

## CHAPTER TWO

# INTERNATIONAL DISPUTE RESOLUTION IN AN ERA OF GLOBALIZATION

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### I. INTRODUCTION

Globalization has influenced the function of international law and with it the mechanisms used to resolve international conflicts and disputes. International armed conflicts have shifted from being primarily inter-State to becoming predominantly intra-State. Collective global problems are driving the development of collaborative problem-solving approaches. New actors and an increasingly interconnected international community are demanding increased participation in adjudicatory forums, challenging the wisdom of State-centric approaches. International courts and tribunals are proliferating, deepening expertise while creating uncertainty. These changes are symptomatic of a more global and interconnected world. In adapting to these changing demands and conditions, old practices evolve and new ones emerge.

Within this context, this chapter examines the purpose and practice of international dispute resolution ('IDR'). It considers how changes brought about by globalization present both challenges and opportunities for IDR. Moreover, this chapter takes a systemic view of IDR that accounts for the full range of legal and diplomatic methods and acknowledges their applicability to international legal disputes as well as armed conflicts. This broad view allows for understanding IDR as a system. Furthermore, while recognising that dispute settlement and conflict resolution are distinct, it reflects the understanding that they are joined by the common normative purpose of promoting global peace and security.

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## II. UNDERSTANDING INTERNATIONAL DISPUTE RESOLUTION

The practice of addressing international disputes has emerged out of the history of international law itself. The creation of mechanisms for the pacific resolution of disputes was necessarily linked to the development of law that sought to promote peace. Roman law, for example, introduced the concept of *humanitas* or ‘the human tendency as an ethical commandment [to engage in] benevolent consideration for others.’<sup>1</sup> During the Eighty Years War and the Thirty Years War that disrupted Europe in the Middle Ages, Hugo Grotius sought to broaden the concept of *humanitas* through the development of *jus ad bellum* and *jus in bello* to support the need for laws that could bind nations and encourage more humane behaviour among peoples and between States.<sup>2</sup> During the Hague Peace Conferences of 1899 and 1907, 28 States met in order to strengthen the collective capacity to promote peace and prevent war.<sup>3</sup> To do so, they adopted the *Convention for the Pacific Settlement of International Disputes* to ‘insure the pacific settlement of international differences’<sup>4</sup> and established the Permanent Court of Arbitration (‘PCA’).<sup>5</sup> After World War I the Covenant for the League of Nations established the Permanent Court of International Justice (‘PCIJ’), which operated from 1922 to 1946, as the first permanent international tribunal with general jurisdiction. It delivered opinions in 29 cases and 27 advisory opinions during this period.<sup>6</sup> After

<sup>1</sup> Adolf Berger, ‘Encyclopedic Dictionary of Roman Law’ (1953) 43 *Transactions of the American Philosophical Society* 333.

<sup>2</sup> Hersch Lauterpacht, ‘The Grotian Tradition in International Law’ (1946) 23 *British Yearbook of International Law* 1; Hugo Grotius, *On the Law of War and Peace* (AC Campbell trans, 1814) [trans of *De Jure Belli ac Pacis* (first published 1625)].

<sup>3</sup> James Brown Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (Oxford University Press, 1918).

<sup>4</sup> *Convention for the Pacific Settlement of International Disputes*, opened for signature July 29 1899, 32 Stat 1779, (entered into force 4 September 1900) art 1; see Philippe Sands, ‘Introduction’ in Ruth Mackenzie et al, *The Manual on International Courts and Tribunals* (Butterworths, 2nd ed, 2010) ix: ‘The 1899 Convention marked a turning point in favour of international adjudication before standing bodies’.

<sup>5</sup> See Daniel Terris et al, *The International Judge* (Brandeis University Press, 2007) 2–3 (describing the creation of the PCA and the structure of the PCA); Mackenzie, above n 4, 102 (describing the PCA as ‘the first global institution for adjudication of international disputes’).

<sup>6</sup> International Court of Justice, *Publications of the Permanent Court of International Justice*, <<http://www.icj-cij.org/pcij/index.php?p1=9>>; see also Terris et al, above n 5, 1–4, for a historical account of the development of international arbitration after the US Civil War, at the 1899 Hague Peace Conference and at the Permanent Court of Arbitration as well as the evolution of international adjudication at the PCIJ and the ICJ before and after World War II.

World War II the United Nations ('UN') Charter established the International Court of Justice ('ICJ') as its principal judicial organ<sup>7</sup> 'whose function is to decide in accordance with international law such disputes as are submitted to it.'<sup>8</sup> This brief historical narrative serves to illustrate that the development of IDR and means for promoting peace through international law are interconnected.

Today, the UN Charter provides the framework for understanding the modern IDR regime. The fundamental purpose of dispute resolution is linked to the purpose of the United Nations 'to maintain international peace and security.'<sup>9</sup> The UN Charter prohibits the threat or use of force unless it is authorized by the UN Security Council or necessary for self-defence.<sup>10</sup> In addition, Article 2(3) requires Members to settle disputes peacefully, and Article 33 provides the list of available methods for doing so.<sup>11</sup> These IDR methods have traditionally been grouped by type (diplomatic, legal, political), aim (prevention, management, resolution), and enforcement status (binding or nonbinding).<sup>12</sup> They include negotiation, defined as direct communication between disputing parties for the purpose of reaching agreements that will settle or resolve a dispute, as well as legal methods of judicial settlement and arbitration (referred to collectively as adjudication).<sup>13</sup> There are several diplomatic or non-legal third-party processes. Mediation is where an impartial third-party facilitates a process for effective communication of issues and interests with the aim of fostering problem solving between the disputing parties.<sup>14</sup> Conciliation

<sup>7</sup> *Charter of the United Nations* arts 92–96.

<sup>8</sup> *Statute of the International Court of Justice* art 38.

<sup>9</sup> *Charter of the United Nations* art 1.

<sup>10</sup> *Ibid* arts 2(4), 40, 51.

<sup>11</sup> *Ibid* arts 2(3), 33(1)–(2): '[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.'

<sup>12</sup> See, eg, JG Merrills, *International Dispute Settlement* (Cambridge University Press, 2005).

<sup>13</sup> See Jacob Bercovitch and Richard Jackson, *Conflict Resolution in the 21st Century* (University of Michigan Press, 2010) 19–31 (discussing the basic principles and frameworks for international negotiation), 47–48 (discussing international arbitration and judicial settlement in binding third parties to a proposed resolution); Merrills, above n 12, 1–2 (discussing negotiation in international disputes), 91, 127 (discussing arbitration in international disputes).

<sup>14</sup> See Bercovitch and Jackson, above n 13, 32–46 (defining and discussing mediation as a method of international dispute resolution); see also Merrills, above n 12, 28–44 (discussing the use and structure of mediation in international disputes).

is a process where a third-party, typically in the form of a commission or panel, provides an impartial examination of the dispute and suggests settlement terms.<sup>15</sup> Fact-finding and inquiry, often combined, offer tools for establishing the facts of a dispute in order to provide a foundation for additional IDR methods.<sup>16</sup> In addition to these three methods, other approaches include facilitation, good offices, truth and reconciliation and peacebuilding.<sup>17</sup> The methods for engaging in the pacific resolution of international disputes are intended for both legal disputes as well as for those that arise from armed conflict. These methods, along with the institutions that support their use, constitute the IDR regime that provides States, and increasingly non-State actors, with 'decision-making procedures.'<sup>18</sup>

This chapter applies the following definitions. Armed conflict is understood as ongoing discord between two or more entities characterized as violent or armed and resulting in death and/or casualties. Conflict occurs in the interstate, intrastate and non-State contexts, all of which can become a threat to international peace and security. International dispute refers to legal disputes that can be resolved on the basis of international law. Settlement implies that the parties to the dispute accept the adjudicatory authority's outcome that decides the dispute, often in favour of one side or another, based upon the application of the facts to the law.<sup>19</sup> Resolution implies that the parties have not only settled the legal matter, but that they have also resolved the underlying tensions giving rise to the dispute in the first place.<sup>20</sup> The resolution of international conflicts and international disputes can be interconnected. For example, in the *Hostages* case, the ICJ was instrumental in resolving legal disputes that could have escalated into armed conflict.<sup>21</sup> In *Nicaragua*, the Court addressed legal

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<sup>15</sup> See Merrills, above n 12, 64 (discussing the method and history of the process of conciliation).

<sup>16</sup> Ibid 45–46 (noting the use of inquiry in resolving a disputed issue of fact).

<sup>17</sup> See Bercovitch and Jackson, above n 13, for definitions and examples of these and additional IDR methods.

<sup>18</sup> See Stephen D Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36 *International Organization* 185, 185 (offering a comprehensive discussion of international regimes and the influence that changes in structure, norms, and decision-making can have on them).

