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**GLOBAL LEGAL INTEGRATION:**

**THE EMERGING ARCHITECTURE OF DISPUTE RESOLUTION IN AN ERA OF CLIMATE CHANGE**

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ABSTRACT

Climate change is recognized as the greatest emerging threat to global peace and security. As nations and communities prepare to adapt to myriad impacts, our choices may lead to unprecedented international cooperation or conflict. Within this context, this Article critically examines the role of the international legal system, through dispute resolution, to effectively respond to emerging global challenges arising from climate change. The central claim is that the system is not prepared to deal with the class of conflicts driven by climate change – particularly complex, multi-party disputes over natural resources. Close examination reveals serious concerns.

First, the main methods of international dispute resolution are structurally inhibited. International adjudicatory bodies restrict the involvement of non-state actors and are ill-equipped to resolve matters involving extra-legal issues. Mediation, despite being utilized by states more often than any other dispute resolution process, lacks the institutional capacity to enforce agreements and encourage compliance with outcomes over the long term. Second, the menu of dispute resolution options for inter-state conflicts is commonly, and falsely, perceived to be dichotomous – the idea that states must engage in one process or another. This obscures the need to focus on how and when multiple dispute resolution methods should be used together. This analysis suggests that significant reform is required if the global system of dispute resolution is going to effectively prevent conflict in a world where resources are increasingly scarce.

In response, this Article introduces the concept of global legal integration – between dispute resolution methods and institutions – and argues why it can provide an attractive and attainable step toward effective reform. For example, in *In Case Concerning Frontier Disputes*, the governments of Mali and Burkina Faso reached a cease-fire agreement only after the ICJ ordered them to mediation. The combination of legal and interest-based dispute resolution efforts brought an end to the armed conflict. By examining such nuances, this Article seeks to raise awareness about the need to increase understanding of how multiple dispute resolution methods work together, achieve complementarity and promote subsidiarity. It also addresses three resulting challenges to fundamental aspects of international law. First, effective dispute resolution demands the inclusion of non-state actors that will be affected by resource scarcity and, in doing so, disrupts the classical notion of a state-centric international legal system. Second, actions required to resolve conflict may take place without or even against state consent, thus challenging the state as the sole source of power, authority and legitimacy in international law. Third, resolving resource disputes will demand a system that protects and enforces public interests, even when they conflict with those of states. By establishing a clear descriptive account of the emerging architecture of dispute resolution, this Article strives to advance global capacity to resolve disputes in an era of climate change.

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*In a time of war the law falls silent.*

-Cicero

## INTRODUCTION

Natural resources are vital to human survival and are necessary for global peace and security. In an era of climate change, these resources will become increasingly scarce. From drought to sea-level rise, impacts will affect the amount and availability of water, food and sources of energy. Nations and individuals will face difficult decisions about how to respond, choices that can lead to unprecedented global cooperation or to war. In a world where there is not enough water or oil, will the rule of law prevail or will nations take up arms to protect and acquire limited resources? International law and dispute resolution serve as tools to influence these choices and shape human behavior. But is the global legal system, is any legal system, prepared for the nature and scope of challenges that may arise from climate change?

The central claim of this Article is that international legal system of dispute resolution is not prepared to adequately address and resolve disputes arising from climate change. International adjudication is designed to resolve disputes over legal rights and lacks the capacity to address the class of conflicts driven by climate change - complex, multi-party disputes involving political and environmental complications. International judicial bodies like the International Court of Justice (ICJ) lack the authority to address non-legal aspects of a dispute and thus fail to fully resolve most cases.<sup>1</sup> Furthermore, many forums lack jurisdiction over non-state actors who are important stakeholders in such disputes.<sup>2</sup> Often, legal matters are settled, but dormant tensions give rise to renewed conflict in the future. Case studies of inter-state conflicts over natural resources reveal that unresolved disputes drive armed conflict. Once armed conflicts break out, efforts designed to achieve cease-fire agreements and troop withdrawal do not address and resolve underlying causes of the dispute that led to the conflict in the first place.

At the same time, mediation, despite being utilized by states more often than any other process,<sup>3</sup> also has limitations that inhibit its effectiveness. Mediation helps parties resolve underlying causes of conflict through interest-based methods that encourage disputants to develop solutions to their problems (e.g., the allocation of scarce resources). However, these processes are ad-hoc and lack institutional support from the international legal system.<sup>4</sup> Lessons learned are often not recorded and agreements reached remain confidential. Compliance is precarious because it is voluntary and poorly supported by enforcement regimes.<sup>5</sup> Mediation lacks an authoritative and powerful global institution capable of encouraging participation among states and non-state actors alike and encouraging and enforcing compliance with agreed upon outcomes.

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<sup>1</sup> Cesare Romano, *THE PEACEFUL SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES* 323 (2000).

