing that there is a need for the systematic treatment of dispute resolution methods that extends beyond the existing literature on the ad hoc use of nonbinding IDR methods (mediation and conciliation) and considering how it might beneficially inform the field of international investment dispute resolution).

²¹¹ See Kenneth Cloke, *Conflict Resolution Systems Design, the United Nations and the New World Order*, 8 *MEDIATION Q.* 343, 344-45 (1991) (suggesting the beneficial application of DSD in United Nations' dispute resolution).

²¹² See Andrea Kupfer Schneider, *Public and Private International Dispute Resolution*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 438, 450-51 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (discussing cross-fertilization between the international and domestic dispute resolution disciplines); see also Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 *HARV. NEGOT. L. REV.* 51, 75-76 (2009) (arguing that there is a need to analyze dispute resolution processes alongside legal frameworks in order to understand how one influences the other).

conflicts in order to mitigate loss of life while still pursuing their geopolitical aims.²¹³ Peace was defined as the absence of violence. Between 1990 and 2007, 48% of all conflicts occurred in states where a conflict had ended no more than five years prior,²¹⁴ and since 2000, there have been a high number of recurrent conflicts.²¹⁵ In response to the increase in recurrence, a new paradigm for understanding how to end conflict has emerged.²¹⁶ IDR methods have shifted from state-centric, power-based approaches aimed at managing conflict, toward interest-based approaches that promote resolution between non-state actors through reconciliation and other means.²¹⁷ Efforts to achieve security occur through a mix of conflict resolution practices that build a positive peace.²¹⁸ The dominance of state-driven IDR has given way to the rise of inter-governmental and regional organizations in the last twenty years. Regional and local groups have the ability to act as first-responders and often add value due to their cultural intelligence of local

²¹³ See BERCOVITCH & JACKSON, *supra* note 2, at 1-8 (discussing the approaches to conflict resolution that evolved after World War II).

²¹⁴ *E.g.*, Lawrence Wocher, *Preventing Violent Conflict: Assessing Progress, Meeting Challenges*, 231 U.S. INST. OF PEACE SPECIAL REP. 5-6 n.21 (2009) (presenting the UCDP Conflict Termination Dataset); *see also* Harbom et al., *supra* note 63, at 622 (noting that between 1989-2005, 144 peace agreements were made in 46 of the 121 armed conflicts: 43 were full agreements, 79 were partial agreements, and 22 were agreements to start a peace process).

²¹⁵ Hewitt, *supra* note 62, at 27-33 (defining the term 'conflict', in the context of the data tracked, to include inter, intra and non-state conflict resulting in a minimum of 1000 battle-related deaths, which may reflect lower recurrence rates for lower-level conflicts and does not reflect levels of new low-level conflict; and identifying 31 recurrent conflicts in Sri Lanka, Azerbaijan, India, Chad, Iran and two in Myanmar).

²¹⁶ The disorganization of existing IDR efforts has been criticized as reducing the effectiveness of the international community's peace-building capacity. *See* Charles T. Call & Elizabeth M. Cousens, *Ending Wars and Building Peace: International Responses to War-Torn Societies*, 9 INT'L STUD. PERSP. 1, 10-15 (2008) (examining shortcomings in current IDR, how these shortcomings affect peace-building efforts, and what is needed to help overcome these shortcomings).

²¹⁷ *E.g.*, BERCOVITCH & JACKSON, *supra* note 2, at 8-16 (arguing that new methods of conflict resolution are more effective and comprehensive because they seek to resolve underlying conflicts, rather than solely end violence).

²¹⁸ *See generally* NATIONAL RESEARCH COUNCIL, INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR (Paul C. Stern & Daniel Druckman, eds., 2000) (containing articles covering a wide range of topics related to new methods in IDR).

contexts.²¹⁹ The participation of inter-governmental and regional organizations has also promoted democratization of IDR and the inclusion of civil society participation and non-state governance. The United Nations, for instance, has provided non-state entities increased access to international lawmaking.²²⁰

This paradigm shift has developed a vision of IDR that promotes non-state actor participation, considers a broad scope of issues, integrates methods and institutions and enhances its capacity to resolve conflict in a variety of international contexts.²²¹ An integrated system “embod[ies] the authentic meaning of justice: to attain peace through effective dispute resolution.”²²² However, as Part 6 will explore, these changes pose important implications for the international legal system.