<sup>19</sup> John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* (Oxford University Press, 1999) 1–2.

<sup>20</sup> Ibid.

<sup>21</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, 3 ('*Hostages*').

disputes that arose from armed conflict.<sup>22</sup> Beyond preventing conflict, the IDR system also provides the international community with a regime for enhancing cooperation and solving collective problems.

### III. CHANGES

Globalization is changing the world order, and with it, international law. As relationships between nations and individuals become more intertwined and new technologies transform global politics and economies, the ways that societies operate have also changed. This section considers how such developments are influencing international disputes and international conflict. First, the nature, scope and impact of international conflict have changed. Armed conflict that poses a major threat to international peace used to occur primarily between nations. Today, these events increasingly occur in the intrastate or non-State context. A second development has been the emergence of global collective problems, such as climate change, that threaten peace and security. A third change is the rise of a new international community of engaged non-State actors that demand increased access to, and involvement in IDR. Fourth, the diversity and availability of dispute resolution venues has diversified and proliferated offering both promise as well as problems, such as uncertainty and fragmentation. Fifth, the paradigm of peace promotion has shifted from managing and settling disputes to resolving them and promoting societal reconciliation. These five categories of change present challenges for the IDR regime and offer new opportunities for enhancing its capacity in an era of globalization.

#### A. *From Inter-State to Intra-State Conflict*

Prior to WWII, most wars occurred between States, driving the need for an international legal system capable of providing interstate dispute resolution. Today's wars are different. They are taking place within a State as civil, regional, internal and inter-communal conflicts.<sup>23</sup> Empirical studies

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<sup>22</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction) [1984] ICJ Rep 392.

<sup>23</sup> Meredith Reid Sarkees and Frank Whelon Wayman, *Resort to War* (CQ Press, 2010) 64–70.

show that since World War II interstate wars have declined while intrastate and non-State wars have increased. A 2010 study by the Correlates of War ('COW') Project identified 655 wars between 1816 and 2007 and found that intrastate wars have outpaced interstate ones since 1945.<sup>24</sup> The University of Maryland's 2010 Peace and Conflict Report found a similar trend and reported that by early 2008, there were 26 active armed conflicts in the world and all were classified as intrastate, occurring between a government and one or more internal groups.<sup>25</sup> A third study of 121 conflicts between 1989 and 2005 confirmed the same finding and noted that all 31 ongoing conflicts in 2005 were intrastate, with six of them becoming internationalized (indicating the presence of a second State's armed forces).<sup>26</sup>

Intrastate wars are different in their nature as well as in their context. As the events of the Arab Spring demonstrate, they often arise from the political failure of the State. They do not result in definitive victories where one side surrenders to another. The line between civilians and combatants blurs as violence breaks out in neighborhoods, among families and between friends. The authority and legitimacy of warring factions is difficult to ascertain. Thus, the traditional understanding of international conflict as a war that occurs between nations, such as World War II, has been expanded to embrace the understanding that even internal wars, such as the conflicts in Syria, the Sudan and the Democratic Republic of Congo, can threaten international peace and security. This may occur due to a spillover effect, regional proliferation, the threat or use of nuclear, biological or chemical weapons or the finding of international war crimes.<sup>27</sup> This shift in the nature of war calls for better understanding about the relationship between international law, IDR and peace promotion.<sup>28</sup>

<sup>24</sup> Ibid 337–341.

<sup>25</sup> See J Joseph Hewitt, 'Trends in Global Conflict, 1946–2007' in J Joseph Hewitt, Jonathan Wilkenfeld and Ted Robert Gurr (eds), *Peace and Conflict 2010* (Paradigm Publishers, 2010) 27–32.

<sup>26</sup> Lotta Harbom, Stina Högladh and Peter Wallensteen, 'Armed Conflict and Peace Agreements' (2006) 43 *Journal of Peace Research* 617, 618, table 2.

<sup>27</sup> Jacob Bercovitch and Judith Fretter, *Regional Guide to International Conflict and Management from 1945–2003* (Congressional Quarterly Press, 2004) 7–8.

<sup>28</sup> See, eg, Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era* (Stanford University Press, 1998); Helen Durham and Timothy McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Martinus Nijhoff Publishers, 1999); Carsten Stahn and JK Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser Press, 2008).

### B. *Collective Disputes and Interconnected Issues*

Just as armed conflict has shifted from the interstate to the intrastate context, the nature of international disputes is also changing. Globalization has enhanced the scope and speed of the connection of actors in the global community. Today's large-scale harms capable of threatening global peace and security arrive in many forms. Beyond traditional war, threats can occur through global economic crises, climate change, terrorism, health pandemics and so forth. International disputes arising from such interconnected issues have proven difficult to address through traditional judicial means because they often involve extralegal concerns and non-State actors.<sup>29</sup> Many of today's international disputes, understood to be 'specific disagreement[s] concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another,'<sup>30</sup> are complex. They involve international organizations, corporations, NGOs and individuals in addition to States and are occurring at the intersections of public, private, cross-border and transnational arenas.

Efforts to resolve these disputes through traditional forms of adjudication have become increasingly ineffective because resolution requires the broader participation of the international community. As former ICJ Judge Christopher Weeramantry has stated, '[w]hen we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to progress beyond weighing the rights and obligations of the parties within a closed compartment of individual State self-interests, unrelated to the global concerns of humanity as a whole.'<sup>31</sup> One nation cannot solve collective problems. Neither can States alone. Thus, the nature of many international disputes today requires the IDR system to provide the international community with a venue for collective problem solving. It also necessitates dispute resolution options for cases where legal rights have yet to be established or remain unclear.

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<sup>29</sup> See Anna Spain, 'Beyond Adjudication: Resolving International Resource Disputes in an Era of Climate Change' (2011) 30 *Stanford Environmental Law Journal* 343.

<sup>30</sup> Merrills, above n 12, 1.

<sup>31</sup> *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, [88] (Judge Weeramantry).

### C. *New Actors: Individuals and the International Community*

In the new era of globalization, every individual seeks to have a voice.<sup>32</sup> Although States have been the dominant actors within international law, individuals today are demanding increased participation. States have the international legal capacity to enter into treaties but non-State actors are playing an increasingly powerful role in shaping the treaty-making process. For example, during the 15th session of the Conference of the Parties to the *UN Framework Convention on Climate Change* in Copenhagen in 2009, individuals and civil society groups far outnumbered State delegates, using their numbers to make up for the power their non-State delegate status lacked.<sup>33</sup>

IDR embraced participation by individuals early in its history. For example, under the International Prize Court proposed to be established by the 1907 *Hague Convention XII*, individuals would have been able to lodge appeals against the decisions of national prize courts, although States could forbid nationals from using this option (ultimately the Convention never entered into force).<sup>34</sup> Individuals enjoyed standing to bring claims before the Central American Court of Justice (1907–1918) against foreign States without consent of their home country.<sup>35</sup> Individuals have brought claims against foreign States for war damages and mass claims before tribunals such as the Anglo-German Mixed Arbitral Tribunal in 1924.<sup>36</sup> Despite these early developments, individuals still have limited rights and access to international adjudication.<sup>37</sup>

Beyond individuals, the new international community also includes collectives of stakeholders joined by similar norms, interests and identities.

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<sup>32</sup> See Thomas Franck, *The Empowered Self* (Oxford University Press, 1999) 1 ('nationalism is in retreat ... individualism has emerged, at the end of the twentieth century, as an increasingly preferred alternative to self-definition imposed by nationalism, genetic and territorial imperatives').

<sup>33</sup> José Alvarez, 'The New Treaty Makers' (2002) 25 *Boston College International & Comparative Law Review* 213; Anna Spain, 'Who's Going to Copenhagen? The Rise of Civil Society in International Treaty Making' (2009) 13 *ASIL Insights*.

<sup>34</sup> *Convention (XII) relative to the Creation of an International Prize Court*, opened for signature 18 October 1907, 2 *AJIL* 174 (not yet in force) art 4.

<sup>35</sup> *Convention for the Establishment of a Central American Court of Justice*, 2 *AJIL Sup* 231 (entered into force 20 December 1907) art II.

<sup>36</sup> Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society* (Cambridge University Press, 2004) 48.

<sup>37</sup> Rüdiger Wolfrum, 'Solidarity amongst States: An Emerging Structural Principle of International Law' (2009) 49 *Indian Journal of International Law* 1 (discussing the vulnerability of the individual within international law).