<sup>2</sup> Rosalyn Higgins, *The ICJ, The ECJ, and The Integrity of International Law* 52 ICLQ 1 at 8 (2003).

<sup>3</sup> See Jacob Bercovitch, *REGIONAL GUIDE TO INTERNATIONAL CONFLICT AND MANAGEMENT FROM 1945-2003* 13 (2003).

<sup>4</sup> See Edward Luttwak, *Give War A Chance*, FOREIGN AFFAIRS (July/August 1999) arguing that dispute settlement prevents lasting peace by interrupting wars between minor powers, which should be allowed to run their course.

<sup>5</sup> For example, voluntary enforcement regimes that are well supported, like Non-Compliance Procedures (NCP's) of multilateral treaties, enjoy high rates of compliance.

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Furthermore, the menu of dispute resolution options for inter-state conflicts is commonly, and falsely, perceived to be dichotomous – the idea that states must engage in one process or another. Adjudication is often presented as an inimical alternative to informal consensual practices like mediation. This obscures the need to focus on how and when multiple dispute resolution methods should be used together.

In responding to these concerns, this Article argues that a new integrated architecture of global dispute resolution is required. Using different methods of dispute resolution together helps overcome some of the flaws mentioned above.<sup>6</sup> The concept of global legal integration highlights the need to understand how dispute resolution methods work together, when they should be used and whether this leads to more desirable outcomes. More than identifying the menu of options for international dispute resolution, integration looks at how architectural elements such as process design and timing affect outcomes. Integrating methods also requires integrating international legal and dispute resolution bodies so that mediators and judges can work together in a coherent way. An example in the United States that integrates litigation and mediation is known as the “multi-door courthouse.”

This new architecture challenges international law to recognize the importance of non-state actors and in doing so, questions the benefits and costs of having a closed, state-centric system.<sup>7</sup> A system that limits the participation of non-state stakeholders in international decision-making hinders effective dispute resolution. Sometimes solving global problems may require nations to comply with international laws absent their consent, which challenges fundamental notions about the sources of legitimacy, authority and power.<sup>8</sup> Furthermore, an effective system must sometimes elevate public interests over those of states. Resolving international disputes over resources and other issues raises questions such as these about the emerging purpose and scope of international law in an era of climate change.

The normative purpose of this Article is to encourage thinking about the structural evolution of international law through the important example of climate change, conflict and dispute resolution. International law has always developed in response to international conflicts, with the pivotal examples of the Treaty of Westphalia and World War II. With regard to climate change, *responding* is not sufficient. The world cannot afford to wait for the international legal system to retroactively address to the conditions presented by climate change. It must anticipate and prepare for them instead. This is the guiding principle behind this Article’s claim about the emerging architecture of global dispute resolution and the need for global legal integration. Such reform can help international law meet the needs of the future.

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<sup>6</sup> See Michelle Burgis, BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE at 36-37, 52 (2009) discussing the benefits of subsidiarity, such as having diverse forums operating out of local, contextually appropriate settings.

<sup>7</sup> *Id.* See generally Martinus Nijhoff, THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW: AN INTRODUCTION, Frederick Snyder and Surakiart Sathirathai (eds.) (1987).

<sup>8</sup> See Kal Raustiala, DOES THE CONSTITUTION FOLLOW THE FLAG? (2009).

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## I. CLIMATE IN CRISIS: WILL THERE BE WAR?

Will there be more wars in an era of climate change? Now recognized as the greatest emerging threat to global peace and security, impacts from climate change will cause a variety of harsh conditions, including scarcity of water, food and energy resources.<sup>9</sup> The redistribution or absence of these can drive conflict for obvious reasons – they are essential for human survival.<sup>10</sup> Given the enormity of this topic, which has been analyzed in detail elsewhere,<sup>11</sup> this section focuses specifically on the links between climate change, resource scarcity and *international* conflict.

In 2007 the Intergovernmental Panel on Climate Change (IPCC) provided undeniable evidence that the planet is warming. The Earth is warmer than it was in 1860 by approximately .75 C° based on a global average with the years between 1995 and 2006 including 11 of the 12 warmest on record.<sup>12</sup> Scientists concur that most of the warming over the last 50 years is due to human activity,<sup>13</sup> primarily the consumption of fossil fuels and deforestation, which are the core drivers of increased greenhouse gases in the atmosphere.<sup>14</sup>

The impacts from global warming are already manifesting themselves. Warming of the oceans is causing ice sheets to melt more quickly than predicted<sup>15</sup> and existing seawater to expand.<sup>16</sup> Sea-level rise could reach 13 to 16 feet, which would inundate small-island states, coastal cities and low-lying countries like Bangladesh.<sup>17</sup> By mid-century, overall fresh water supplies will decline as storage in glaciers and snow cover disappears,<sup>18</sup> crop yields and food production will decrease and extreme weather events and disease will increase.<sup>19</sup> The estimated economic damage is \$171 billion annually.<sup>20</sup> Europe can expect increased mortality

<sup>9</sup>See REPORT OF THE UN SECRETARY GENERAL, *Climate Change and its Possible Security Implications*, A/64/350 (Sept. 11, 2009) discussing emerging climate change threats to global peace and security.