6. IMPLICATIONS FOR INTERNATIONAL LAW

This Article has identified ways in which international law has influenced IDR. IDR has also developed, as a substructure of international law, in ways that affect the superstructure of the international legal system.²²³ As this Article suggests, reforming IDR challenges international law to become a more open and integrated system. Embracing mediation and reducing the primacy of adjudication removes some authority from states as it promotes non-state actor participation in IDR processes. An integrated IDR structure creates a decentralized substructure within the international legal system. This Part considers such implications by evaluating how the international legal system’s state-centric foundations and scope are in tension with the evolving nature of international conflict and approaches to resolving it.

²¹⁹ See Frazier & Dixon, *supra* note 16, at 390 (outlining two factors that contribute to the increased participation of regional organizations in dispute resolution).

²²⁰ See ALVAREZ, *supra* note 188, at 154–56 (discussing the ways in which the U.N. has provided increased access to non-state entities).

²²¹ See Anne Peters, *Dual Democracy*, in *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 263, 296–313, 333 (Jan Klabbers et al. eds., 2009) (discussing these principles in the context of a global participatory democracy); see also RAFAEL DOMINGO, *THE NEW GLOBAL LAW* 181–85 (2010) (making the case for the need to democratize decision-making in global law).

²²² DOMINGO, *supra* note 221, at 112.

²²³ See CRAWFORD, *supra* note 5, at 18 (exploring the effects of the superstructure of international law on its foundation).

6.1. Foundations

The foundations of the international legal system emerged from a 17th century conceptual framework of an international network of sovereign states that governed their subjects.²²⁴ International law was constructed around the principles of state territorial sovereignty and state consent²²⁵ and has primarily served to regulate the mutual behavior of states.²²⁶ With the rise of the territorial state, international law developed under a classic regime of sovereignty in which the state held authority over all other subjects and objects in a given territory. Non-state actors were the objects of a state, based on territorial or other forms of control.²²⁷ These actors had no standing under international law to contest the actions of states; they had to—and often did—resort to violence to establish “effective control” over the area or territory if they wanted to make a case for international recognition.²²⁸

While the focus on states in the realm of dispute resolution once made sense, given the rationale that resolving inter-state

²²⁴ See, e.g., David Held, *The Changing Structure of International Law: Sovereignty Transformed?*, in THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 162, 162–64 (David Held & Anthony McGrew eds., 2d ed. 2003) (describing the “classic regime of sovereignty” that arose in the seventeenth century).

²²⁵ See generally James Crawford & Susan Marks, *The Global Democracy Deficit: An Essay in International Law and its Limits*, in INTERNATIONAL LAW AS AN OPEN SYSTEM: SELECTED ESSAYS, *supra* note 5, at 137–38 (noting that territorial sovereignty and state consent had become defining pillars of international law by the early nineteenth century).

²²⁶ See, e.g., DOMINGO, *supra* note 221, at 57–58 (emphasizing that international law primarily governs state actors rather than individuals because states have “plenary legal capacity”).

²²⁷ See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 65–67 (7th ed. 2008) (explaining that because corporations do not have international legal personality, an agreement between a state and a foreign corporation is not necessarily subject to the law of treaties; however, states may agree to grant certain entities like corporations legal status so that they can be governed by that state’s national law).

²²⁸ E.g., David Held, *The Changing Structure of International Law: Sovereignty Transformed?*, in THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE, *supra* note 224, at 162–63 (explaining that some actors attempted to assert territorial control through violence in order to obtain sovereign recognition within the global political community); see also Thomas Baldwin, *The Territorial State*, in JURISPRUDENCE: CAMBRIDGE ESSAYS 207, 224–25 (Hyman Gross & Ross Harrison eds., 1992) (explaining that because the current international legal system does not provide opportunities for communities to “secede from existing political arrangements[,]” communities rely upon violence to assert control over territories).

disputes would prevent nations from employing their armies and thus aid in the reduction of war, this paradigm no longer holds true. In its 1949 *Reparations Opinion*, the ICJ treated the U.N. as an international person with the capacity to bring international claims.²²⁹ This marked an early expansion of subjecthood beyond states to international organizations.²³⁰ Such expansion must go further because threats to global peace and security are increasingly taking place within, not between, states. If state dominance in IDR prevails, it will restrict the capacity of the system.²³¹ Opening up the IDR system is necessary to advance its capacity for dispute resolution. Effective dispute resolution requires the participation of key stakeholders, regardless of legal status under international law. It also requires appreciating and addressing the interplay between legal and extra-legal aspects of a dispute. However, the opening of the system needs to occur in a way that will integrate, not divide, the distinct parts of the system.²³²

Despite the evolution of IDR, the foundations of international law remain state-centric.²³³ This is evident in the ways that the IDR system promotes the supremacy of the state and limits non-state actor participation. Adjudication is designed around rules created by states and participation controlled by states. Non-judicial forms of IDR that are open to more parties have been underdeveloped. If resolving disputes remains the business of states and the system itself remains closed, the tension between an evolving IDR system

²²⁹ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 178, 187 (Apr. 11) (holding that there can be types of international legal personality beyond statehood).