People now unify across borders and boundaries over common causes and events that threaten the global community as a whole. The concept of collectivity and its place in international law is not new. James Crawford described it as having a 'responsibility to the international community as a whole.'<sup>38</sup> Supported by a guiding principle of solidarity, the concept has origins in Christian and natural law.<sup>39</sup> From universal norms to shared obligations, the principle of collectivity acknowledges that for certain matters and in certain instances international law ought to prioritize collective rights, interests and needs. The establishment of the International Criminal Court and efforts to protect global environmental resources are two powerful examples of areas where collectivity is a guiding principle.

Collectivity should be a fundamental guiding principle of IDR because effective dispute resolution requires the participation of key stakeholders, regardless of their international legal personality or status. The inclusion of such stakeholders recognizes the importance of subsidiarity, or resolving disputes at the level at which they occur.<sup>40</sup> In the *Gabčíkovo-Nagymaros Project* case, Judge Weeramantry emphasized the importance of subsidiarity in referring to local customary law and negotiation practices on traditional water management in Bali as guidance for the case.<sup>41</sup> Yet inclusion of individuals and other non-State stakeholders can cause tension between the aims of IDR and those of international law when the priorities of the State clash with those of the public.<sup>42</sup> This is evident where international

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<sup>38</sup> James Crawford, 'Responsibility to the International Community as a Whole' in *International Law as an Open System* (Cameron May, 2002) 341.

<sup>39</sup> For a historical and definitional background on the concept of solidarity in international law see Wolfrum, above n 37, 8.

<sup>40</sup> Anne Marie Slaughter, *A New World Order* (Princeton University Press, 2004) 30 (defining subsidiarity as 'a principle of locating governance at the lowest possible level—that closest to the individuals and groups affected by the rules and decisions adopted and enforced'); Jerome Priscoli and Aaron T Wolf, *Managing and Transforming Water Conflicts* (Cambridge University Press, 2009) 3, 95, 106 (discussing the need to keep problem-solving local for effective management of water disputes); For an example of treaty language on subsidiarity, see the *Treaty of European Union*, opened for signature 7 February 1992, OJ C 191 (entered into force 1 November 1993) ('*Treaty of Maastricht*') (establishing the foundations of the European Union, 1985 *European Charter of Local Government, European Community Treaty Protocol* 30).

<sup>41</sup> *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)*[1997] ICJ Rep 7 (Judge Weeramantry) [88]–[119]; see also Eyal Benvenisti, 'Asian Traditions and Contemporary International Law on the Management of Natural Resources' (2008) 7 *Chinese Journal of International Law* 273, 277.

<sup>42</sup> See Teruo Komori, 'Changing Character of International Law' in Teruo Komori and Karel Wellens (eds), *Public Interest Rules of International Law* (Ashgate, 2009) 1 (discussing how general international rules were not created to protect general interests

law limits powerful States in protection of collective interests and cases where the international legal system protects States.<sup>43</sup>

These changes pose important questions about IDR. What are the rights of people to resolve their own disputes and where are the limits? What recourse do individuals and their representative organizations have for resolving international disputes? Should individuals be granted standing before the ICJ and other adjudicative bodies? Should jurisdiction be expanded in this manner? For example, in the *Arrest Warrant* case, ICJ Judge ad hoc Van den Wyngaert criticized the court for ignoring the statements of NGOs offering the opinion of civil society and noting that opinion's importance in the formation of international customary law today.<sup>44</sup> Questions such as these, about the rights and obligations of individuals with regard to international dispute resolution, shape the discourse on how IDR should evolve and whom international law should serve.

#### D. *Proliferation and Uncertainty*

As international law has grown over the past few decades, so too have the methods for resolving international disputes. This growth has been documented in the following ways. First, international courts and tribunals have proliferated.<sup>45</sup> Second, the creation of treaty-based forums that

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and why this is changing with regard to international environmental protection, humanitarian law, law of the sea and space, and other areas).

<sup>43</sup> See José Alvarez, 'Contemporary International Law: Empire of Law or Law of Empire' (2009) 24 *American University International Law Review* 811 (describing the shift in international law from a system based on the co-existence of nations to one of a new empire defined as a collective order that moves beyond statehood); Marie-Claire Cordonier Segger, 'The Role of International Forums in the Advancement of Sustainable Development' (Fall 2009) 10 *Sustainable Development Law & Policy* 1 (discussing the collective nature of international law in sustainable development); cf Philippe Sands, *Lawless World* (Viking Adult, 2005); Pierre-Marie Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskeniemi' (2005) 16 *European Journal of International Law* 131 (arguing that national interests trump longer term international objectives because powerful nations maneuver against majority aims).

<sup>44</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, [154]–[155] (Judge Van den Wyngaert).

<sup>45</sup> See Mackenzie et al, above n 4, xi–xiii (describing the proliferation of international adjudicatory bodies as evidence of the growing trend toward third-party adjudication of international disputes); Cesare PR Romano, 'The Proliferation of International Judicial Bodies: The Piece of the Puzzle' (2000) 31 *New York University Journal of International Law and Politics* 709; Andrea K Schneider, 'Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution' (2009) 41 *New York University Journal of International Law and Politics* 789, 793 (citing evidence for the growing caseload in courts that hear human rights cases

provide for dispute resolution has also become more pervasive.<sup>46</sup> Furthermore, the practice of dispute resolution within treaty regimes has become so preponderant that some States have argued that it is unnecessary to include a specific requirement in a treaty on the grounds that the international legal requirement to seek peaceful settlement of disputes is of such an obvious nature that it does not need to be restated.<sup>47</sup> Third, there has been a trend toward compulsory jurisdiction and binding decision-making in international adjudicatory forums.<sup>48</sup> The normalization of adjudication suggests that disputes 'are more likely than ever to be resolved through a trial or adjudicatory method.'<sup>49</sup>

Proliferation has generated increased specialization in IDR. Adjudicatory forums increasingly seek to address specific types of disputes, usually defined by subject matter. Other than the ICJ, which provides judicial settlement and the PCA, which provides arbitration, conciliation, and fact-finding,<sup>50</sup> most international courts and tribunals have limited

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and economic disputes); Andrea Schneider, 'Not Quite a World Without Trials: Why International Dispute Resolution Is Increasingly Judicialized' (2006) *Journal of Dispute Resolution* 19 (discussing the increase in the use of trials to resolve international legal disputes).

<sup>46</sup> See Mackenzie et al, above n 4, 431–52 (noting the development of quasi-judicial procedures at UN Treaty Bodies for addressing alleged violations of human rights, eg, the Committee on the Elimination of Racial Discrimination, the Committee against Torture and the Committee on the Elimination of Discrimination against Women).

<sup>47</sup> Dominique Alheritiere, 'Settlement of Public International Disputes on Shared Resources: Elements of a Comparative Study of International Instruments' (1985) 25 *Natural Resources Journal* 701, 705 (noting several nations' 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).

<sup>48</sup> Cesare PR Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent' (2007) 39 *New York University Journal of International Law and Politics* 791, 792–95 (discussing the shift toward compelling disputants to consent to the jurisdiction of an international adjudicative body); see also Schneider, above n 45 (discussing the increase in the use of trials to resolve international legal disputes).

<sup>49</sup> Schneider, above n 45, 793; see Georges Abi-Saab, 'The Normalization of International Adjudication: Convergence and Divergences' (2010) 43 *New York University Journal of International Law and Politics* 1, 9–10; Robert Y Jennings, 'The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers' in Laurence Boisson de Chazournes et al (eds) 9 *American Society of International Law Bulletin* 2, 3 (American Society of International Law Publications, 1995).

<sup>50</sup> See Permanent Court of Arbitration, *Optional Conciliation Rules*, <[http://www.pca-cpa.org/showfile.asp?fil\\_id=197](http://www.pca-cpa.org/showfile.asp?fil_id=197)> ('PCA Optional Conciliation Rules'); Permanent Court of Arbitration, *Optional Rules for Fact-finding Commissions of Inquiry*, <<http://www.pca-cpa.org/upload/files/INQENG.pdf>> (establishing optional rules of fact-finding which parties

jurisdiction based on subject matter or treaty status. The International Tribunal for the Law of the Sea ('ITLOS'), established by the 1982 *United Nations Convention on the Law of the Sea* ('UNCLOS'), handles disputes over marine resources and maritime boundaries.<sup>51</sup> The World Trade Organization's Dispute Settlement Understanding ('WTO DSU') provides WTO members with dispute settlement, supervising consultations between disputing parties, adopting Appellate Body panel reports, and supervising implementation of awards<sup>52</sup> as well as offering disputing parties the option of engaging in direct consultations,<sup>53</sup> or third-party intervention procedures of good offices, conciliation, and mediation.<sup>54</sup> The International Centre for the Settlement of Investment Disputes ('ICSID') provides arbitration and conciliation for investment disputes between 'a Contracting State and a national of another Contracting State,' such as individuals and companies.<sup>55</sup> 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 provisions.<sup>56</sup>

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may adopt at their discretion); *Convention for the Pacific Settlement of International Disputes* arts 9, 15 (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').