<sup>10</sup>See Steve Lonergan, *Water Resource and Conflict: Examples from the Middle East*, 33 CONFL. & THE ENV. 2, Nils Petter Gleditsch (ed.) at 375 (1997) discussing the essential nature of water on human survival.

<sup>11</sup>For extended definitions and discussion of natural resource scarcity see Thomas Homer-Dixon, ENVIRONMENT, SCARCITY AND VIOLENCE at 47-52 (1999). See also ENVIRONMENTAL CONFLICT, Paul Diehl and Nils Petter Gleditsch (eds.) at 257-272 (2001) discussing nine common problems with research on scarcity and conflict.

<sup>12</sup> IPCC, 2007: *Summary for Policymakers* in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M.Tignor and H.L. Miller (eds.) Cambridge University Press at 10 (2007) available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf> IPCC.

<sup>13</sup> *Id.* at 5 reporting measurements for global surface temperature since 1850.

<sup>14</sup>*Id.* at 2 reporting that CO2 emissions are primarily caused by human consumption of fossil fuels; emissions of methane and nitrous oxide are primarily caused by agricultural activity and deforestation. On average, CO2 emissions increasing at 7.2 GTC per year in 2000-2005 up from 6.4 GTC per year in the 1990's.

<sup>15</sup> *Id.* at 5 global average sea level rise is speeding up. It rose at an average rate of 1.8 mm per year from 1961-2003 and 3.1 mm from 1993-2003; at 15 late-summer arctic ice sheets are expected to disappear by the end of this century; arctic sea ice has been decreasing by 2.7% per decade and the Arctic ice melt has experienced a 40% loss since 1980.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.* at 11.

<sup>19</sup> *Id.* at 12.

<sup>20</sup> IRIN Humanitarian News and Analysis, *Climate Change Cost Estimates Flawed, Study Says*, (Sept. 1, 2009). The UNFCCC committee of scientists estimating impacts from 2002-2008, led by Martin Perry, estimated that

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caused by heat and disease and sub-Saharan Africa should prepare for a significant reduction in agricultural output due to shorter growing seasons and drought. Such impacts are global, cumulative and irreversible in nature and there are large time lags between the emissions released into the atmosphere today and the effects in years to come.<sup>21</sup>

How these impacts will affect the world's freshwater resources is a major concern. Today, over 1.4 billion people lack access to safe water and 76% of the world's population lives in water-stressed areas.<sup>22</sup> Climate change will exacerbate water scarcity, particularly in Africa, where according to some estimates, most regions will face water shortages by as early as 2030.<sup>23</sup> In addition to impacts, environmental degradation, pollution and poor management practices contribute to scarcity.<sup>24</sup> Given these facts and predictions, global concerns about the security risks of climate change are starting to emerge.<sup>25</sup> Concerns that scarcity and other impacts will lead to war<sup>26</sup> have placed climate change on the national security agenda in the U.S. and in other countries.<sup>27</sup>

While history reveals that nations have waged wars over natural resources,<sup>28</sup> there is no scholarly consensus that resource scarcity will cause conflict, in part because it is difficult to establish a direct causal relationship.<sup>29</sup> Recent empirical analysis about the relationship between climate change, environmental degradation and armed conflict underscores the complications of proving a direct link and causality.<sup>30</sup>

On one side of the debate, scholars argue that scarcity of critical resources drives people to conflict.<sup>31</sup> Empirical studies show that incidents of conflict increased significantly when there is a large or rapid change to an ecosystem or political setting and when existing governance structures cannot effectively manage that change.<sup>32</sup> Thomas Homer-Dixon argues that interstate wars over water are possible but unlikely and such conflicts are more

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annual agricultural sector costs as a result of warming temperatures will reach \$14 billion, \$11 billion for water; \$130 billion for infrastructure reaching an annual total of \$171 billion in costs. Perry argues that these estimates err on the low side because of the short-time frame in which the study was produced.

<sup>21</sup> IPCC Presentation at Pre-COP in Warsaw, *20th Anniversary of the Intergovernmental Panel on Climate Change*, (Feb. 10, 2008) available at <http://www.ipcc.ch/pdf/presentations/pre-cop-warsaw-2-10-2008/pres-warsaw-climate%20-botagaj-1.pdf>

<sup>22</sup> Jerome Delli Priscoli and Aaron Wolf, *MANAGING AND TRANSFORMING WATER CONFLICTS* xxii (2009).

<sup>23</sup> UNFCCC Report 18-19 (2007).