²³⁰ See CRAWFORD, *supra* note 5, at 20–21 (noting that in the wake of the ICJ's 1949 *Reparations Opinion*, several non-state international organizations have since been recognized as actors who may participate in international dispute resolution).

²³¹ See DOMINGO, *supra* note 221, at 110–11 (arguing that the structure of the modern state and the state's dominant role in international affairs constrains resolution of legal disputes in a global context).

²³² See, e.g., ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 26–28 (2009) (discussing how international law has diverged into public and private realms, with the latter affording non-state actors more access and authority).

²³³ See generally STEPHEN BELL & ANDREW HINDMOOR, *RETHINKING GOVERNANCE: THE CENTRALITY OF THE STATE IN MODERN SOCIETY* (2009) (discussing the origins and purpose of state-centricity in governance within international law).

(the superstructure) and the state-centric foundations of international law will continue to grow.

6.2. Scope

There is also fundamental tension about scope or who international law ought to serve.²³⁴ This tension manifests itself when the priorities of the state clash with those of the public.²³⁵ It is also evident in instances where international law limits powerful states in the protection of collective interests.²³⁶ One important shift in scope has been the conceptualization of an international community that goes beyond an identity based solely on the collection of states, to include a broader collection of stakeholders joined by shared interests. This concept of collectivity and its place in international law is not new. Crawford described it as having a "responsibility to the international community as a whole."²³⁷

²³⁴ See Teruo Komori, *Introduction to PUBLIC INTEREST RULES OF INTERNATIONAL LAW: TOWARDS EFFECTIVE IMPLEMENTATION* 1, 1 (Teruo Komori & Karel Wellens eds., 2009) (discussing how general international rules were not created to protect the general interests of a global human community and why this is changing with regard to international environmental protection, humanitarian law, law of the sea and space, and other areas of international law).

²³⁵ See generally Robert O. Keohane, *The Demand for International Regimes*, in *INTERNATIONAL REGIMES* 141 (Stephen D. Krasner ed., 1983) (explaining how international law can be used as a forum to form mutual agreements among self-interested actors).

²³⁶ See Jose E. Alvarez, *Contemporary International Law: An 'Empire of Law' or the 'Law of Empire'?*, 24 *AM. U. INT'L L. REV.* 811, 836 (2009) (describing the shift in international law from a system based on the co-existence of nations to one based on a new "empire," defined as a collective order that exists beyond statehood); Marie-Claire Cordonier Segger, *The Role of International Forums in the Advancement of Sustainable Development*, 10 *SUSTAINABLE DEV. L. & POL'Y* 4 (2009) (discussing how international forums can advance sustainable development and counter the problems posed by competing national and international interests). *But see* PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES* (2005) (analyzing recent events in international law and discussing some of the circumstances in which certain states rebel against international agreements often for domestic collective interests that conflict with the international rules); Pierre-Marie Dupuy, *Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi*, 16 *EUR. J. INT'L L.* 131 (2005) (noting that national interests often trump longer term international objectives because powerful nations maneuver against majority aims, as demonstrated by the tensions between U.S. unilateralism and EU multilateralism, particularly pertaining to matters of terrorism during the past decade).

²³⁷ JAMES CRAWFORD, *Responsibility to the International Community as a Whole*, in *INTERNATIONAL LAW AS AN OPEN SYSTEM: SELECTED ESSAYS*, *supra* note 5, at 341.

Supported by a guiding principle of solidarity, the concept has origins in Christian and natural law.²³⁸ From universal norms to shared obligations, this idea recognizes that for certain matters, and in certain instances, international law ought to prioritize collective rights, interests, and needs.²³⁹ The establishment of the International Criminal Court and efforts to protect global environmental resources offer two powerful examples of areas where collectivity is a guiding principle. IDR offers a third.