<sup>51</sup> See *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 284 (reaffirming the principle of pacific settlement of disputes); art 284 (describing procedures for conciliation by a State Party).

<sup>52</sup> Mackenzie et al, above n 4, 73 (outlining the general responsibilities of the WTO DSU). See also World Trade Organization, *Dispute Settlement* <[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm)>.

<sup>53</sup> See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1869 UNTS 401 (entered into force 1 January 1995) annex 2, art 4 (*DSU*) (outlining the rules and procedures for initiation of a consultation).

<sup>54</sup> *Ibid* art 5 (outlining the rules and procedures for good offices, conciliation, and mediation).

<sup>55</sup> See *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) arts 25(1)–(2), (outlining the scope of the ICSID's jurisdiction). The Additional Facility Rules also allow cases involving parties not contracted to the Convention or cases involving non-investment issues: International Centre for the Settlement of Investment Disputes, *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*, art 2 <[http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf)> (providing for additional parties ICSID will offer jurisdiction over).

<sup>56</sup> See Nassib G Ziadé, 'ICSID Conciliation' (1996) 13(2) *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

One concern is that the proliferation of international courts and the 'judicialization' of international disputes have led to a multiplicity of dispute resolution options that are uncoordinated. In the adjudication realm, a system where multiple courts may exert jurisdiction over the same subjects and/or issues presents concerns about fragmentation, legitimacy and authority.<sup>57</sup> Inconsistent findings by different judicial bodies create multiple sources of international law that can lead to fragmentation of international legal jurisprudence.<sup>58</sup> For example, the decision of the International Criminal Tribunal for the former Yugoslavia in *Tadić* was interpreted by some to be a departure from the earlier standard of effective control used by the ICJ in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*.<sup>59</sup> Another concern arose when the

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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).

<sup>57</sup> See Tim Stephens, 'Multiple International Courts and the Fragmentation of International Environmental Law' (2006) 25 *Australian Yearbook of International Law* 227; Y Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003); Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian Yearbook of International Law* 191; Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press, 2009) 326–31 (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' (2007) 1 *European Journal of Legal Studies* 1 (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, 'The ICJ, The ECJ, and the Integrity of International Law' (2003) 52 *International and Comparative Law Quarterly* 1 (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' (2009) 20 *European Journal of International Law* 265 (exploring the challenges posed by the proliferation of international tribunals and courts); cf Martti Koskeniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1 (viewing international law not as a true legal system in the national sense, and thus not subject to the same concerns about fragmentation); Martti Koskeniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553 (suggesting that worries over the fragmentation of international law may be exaggerated).

<sup>58</sup> Rosalyn Higgins, above n 57, 18 (noting, but disagreeing with, other findings of conflicting international jurisprudence in relation to the European Court of Human Rights judgment in *Loizidou v Turkey* [1995] 10 Eur Court HR 99, [65]–[89] where the Strasbourg Court and the ICJ differed on a question regarding treaty reservations); International Tribunal of the Sea cases *Southern Bluefin Tuna Case (Australia v Japan) (Provisional Measures)* (1999) 38 ILM 1624 and *Southern Bluefin Tuna Case (Australia v Japan) (Jurisdiction and Admissibility)* (2000) 39 ILM 1359, where one arbitral tribunal revoked earlier provisional measures granted by another tribunal ('*Southern Bluefin Tuna Cases*').

<sup>59</sup> Higgins, above n 57, 19.

judgment of the European Court of Human Rights ('ECHR') in *Loizidou v Turkey* adopted legal reasoning that contrasted with the ICJ's decisions regarding State reservations to treaties.<sup>60</sup> The International Law Commission considered the impact of diversification and fragmentation on international law in its 2006 report and noted its concerns about the lack of coherence, consistency and legitimacy of international law.<sup>61</sup> These concerns are multiplied when considering the full range of IDR methods, driving the need for the international legal system to find a way to structurally coordinate practices and institutions in order to prevent fragmentation.

The relationship between evolution, proliferation, diversity and uncertainty in IDR is dynamic and therefore difficult to capture at any given moment. However, it is important to recognize that the fluidity and flexibility of IDR is a great asset to international law. The ability for IDR practices continually to adapt to changing circumstances enhances its effectiveness. The issue is how to address the concerns without stifling the benefits. This requires determining to what extent the lack of coordination among IDR bodies undermines the authority or legitimacy of international law. It also requires establishing common principles that confirm a normative structure.<sup>62</sup>

### E. *The Shifting Paradigm of Peace*

A fifth change in an era of globalization has been the shift in the normative paradigm for promoting peace. For much of the 20th century, armed

<sup>60</sup> *Loizidou v Turkey* [1995] 10 Eur Court HR 99, [65]–[89]; See also *Southern Bluefin Tuna Case* (1999) 38 ILM 1624 and *Southern Bluefin Tuna Case* (2000) 39 ILM 1359.

<sup>61</sup> International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) (report of the study group detailing the complications arising from the increasing diversity of international law tribunals); see also, Stephens, above n 57, 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?' (1998) 271 *Recueil des Cours* 115 (exploring the fragmentary effects of a high number of tribunals on international law); Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 *Michigan Journal of International Law* 849 (detailing the upside and downside of procedural and institutional fragmentation in international law).

<sup>62</sup> See Vicuña, above n 36, 6; Christian Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?' (2007) 40 *New York University Journal of International Law & Policy* 259, 271 (proposing an institutional hierarchy as a possible solution to the problem of fragmentation in international law).

conflicts were mainly interstate and were based on territorial disputes or were proxy wars between superpowers.<sup>63</sup> States focused on conflict management in order to preserve geopolitical balance in an era of superpowers and proxy wars.<sup>64</sup> Conflict was addressed through a management approach where States tried to stabilize situations to mitigate loss of life while still pursuing their geopolitical aims. In this paradigm, peace was the absence of violence. Since the end of the Cold War, wars have shifted to the intrastate context and are marked by identity disputes and ethnic conflict.<sup>65</sup> Violence occurs in cycles with no clear beginning or end. The ends of intrastate wars rarely result in clear victors, and the likelihood of recurrence events is high. For example, 48% of all conflicts between 1990 and 2007 occurred in States where a conflict had ended no more than five years previously.<sup>66</sup>

This has brought about a new conceptualization of peace. Peace is marked not just by the absence of violence and armed conflict but by the positive progression toward resolution, rebuilding and reconciliation among those affected by war.<sup>67</sup> In his 2003 speech, UN Secretary-General Kofi Annan announced that 'a decisive moment' had arrived and that 'the aspiration set out in the [UN] Charter to provide collective security' is a shared responsibility.<sup>68</sup>

The shifting paradigm of peace has influenced IDR as well. For most of the 20th century, IDR methods emphasized settling legal disputes between States. Now IDR methods are shifting from State-centric, power-based approaches to interest-based approaches that promote resolution between

<sup>63</sup> Bercovitch and Jackson, above n 13, 1–16.

<sup>64</sup> Louis Kriesberg, 'Applications and Misapplication of Conflict Resolution Ideas to International Conflicts' in John A Vasquez et al (eds), *Beyond Confrontation: Learning Conflict Resolution in the Post-Cold War Era* (University of Michigan Press, 1998) 211–38.

<sup>65</sup> Bercovitch and Jackson, above n 13, 8–14.

<sup>66</sup> Hewitt, Wilkenfeld, and Gurr (eds), above n 23, 31 (identifying the surge of recurring conflicts in Sri Lanka, Azerbaijan, India, Chad, Iran and two in Myanmar); see also Lawrence Wocher, 'Preventing Violent Conflict: Assessing Progress, Meeting Challenges' (2009) 231 *United States Institute of Peace Special Report* 5, n 21 (presenting the UCDP Conflict Termination Dataset).

<sup>67</sup> The disorganization of existing IDR efforts has been criticized as reducing the effectiveness of the international community's peace-building capacity. See Charles Call and Elizabeth Cousens, 'Ending Wars and Building Peace: International Responses to War-Torn Societies' (2008) 9 *International Studies Perspective* 1, 10–15.

<sup>68</sup> *Note by the Secretary-General: A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change to the Secretary-General*, UN GAOR, 59th Sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) 1.

non-State actors.<sup>69</sup> In the last twenty years, the dominance of State-driven IDR has given way to the rise of intergovernmental and regional organizations. Regional and local groups have the ability to act as first-responders and often add value due to their cultural intelligence of local contexts.<sup>70</sup> It 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.<sup>71</sup> This paradigm shift has developed a vision of IDR that promotes non-State actor participation, considers a broad scope of issues, appreciates a variety of IDR methods and seeks to enhance capacity to resolve disputes in a variety of international contexts.<sup>72</sup>

This paradigm shift has introduced new actors, new processes and new goals. First, intrastate conflict occurs between individuals and communities that must become non-State participants in any peacebuilding process. Plans for US-Taliban peace talks serve as an example.<sup>73</sup> Second, the new paradigm for conflict resolution recognizes the importance of multi-dimensional approaches, such as mediation, collaborative governance, truth and reconciliation commissions and community-based healing among others.<sup>74</sup> The aim is to achieve security through a mix of conflict resolution practices that build a positive peace.<sup>75</sup> Third, there has been increased creativity in applying multiple methods of IDR.<sup>76</sup>

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<sup>69</sup> Bercovitch and Jackson, above n 13, 1–16, (arguing that new methods of IDR are more effective and comprehensive because they seek to resolve underlying issues rather than merely settle the dispute and cease violence).

<sup>70</sup> Derrick V Frazier and William J Dixon, 'Third-Party Intermediaries and Negotiated Settlements, 1946–2000' (2006) 32 *International Interactions* 385, 390 (outlining two factors that probably contribute to the increased prominence of regional organizations in dispute resolution).

<sup>71</sup> See José Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005) 154–56 (discussing the ways in which the UN has provided increased access to non-state entities).

<sup>72</sup> See Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, 2009) 262, 313–333 (discussing these principles in the context of global participatory democracy); see also Rafael Domingo, *The New Global Law* (Cambridge University Press, 2010) 181–185 (making the case for the need to democratise decision-making in global law).

<sup>73</sup> See eg, Alissa Rubin, 'Former Taliban Officials Say U.S. Talks Started,' *New York Times* (New York), 29 January 2012, A9.

<sup>74</sup> Peters, above n 72, 69.

<sup>75</sup> See National Research Council, *International Conflict Resolution After the Cold War* (National Academy Press, 2000).

<sup>76</sup> See Anna Spain, 'Integration Matters: Rethinking the Architecture of the International Dispute Resolution System' (2010) 32 *University of Pennsylvania Journal of International Law* 1.

For example, in its recent decision in the *Abyei Arbitration*, the PCA called for the parties to develop a 'survey team to demarcate the Abyei Area as delimited by this Award' and that 'the Tribunal hopes that the spirit of reconciliation and cooperation visible throughout these proceedings, particularly during the oral pleadings last April, will continue to animate the Parties on this matter.'<sup>77</sup>

#### IV. CHALLENGES

Given these five areas of change—the nature of international conflict, interconnected issues and collective disputes, new actors, proliferation of IDR and a paradigm shift—this section considers whether the traditional international legal tools for addressing disputes are sufficient or, if not, how they might adapt to a globalized world. Four challenges that constrain the practice of IDR are considered. The first two challenges are posed by the traditional international legal principles of sovereignty and Statehood.<sup>78</sup> A third challenge emerges from these two—the limitations of adjudication in an era of globalization. Finally, this section considers the role of non-judicial methods such as mediation and how to enhance their use in the international legal system.

##### A. *The Doctrine of State Sovereignty*

The doctrine of State sovereignty is a principle upon which the international legal system was founded. The origins of the concept emerged out of the Peace of Westphalia, which sought to provide peace by establishing a new form of legal authority that afforded States exclusive control over their domains (eg, people and territory).<sup>79</sup> The classic view of Westphalian

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<sup>77</sup> *Abyei (Government of Sudan v Sudan People's Liberation Movement/Army)* 48 ILM 1258, [769] ('*Abyei*'); *The Roadmap for Return of IDPs and Implementation of Abyei Protocol*, Khartoum (8 June 2008) arts 1–3.

<sup>78</sup> For further discourse on statehood and sovereignty see James Crawford, 'Negotiating Global Security Threats in a World of Nation States: Issues and Problems of Sovereignty' in *International Law as an Open System*, above n 38, 95–121.

<sup>79</sup> See Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21 *International History Review* 569, 570 (explaining that the treaty did not establish interstate recognition of sovereign equality but served to 'convince people that states ought to have exclusive territorial authority'); see also John G Ruggie, 'Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis' (1983) 35 *World Politics*

sovereignty established the principle of non-intervention that 'no state has the right to intervene in the internal or external affairs of another.'<sup>80</sup> As Sir Hersch Lauterpacht asserted in 1933, 'any inquiry of a general character in the field of international law finds itself at the very start confronted with the doctrine of sovereignty.'<sup>81</sup>

Sovereignty challenges IDR in the following ways. First, as the PCIJ established in *Eastern Carelia*, 'no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.'<sup>82</sup> As States have created the rules, practices and institutions for engaging in IDR, they have built in doctrines that protect their sovereignty. The doctrine of justiciability, which provides a way to limit the scope of judicial review for international courts, is one example.<sup>83</sup> Former US Secretary of State Dean Acheson relied on this doctrine in arguing after the Cuban Missile Crisis that there are certain political-legal situations that are so vital to States that the ICJ should not interfere.<sup>84</sup> If sovereignty is interpreted in a

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275 (stating that sovereignty 'signifies a form of legitimation'); David Held, 'The Changing Structure of International Law: Sovereignty Transformed?' in David Held and Anthony McGrew (eds) *The Global Transformations Reader: An Introduction to the Globalization Debate* (Polity Press, 2nd ed, 2003) 162, 162–64 (describing the 'classic regime of sovereignty' that arose in the seventeenth century).

<sup>80</sup> *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 8; see also Emerich de Vattel, *The Law of Nations; or Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns* (Joseph Chitty trans, T & JW Johnson & Co Law Booksellers, 1883) 155 [trans of: *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (first published 1758)] ('To interfere in the government of another, in whatever way indeed that may be done is opposed to the natural liberty of nations, by virtue of which one is altogether independent of the will of other nations in its action'); *The Serious Crisis in Panama in its International Context*, OAS Res 1, Meeting of Consultation of Ministers of Foreign Affairs, 21st mtg OAS Doc. 8/89 rev. 2 (17 May 1989) (adopting similar language).

<sup>81</sup> Hersch Lauterpacht, *Function of Law in the International Community* (Clarendon Press, 1933) 2.

<sup>82</sup> *Status of Eastern Carelia (Advisory Opinion)* [1923] PCIJ (ser B) No 5, 27; see also *Mavrommantis Palestine Concessions (Greece v Britain)* [1924] PCIJ (ser A) No 2, 16; *Factory at Chorzów (Germany v Poland) (Jurisdiction)* [1927] PCIJ (ser A) No 9, 32.

<sup>83</sup> See, eg, *Military and Paramilitary Activities in Nicaragua (Nicaragua v United States of America) (Judgment)* [1986] ICJ Rep 14, 212 (Judge Oda) (discussing how the *travaux préparatoires* of the ICJ Statute and applicable State practice suggest that, in accepting the ICJ Statute, States did not intend to submit themselves to judicial settlement over political disputes).

<sup>84</sup> Dean Acheson, *Proceedings of the ASIL* (1963) 13–14; see also Eugene Rostow, 'Dispute Involving the Inherent Right of Self-Defence' (1987) 81 *American Journal of International Law* 264.

manner that allows States the option of not participating in any form of IDR it frustrates the fundamental purpose for the creation of IDR, to ensure pacific resolution of disputes in order to prevent the recourse to war.

A second challenge occurs when a nation's sovereign right to territorial integrity is the cause of an international legal dispute. This challenge occurs in environmental disputes. Early on, *Trail Smelter* established the rule that States enjoy permanent sovereignty.<sup>85</sup> States may use their own natural resources as they wish, as long as they do not cause serious harm to another nation.<sup>86</sup> However, this guidance is not helpful for addressing disputes, like those arising from climate change, the origins of which are not confined within territorial boundaries or which are subject to any one nation's legal jurisdiction.

As people and nations become increasingly interconnected, disputes involving collective interests are more common. Addressing these disputes through the IDR system demands a new relationship with sovereignty, which itself is evolving. For example, the development of the Responsibility to Protect Doctrine has established an emerging norm that State sovereignty is a limited right, not an absolute one.<sup>87</sup> Actions taken by the UN Security Council in Libya and, more recently, in Syria support this view.<sup>88</sup> As globalization shapes new understandings of sovereignty, its relationship to IDR must also evolve. The challenge is to figure out what this means for IDR.

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<sup>85</sup> *Trail Smelter (United States v Canada)* (1941) 3 UN Reports of International Arbitral Awards 1905 (weighing Canada's right to smelt ore in its territory against the U.S. right to harvest apples and not be subject to damaging smoke from Canada).