Like most international rules and institutions, the IDR system was built by states through international agreements. To protect their authority, nations are reluctant to create and enter into regimes that require them to submit to higher forms of authority against their consent. As a result, state participation in IDR is subject to some form of consent, whether explicit or implied. This is true for both mediation, which is voluntary (although sometimes coerced) and adjudication, which requires state consent through express agreement or implied means. Thus, state participation in an IDR process necessarily requires some willingness on the state's part to defer to an outside authority and to be confined by such. This requirement makes states cautious about pursuing adjudication to address their most serious conflicts.²⁴⁰ Legitimacy and representation problems at the ICJ and the PCA further contribute to this tendency.²⁴¹

It is difficult for the IDR system to protect collective interests when they are not aligned with or are contrary to those of states. Furthermore, it is unclear if states can or should define what the interests of the public are. A system that requires state consent does not allow for the protection of a collective public stakeholder because the interests of disagreeing states will prevail. This is at tension with the core purpose of having an IDR system that

²³⁸ For a historical and definitional background on the concept of solidarity in international law, see Rudiger Wolfrum, *Solidarity Amongst States: An Emerging Structural Principle of International Law*, 49 INDIAN J. INT'L L. 8 (2009).

²³⁹ See generally DELMAS-MARTY, *supra* note 47 (arguing for a more integrated system of international law that would provide order to the rights and interests involved without excluding them).

²⁴⁰ See *id.* at 34–35 (describing a nation as regressive when it closes itself off from international community).

²⁴¹ See G. Shinkaretskaya, *supra* note 69, at 89 (explaining that because “the decisions of international adjudication bodies can have no other significance than that provided by Statute documents,” the international adjudicatory bodies exist in an odd framework vis-à-vis the state and concerned parties).

protects the common interests of all nations by replacing the "recourse to self-help by individual states by a collective response system."²⁴² Translating this founding philosophy into other areas of collective concern, such as global peace and security, presents significant challenges and raises important questions about how to prioritize conflicts of interest between states and the collective global community.

The state-centric model frustrates the ability to include the broader international public or non-state stakeholders in a conflict resolution or problem-solving process in a way that does not demand their inferior status. States are the primary subjects of international law based on their superior legal status.²⁴³ Yet, full participation is paramount to the success of IDR and sustaining agreements that maintain peaceful conditions over the long term.²⁴⁴ Society-centered approaches that involve the international community as a whole in promoting the collective interests of global peace and security are established through largely egalitarian governance networks.²⁴⁵ For IDR, this necessarily requires embracing a paradigm shift away from the state-centric model, and, perhaps, accepting a system that treats the individual as the ultimate subject of authority in international law.²⁴⁶ However, translating these preferences from IDR to international law as a whole requires a balanced approach, since both state and collective interests are valued in the international order.

7. CONCLUSION

Global changes are prompting reforms in international law and, as this Article has shown, in our approaches to resolving

²⁴² Wolfrum, *supra* note 238, at 13.

²⁴³ See DOMINGO, *supra* note 221, at 58 (arguing that states are the primary subjects of international law, and that individuals are subordinate to states within this framework).

²⁴⁴ See *id.* at 181–85 (arguing that global law should be grounded upon a horizontal democratic structure that fosters broad participation amongst diverse types of actors, rather than domination by a select cohort of powerful state actors).

²⁴⁵ See generally BELL & HINDMOOR, *supra* note 233, at 3 (stating that society-centered approaches involve "a wider range of actors within governing processes . . . held together . . . by informal and relatively egalitarian networks").

²⁴⁶ See generally Samantha Besson, *The Authority of International Law – Lifting the State Veil*, 31 SYDNEY L. REV. 343 (2009) (arguing that international law should understand individuals, not states, as the central actors and as the basis of the law's authority and legitimacy).

international disputes. The data on international conflict suggests that intra-state wars are the primary emerging threat to global peace and security. Ethnic wars, identity conflict, terrorism, and non-state wars extend beyond the traditional inter-state paradigm. As these types of conflict emerge, they call into question whether the international legal system, largely created by states for states, has the capacity to address international conflict in the modern era.

This Article has argued that there are three fundamental limitations of the IDR system. As long as the IDR system operates in a silo manner that focuses primarily on adjudication, it will be limited in its capacity and effectiveness. International adjudication forums need to find new ways to open their doors to non-state stakeholders. Mediation at the international level requires additional institutionalization and support. International legal scholars need to enhance understanding about the use of multiple methods and mixed methods, and when and why they provide valuable contributions to the IDR system. Finally, the architecture of the IDR system would benefit from a framework that promotes the integration of methods and institutions in order to increase capacity and effectiveness.

The proliferation and evolution of IDR demands rethinking its traditional structure and recognizing where it is dependent on and independent from international law. Conceptualizing IDR as an integrated system requires increasing the participation of non-state actors and considering how extra-legal issues should be resolved alongside legal ones. It also recognizes the complexity of IDR as a substructure of the international legal system that branches into political, social, and cultural realms. In these ways, IDR has the potential to influence the foundations of international law in small, but profound, ways.