<sup>86</sup> See Franz X Perrez, 'The Relationship between "Permanent Sovereignty" and the Obligation not to Cause Transboundary Environmental Damage' (1996) 26 *Environmental Law* 1187, 1198 (noting the 'obligation of all states to protect within their territory the rights of other states, especially the right to national integrity and inviolability during peace and war'); Austen L Parrish, 'Sovereignty's Continuing Importance' in Bratspies & Miller (eds), *Transboundary Harm in International Law* (Cambridge University Press, 2006) 181–194.

<sup>87</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, December 2001) (establishing R2P as an emerging norm in international law); 2005 *World Summit Outcome*, GA Res 60/1, UN GAOR, 60th sess, UN Doc A/RES/60/L.1 (16 September 2005) (establishing widespread State support for the principle of R2P); SC Res 1674, UN SCOR, 5430th mtg, UN Doc S/RES/1674 (28th April 2006) para 4; UN Secretary-General, *Implementing the Responsibility to Protect*, UN GAOR, 63rd sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009) 8–9.

<sup>88</sup> See SC Res 1973, UN SCOR, 6498th mtg, UN Doc S/RES/1973 (17 March 2011) (authorising member States to 'take all necessary measures'); SC Res 2043, UN SCOR, 6756th mtg, UN Doc S/RES/2043 (21 April 2012) (establishing a UN Military Supervision Unit in Syria with 300 unarmed military observers).

### B. *State-Centricity in IDR*

Closely related to the issues presented by sovereignty are those that arise due to the State-centric nature of the IDR system. Historically, IDR practices and institutions, such as the PCA, PCIJ and ICJ, have been established by States. Thus, their interests are negotiated into the rules and structure of these forums. International law granted supreme legal status to States, designating them as the primary subjects of international law.<sup>89</sup> Non-State actors were commonly treated as the objects of a State based on territorial or other forms of control. These actors had no standing under international law to contest a State's action or territory and thus often resorted to violent means to establish 'effective control' over the area of territory if they wanted to make a case for international recognition.<sup>90</sup> This State-centric focus made sense at that time because the purpose of establishing pacific dispute resolution was to prevent war between nations.

The challenge today is that a State-centric international legal system limits the capacity of IDR. Effective IDR requires the inclusion of all relevant stakeholders, including non-State actors, in the process. Yet many forums either do not provide for this or strictly limit the type and role of non-State actor participation. Despite these formal rules, IDR is becoming increasingly porous as new actors pierce through the old veil. Non-State actors are behaving more and more like subjects, not objects, of international law. Corporations and individuals are pursuing international dispute resolution independent of their governing State. NGOs are influencing the development of norms. This opening up of the system results in more actors and wider participation. However, without formal recognition and organization under the international legal regime, it also contributes to lack of clarity and confusion about the extent of State power and governance and the rights and responsibilities of everyone else.

The time has come to re-examine the place of States in the IDR system.<sup>91</sup> What are the dangers of increasing non-State actor participation in and power over IDR processes? Where do States need to maintain supreme authority and why? For States that represent the collective will of their

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<sup>89</sup> Martti Koskenniemi, 'The Place of Law in Collective Security' (1996) 17 *Michigan Journal of International Law* 255.

<sup>90</sup> David Held, 'The Changing Structure of International Law: Sovereignty Transformed?' in David Held and Anthony McGrew (eds), above n 79, 162, 163.

<sup>91</sup> See Vicuña, above n 36, 1-9; Edith Brown Weiss, 'The New International Legal System' in Nandasiri Jasentuliyana (ed), *Perspectives on International Law* (Martinus Nijhoff Publishers, 1995) 63-82.

subjects, should IDR seek to preserve democratic values even if they are inconsistent with effective IDR practices? Will increasing the role (and power) of individuals and other non-State actors threaten States and, ultimately, the international legal system? These questions open a discourse about IDR that globalization demands.

### C. *The Limits of Adjudication*

As an essential component of the international legal system, adjudication has been used to settle interstate disputes about territory, State responsibility, trade, investment, and more recently, the environment and human rights.<sup>92</sup> States use adjudication because it offers certainty of process and a binding outcome that enjoys the promise of compliance under international law. International courts assist States in developing a common understanding of facts and law that promotes dispute resolution by clarifying substantive rules of law.

However, adjudication has its limits.<sup>93</sup> States are reluctant to submit important matters to a third-party decision-making authority.<sup>94</sup> For example, in the *Indus River Treaty* case, both India and Pakistan chose not to utilize arbitration and opted to engage in facilitation by the Permanent Indus Commission instead.<sup>95</sup> In the Mekong River Dispute between Thailand and Laos, the parties rejected adjudication as a dispute resolution option in the *Mekong Agreement* stating that disputes that are 'not first resolved by the Mekong River Committee are to be referred to the

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<sup>92</sup> Hersch Lauterpacht, above n 81, 2–4.

<sup>93</sup> Richard B Bilder, 'Some Limitations of Adjudication as an International Dispute Settlement Technique' (1982) 23 *Virginia Journal of International Law* 1, 4 (explaining the potential inability of a legal judgment to address underlying primary, often unrelated, issues which prompted the legal matter); JG Merrills, 'The Role and Limits of International Adjudication' in William E Butler (ed), *International Law and the International System* (Martinus Nijhoff Publishers, 1987); R P Anand, *Studies in International Adjudication* (Vikas Publications, 1969); G Shinkaretskaya, 'The Present and Future Role of International Adjudication as a Means for Peacefully Settling Disputes' (1989) 29 *Indian Journal of International Law* 87, 88 (suggesting that international judicial mechanisms are not effective in avoiding armed conflict).

<sup>94</sup> Patricia Wouters, *Universal and Regional Approaches to Resolving International Water Disputes* in International Bureau of the Permanent Court of Arbitration (ed), *Resolution of International Water Disputes* (Kluwer International, 2000) 346. See also Kenyuan Zou, 'Transnational Cooperation for Managing the Control of Environmental Disputes in East Asia' (2004) 16 *Journal of Environmental Law* 341, 359.

<sup>95</sup> Mary Miner et al, 'Water Sharing Between India and Pakistan: a Critical Evaluation of the Indus Water Treaty' (2009) 34 *Water International* 204, 207.

governments for negotiation, possible mediation or eventual settlement according to principles of international law.<sup>96</sup> In the Amur River Dispute between China and Russia, the parties decided against adjudication and chose to resolve the problem through a joint field-mapping exercise of the disputed area in which they agreed to divide the islands in half.<sup>97</sup>

A court may issue an opinion that fails to resolve key issues in the case.<sup>98</sup> For example, despite the ICJ's decision in *Gabčíkovo-Nagymaros Project* regarding Slovakia and Hungary's dispute over a project to build barrages in the Danube River,<sup>99</sup> the matter remains unresolved.<sup>100</sup> The Court did not address the future conduct of the parties with regard to operating the existing dam or building additional ones. Slovakia and Hungary have been unable to reach an agreement on the central issues (such as the amount of water to be released into the riverbed and plans for the Nagymaros dam).<sup>101</sup> In *Nuclear Tests* and other cases, the ICJ was heavily criticized for leaving the question of legality of nuclear testing, a politicised matter, undecided, and for failing to identify legal principles upon which environmental protection could be based.<sup>102</sup>

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<sup>96</sup> Wouters, above n 94, 137; see also Zou, above n 94, 346 (interpreting the dispute settlement mechanisms provided for under the Mekong Agreement Articles 34 and 35 as negotiation, consultation, mediation and involvement of the Mekong River Committee).

<sup>97</sup> Rongxing Guo, *Territorial Disputes and Resources Management: A Global Handbook Preface* (Nova Science Publishers, 2007) 45–47, 50–51.

<sup>98</sup> See Richard Bilder, 'International Dispute Settlement and the Role of International Adjudication' (1987) 1 *Emory Journal of International Dispute Resolution* 131, 151–61; Christine Gray and Benedict Kingsbury, 'Developments in Dispute Settlement: Interstate Arbitration since 1945' (1993) *British Year Book of International Law* 97, 105 ('Arbitral tribunals ... do not seem prepared openly to avow that they will indulge in non-legal decision-making. The question how far tribunals in fact use compromise in resolving the disputes presented to them').

<sup>99</sup> *Gabčíkovo-Nagymaros* [1997] ICJ Rep 7.

<sup>100</sup> See Salman MA Salman, 'Good Offices and Mediation and International Water Disputes' in the International Bureau of the Permanent Court of Arbitration, *Resolution of International Water Disputes*, above n 94, 155, 162 (describing why *Hungary/Slovakia* remains unresolved).

<sup>101</sup> Marcel Szabo, 'Gabčíkovo-Nagymaros Dispute' (2009) 39 *Environmental Policy & Law* 97.

<sup>102</sup> *Nuclear Tests Case (New Zealand v France)* [1974] ICJ Rep 457 (declining to rule upon the illegality of atmospheric nuclear weapon testing); *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 (discouraging the threat or use of nuclear weapons but not reaching whether such use may be legal in certain circumstances under international law); *Certain Phosphate Lands in Nauru (Nauru v Australia) (Judgment)* [1992] ICJ Rep 240 (avoiding ruling upon the substantive legal issues before the court); see also *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) (Provisional Measures)* [1995] ICJ Rep 288 (declining New Zealand's request to institute a special derivative procedure based on the Court's 1974 judgment on the ground that the situation

There are additional limitations. The nature of the adjudication process does not allow for multi-lateral involvement.<sup>103</sup> States 'have little incentive to resort to international adjudication as a way of clarifying or developing general rules.'<sup>104</sup> There are insufficient proactive measures to prevent harms from occurring and remedies that cannot compensate for the true value of the loss. Most adjudicatory forums exclude non-State actors.<sup>105</sup> Many view international courts as a place for Westernised justice, and concerns about the lack of diversity of judges and court bias persist.<sup>106</sup> 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; it also delivered 22 advisory opinions.<sup>107</sup> Since 1996, the cases submitted to the ICJ have increased in number, scope and complexity. As of 31 December 2012, there were ten contentious cases pending before the ICJ.<sup>108</sup>

These critiques of adjudication highlight its central limitations. The adjudication model is holding firm to the foundations of international law's past, while other processes are evolving and changing in response to the needs of the present and of the future. If international law is to assist in the promotion of global peace and security in this new era, the practice of adjudication must evolve to meet these challenges.

#### D. *Enhancing Mediation*

A fourth challenge facing IDR is the need to enhance capacity for resolving through mediation not just of international conflicts but of

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considered in 1974 had related solely to atmospheric nuclear tests and not to underground tests, the matter in contention in the 1995 proceedings).

<sup>103</sup> See eg, Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2009) 252–53 (arguing that judicial proceedings and arbitration tend not to cater to the multi-lateral character in the context of certain environmental issues).

<sup>104</sup> Bilder, 'Some Limitations of Adjudication as an International Dispute Settlement Technique', above n 93, 2, 5.

<sup>105</sup> See Higgins, above n 57, 12 (describing both the importance of nonstate entities in today's global arena and the lack of legal jurisdiction over these entities).

<sup>106</sup> See Michelle Burgis, *Boundaries of Discourse in the International Court of Justice* (Brill, 2009) 36–37, 52.

<sup>107</sup> See 'Introduction' (1996–1997) 51 *International Court of Justice Yearbook* 1, 3 (providing a general overview of statistics about the ICJ's caseload).

<sup>108</sup> See International Court of Justice, *Pending Cases* <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1>>.

other international disputes as well. Mediation can assist parties in resolving disputes in ways that offer promise in an era of globalization. It promotes subsidiarity, inclusion of non-State stakeholders, consideration of extralegal issues, flexibility and the ability to work independent of constrictive legal frameworks. Furthermore, States have demonstrated a preference for nonbinding guidelines and flexible procedures over binding legal instruments.<sup>109</sup> Adjudication is less effective than non-legal, collaborative methods of IDR (mediation, negotiation) for resolving international environmental disputes because States are reluctant to submit their sovereignty and control to a court or tribunal and because the issues are technically complex and politically sensitive.<sup>110</sup>

There is some institutional support for mediation for international conflicts. Historically, the UN Secretary-General has offered good offices to States on the brink of, or engaged in, war. In addition, the UN Department of Political Affairs houses the UN Mediation Support Unit, a centre that provides educational and operational support for mediation.<sup>111</sup> 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.<sup>112</sup>

International institutional support for mediation of international disputes remains lacking. There is no standing body equivalent to the ICJ to provide mediation services to States for international disputes. Although the PCA and ICSID provide conciliation, they do not offer mediation. Second, the use of mediation in the international context remains

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<sup>109</sup> John F Murphy, *The Evolving Dimensions of International Law: Hard Choices for the World Community* (Cambridge University Press, 2010) 3–4 (discussing the Helsinki Final Act and the Basel Accord as examples of soft law).

<sup>110</sup> Bilder, 'Some Limitations of Adjudication as an International Dispute Settlement Technique', above n 93, 3–5, 9–10; Richard Bilder, 'The Settlement of Disputes in the Field of the International Law of the Environment' (1975) 144 *Recueil des Cours* 145.

<sup>111</sup> United Nations Department of Public Information, 'United Nations Announces New "On-Call" Mediation Team to Advise Peace Envoys in Field' (Press Release, PA/1, 5 March 2008) (announcing the formation of a new Standby Team of Mediation Experts in an effort to build up capacity for preventive diplomacy).

<sup>112</sup> See Norway: Mission to the UN, *UN: Norway Supported "On Call" Mediation Team is a Valuable Resource* (2 September 2009) <[www.norway-un.org/News/News-2009/110609\\_MSU](http://www.norway-un.org/News/News-2009/110609_MSU)> (Team members serve one-year terms and were first deployed to Kenya in March 2008 during the post-election conflict).

ad-hoc.<sup>113</sup> Third, mediation lacks formal enforcement mechanisms under international law, so compliance is voluntary or coerced through political pressure and other means. Mediation lacks the institutional power and support associated with adjudicatory forums that have a place in the international legal regime. Furthermore, there are no universally accepted procedural rules governing the use and practice of mediation. Private mediation providers such as the American Arbitration Association, Judicial Arbitration and Mediation Services ('JAMS') Inc and, most recently, the International Mediation Institute, have developed processes for certifying mediators in the practice of international mediation.<sup>114</sup> 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.

Addressing this challenge requires creative thinking about how, in the absence of precedent, to achieve this aim. Should there be a centralized, standing mediation body for international disputes akin to what the ICJ provides for judicial settlement? Or should existing IDR forums—the WTO, ICSID, PCA, etc—add mediation to the methods that they provide? How will mediation, an interest-based process, fit into the existing international legal framework? These and many other questions will need to be addressed in order to meet this challenge.

## V. OPPORTUNITIES

With the changes and challenges facing IDR in an era of globalization, there are also emerging opportunities for enhancing and improving global capacity for IDR. This section considers two possibilities.

### A. *Integrating IDR*

The complexity of international disputes has driven new IDR approaches. This development can be understood as the integration of IDR, which

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<sup>113</sup> Christine Chinkin, 'Alternative Dispute Resolution Under International Law' in Malcolm Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart Publishing, 1998) 124.

<sup>114</sup> See, eg, International Mediation Institute, *How to Become IMI Certified*, <[www.imimmediation.org/how-to-become-imi-certified](http://www.imimmediation.org/how-to-become-imi-certified)>.

occurs when two or more methods are applied to the same dispute sequentially or when aspects of different methods are integrated into a single process.<sup>115</sup> Although judicial settlement and arbitration have different institutional and procedural structures from mediation, conciliation, and facilitation, the combination of rights based and interests based processes offer important contributions that should be recognized.<sup>116</sup>

Integrated approaches can maximise stakeholder participation by incorporating traditionally excluded parties (non-State actors) into the process. Interest-based methods provide venues for resolution when the law remains uncertain and cannot serve this function.<sup>117</sup> International judicial forums are not well suited to resolve multiparty complex disputes. But mediation lacks a powerful and authoritative framework for compelling participation and enforcing agreed-upon resolutions. The answer is not to privilege one process over another, but rather to integrate them into a mutually reinforcing approach. 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 mediation that involved local stakeholders.<sup>118</sup> Integrated approaches enjoy the flexibility to consider a broad range of extralegal issues deemed inappropriate for a court.<sup>119</sup> Thus, combining subcomponents of

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<sup>115</sup> Spain, above n 76; see also Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Hart Publishing, 2009).

<sup>116</sup> See Christine Chinkin, 'Alternative Dispute Resolution Under International Law' above n 113 (describing the benefits of integrating non-binding dispute resolution methods (eg, conciliation) into environmental treaty compliance regimes); Mari Koyano, 'Effective Implementation of International Environmental Agreements: Learning Lessons from the Danube Delta Conflict' in Teruo Komori and Karel Wellens (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Ashgate, 2009) 259, 285–88 (using a case study of the Danube Delta Conflict to illustrate how environmental conflict management and implementation of agreements apply the combination of dispute resolution methods, specifically fact-finding and facilitation).

<sup>117</sup> See Nilaratna Xuto, 'Thailand: Conciliating a Dispute on Tuna Exports to the EC' in Peter Gallagher et al (eds), *Managing the Challenges of WTO Participation: 45 Case Studies* (Cambridge University Press, 2005); see also *DSU*, 1869 UNTS 401 art 24(2) (requiring that at the request of a least-developed country, the Director-General or Chairman of the DSB offer good offices, conciliation, and mediation before a request for a panel where an appropriate solution has not resulted during the course of consultations).

<sup>118</sup> *Frontier Dispute (Burkina Faso v Mali) (Judgment)* [1986] ICJ 554.

<sup>119</sup> John S Dryzek and Susan Hunter, 'Environmental Mediation for International Problems' (1987) 31 *International Studies Quarterly* 87 (explaining why mediation is an effective method for dealing with decentralized aspects of the global legal and political order).

different IDR processes can result in new and more effective ways to resolve disputes.<sup>120</sup>

For example, in the *Malaysia-Singapore* case, the International Tribunal for the Law of the Sea ('ITLOS') integrated fact-finding and facilitation into its judicial approach by calling for 'the establishment of a group of independent experts to study the land reclamation issues' and make recommendations.<sup>121</sup> In the *Pedra Branca* dispute between Malaysia and Singapore, both countries engaged in negotiations prior to and after referring the case to adjudication before the ICJ.<sup>122</sup> Approaches such as these are reforming the current judicial network<sup>123</sup> and allowing for increased coordination between international legal institutions and international political ones.<sup>124</sup> If adjudication may lead to heightened hostility between nations by making it more difficult to resume talks if a party refuses to accept a final judicial decision, then interest-based methods offer alternative approaches.<sup>125</sup> In the *Thailand-Philippines* dispute over tuna exports, for example, the parties preferred consultations facilitated by the

<sup>120</sup> See, eg, Surya P Subedi, 'WTO Dispute Settlement Mechanisms as a New Technique for Settling Disputes in International Law' in Duncan French et al (eds), *International Law and Dispute Settlement* (Hart Publishing, 2010) 173 (describing the WTO DSB mechanism as a blend of diplomacy negotiation, mediation, arbitration and adjudication that is 'neither fully judicial nor completely a non-judicial mechanism').

<sup>121</sup> Mackenzie et al, above n 4, 68.

<sup>122</sup> The countries agreed to submit the dispute to the ICJ through a negotiated Special Agreement; see S Jayakumar and Tommy Koh, *Pedra Branca: The Road to the World Court* (NUS Press, 2009) 35 (detailing the negotiations leading up to the resolution by the ICJ); Tan Hsien-Li, 'Case Concerning Sovereignty Over Pedra Branca/Palau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)' (2008) 12 *Singapore Yearbook of International Law* 257 (2008) (describing the territorial dispute in detail); Coalter G Lathrop, 'International Decisions: Sovereignty Over Pedra Branca/Palau Batu Puteh, Middle Rocks and South Ledge' (2008) 102 *American Journal of International Law* 828 (examining the ICJ's treatment of the dispute and its resolution).

<sup>123</sup> Christine Chinkin, 'Increasing the Use and Appeal of the Court' in Connie Peck and Roy Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff Publishers, 1997) 43–56; Cesare Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2009) 41 *New York University Journal of International Law and Policy* 755, 756–57 (discussing the trend over the last decade from a cluster of adjudicatory institutions into a network where courts are coordinating to avoid conflict of jurisdiction and jurisprudence).

<sup>124</sup> Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 44 *International and Comparative Law Quarterly* 848.

<sup>125</sup> See Thomas J Dillon, 'The World Trade Organization: A New Legal Order for World Trade?' (1994) 16 *Michigan Journal of International Law* 349, 396–97 (arguing that adjudication may heighten tension between parties due to its adversarial nature and undermine the effectiveness of negotiation if it is unsuccessful).

European Union Trade Commissioner and mediation to the WTO DSB's adjudicative approach.<sup>126</sup>

Integrated IDR also promotes a more accurate descriptive understanding of the field. All too often, States conceive of their IDR options as a binary choice between the categories of binding legal methods or consensual, non-binding diplomatic-political methods. This bifurcation of approaches occludes the capacity to see how and when multiple dispute resolution methods should be used to address legal and extralegal issues within a conflict. But the evolution of IDR practice provides an opportunity to reinforce the interconnected relationship between legal and political aspects of a dispute by designing institutions that treat both aspects in an integrated manner.<sup>127</sup> Redefining the conceptual understandings of IDR methods in this way may help build adaptive flexibility and mitigate ways that the IDR system is slow to adapt to practical realities.

### B. *Encouraging Normative Discourse on Peace & Justice*

The changes and challenges facing IDR present an opportunity to reevaluate the normative purpose of IDR as a substructure of international law. As its history shows, IDR developed in a world where peace had to be secured between States.<sup>128</sup> Globalization has made today's reality more complex.

First, the evolution of IDR has blurred the lines between public and private international law, raising questions about who is responsible for peace.<sup>129</sup> The PCA, for example, has recognized its part in providing a peacemaking function when adjudicating disputes that are a part of ongoing armed conflicts.<sup>130</sup> Is this an isolated example or might there be an emerging practice that international courts and tribunals have some

<sup>126</sup> Xuto, above n 117, 555, 560 (detailing the agreement by the parties to submit to mediation, should the consultations fail).

<sup>127</sup> See Vicuña, above n 36, 85–87 (discussing the advantages of the WTO's DSB unique integrated design).

<sup>128</sup> Hans Kelsen, *Peace Through Law* (University of North Carolina Press, 1946); Tom Farer, 'Law and War' in Cyril Black and Richard Falk (eds), *The Future of the International Legal Order* (Princeton University Press, 1971) 15.

<sup>129</sup> *Charter of the United Nations* art 36(3) ('legal disputes should as a general rule be referred by the parties to the International Court of Justice').

<sup>130</sup> See eg, *Abyei* (2009) 48 ILM 1258 (Judge Al-Khasawneh). See also Judge Awn Shakat Al-Khasawneh at [202] (discussing the missed opportunity for promoting true peace and reconciliation of the parties and noting that '[i]nternational law and indeed law in general sometimes provide only simple recipes for complex situations where populations and tribes intermingle and where the livelihood of certain groups transcends borders').

obligation for promoting peace?<sup>131</sup> If so, what should distinguish the responsibility of the ICJ, as an organ of the UN, from that of institutions like the WTO? And how might this normative aim threaten their adjudicatory functions?

A second query concerns the relationship between peace and justice.<sup>132</sup> The peace–justice tension arises, for example, in international criminal proceedings between those who seek criminal accountability and those who are engaged in peace promotion. The question of whether to afford amnesty to promote peace at the expense of pursuing justice is a common challenge.<sup>133</sup> In Uganda, there were concerns that the ICC's indictments against the Lord Resistance Army's Joseph Kony would disrupt the possibility of peace talks.<sup>134</sup> Envisioning international courts and tribunals as part of the regime for global peace promotion, informs a new relationship between peace and justice. Ultimately, IDR 'embod[ies] the authentic meaning of justice: to attain peace through effective dispute resolution.'<sup>135</sup> Since both are essential aims of the international legal system, the relevant question is how to achieve the proper balance, which the emerging field of transitional justice (eg, Rwanda's Gacaca courts and South Africa's Truth and Reconciliation Commission) considers.<sup>136</sup> These and other aspects of the impact of globalization on IDR require initiating a discourse about what its normative purpose should be in today's world.

<sup>131</sup> Anna Spain, 'Examining the International Judicial Function: International Courts as Dispute Resolvers' (2012) 34 *Loyola of Los Angeles International & Comparative Law Review* 101.

<sup>132</sup> See Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006).

<sup>133</sup> See, eg, *Prosecutor v Morris Kallon, Brima Bazzy Kamara*, (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), 13 March 2004); Diane Orentlicher, 'Amicus Curiae Brief Concerning the Amnesty Provided by the Lomé Accord,' SCSL-2003-07, Submission in *Prosecutor v Morris Kallon*, (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-15-AR72(E), 13 March 2004); Ronald C Slye, 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002) 43 *Virginia Journal of International Law* 173.

<sup>134</sup> See Adam Branch, 'Uganda's Civil War and the Politics of the ICC's Intervention' (2007) 21 *Ethics & International Affairs* 179.

<sup>135</sup> Rafael Domingo, above n 72, 112.

<sup>136</sup> See Ruti G Teitel, 'Transitional Justice Genealogy,' (2003) 16 *Harvard Human Rights Law Journal* 69–94; Christine Bell, 'Transitional Justice, Inter-disciplinarity and the State of the "Field" or "Non-Field"' (2009) 3 *International Journal of Transitional Justice* 5.

## VI. CONCLUSION

Globalization presents changes, challenges and opportunities for the discipline of international dispute resolution and is redefining the paradigm for global peace and security. The UN Charter has served as guidance for the role of international dispute resolution in the 20th century. But a changing world order demands transforming old tools for a new era. Now is the time to advance international dispute resolution to meet the complexities of the 21st century.