<sup>24</sup> Nils Petter Gleditsch, *ARMED CONFLICT AND THE ENVIRONMENT IN ENVIRONMENTAL CONFLICT* 257-58 (2001).

<sup>25</sup> See Sec. C. Res. 1625 (Sept. 14, 2005) addressing threats to international peace and security at the Security Council Summit. See, e.g., *A Bad Climate for Development*, *THE ECONOMIST* (Sept. 17, 2009).

<sup>26</sup> Gleditsch *supra* note 24 at 320. See generally Thomas Homer-Dixon, *ENVIRONMENT, SCARCITY AND VIOLENCE* (1999).

<sup>27</sup> See Joshua Busby, *Who Cares About the Weather? Climate Change and U.S. National Security*, *SECURITY STUDIES* (2008) and *Bill Ties Climate to National Security*, *BOSTON GLOBE* (Apr. 9, 2007).

<sup>28</sup> *INTERNATIONAL DISPUTE SETTLEMENT*, Bodansky, Brunnee and Hey (eds.) 1037 (2007).

<sup>29</sup> Idean Salehyan, *From Climate Change to Conflict? No Consensus Yet*, 45 *J. PEACE. RES.* 3 (2008) at 315. Ragnhild Nordas and Nils Petter Gleditsch, *Climate Change and Conflict*, 26 *POLITICAL GEOGRAPHY* 627 (2007) at 627-638 calling for better integration (coupling) of climate change and conflict models and increased specificity about the types of expected violence.

<sup>30</sup> *Id.* at 316 referring to the *POLITICAL GEOGRAPHY* 2007 Special Issue.

<sup>31</sup> See Homer-Dixon (1999) *supra* note 26 at 166-68 discussing why scarcity can contribute to violent conflict (in the intra-state context) and that these conditions are likely to increase in the future. See generally James Lee, *CLIMATE CHANGE AND ARMED CONFLICT* (2009).

<sup>32</sup> Priscoli and Wolf *supra* note 22 at 19 citing the TFDD study of 2006.

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likely to be intra-state than inter-state.<sup>33</sup> Nils Petter Gleditsch argues that resource scarcity is a “traditional source of armed conflict”<sup>34</sup> and interstate wars “but less so than political or economic variables.”<sup>35</sup>

On the other hand, those that reject this view argue that because scarcity is not the only factor that will increase the risk of violent conflict it cannot be evaluated in such an absolute manner.<sup>36</sup> Far from causing conflict, some even argue that certain types of resource scarcity increases international cooperation<sup>37</sup> or that resource abundance rather than scarcity is more likely to cause conflict.<sup>38</sup> Scholars representing the view from the global South claim that industrialization, the global trade regime, over-consumption and Western state interests in resources are the acute environmental threat and subsequent causal factor in conflict for developing countries.<sup>39</sup> They also stress that the most vulnerable people of the world have the least capacity to adapt<sup>40</sup> if scarcity and conflicts occur.<sup>41</sup>

Data about all kinds of international conflicts since World War II provides additional insights. Most conflicts occurred between 1956 and 1985 as a result of decolonization and the Cold War, which kept the peace in Europe but did not prevent war in other places. More interstate conflicts took place in the Middle East, for example, than in any other region despite the fact that it has the second-fewest states of any region.<sup>42</sup> Recent conflicts have resulted from ethnic violence and terrorism.<sup>43</sup> The good news is that the total number of international conflicts has been in decline since the mid-1980s.<sup>44</sup> Between 1996-2003, both interstate and intrastate conflicts dropped significantly, with only 29 events occurring during that period.<sup>45</sup>

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<sup>33</sup> Thomas Homer-Dixon, *Environmental Scarcities and Violent Conflict: Evidence from Cases*, 19 INTERNATIONAL SECURITY 1 (1994) pp. 5-40. *But see* Paul Diehl and Nils Petter Gleditsch (eds.), ENVIRONMENTAL CONFLICT 263-65 (2001).

<sup>34</sup> Nils Petter Gleditsch, *Environmental Conflict and the Democratic Peace*, 33 CONFL. & ENV. 91 (1997).

<sup>35</sup> Diehl and Gleditsch (2001) *supra* note 33 at 256.

<sup>36</sup> *Id.* at 317 citing Barnett & Adger (2007) at 644 and noting other critical views of the resource scarcity-conflict link from Gleditsch (1998) and Urdal (2005).

<sup>37</sup> Priscoli and Wolf (2009) *supra* note 22 at 19 arguing that since parties generally recognize that water is too important to fight about they are more likely to respond with cooperative behavior than with conflict.

<sup>38</sup> Diehl and Gleditsch (2001) *supra* note 33 at 257 citing Indra de Soysa’s study finding empirical support that resource abundance in least developed nations is more likely to lead to civil war than resource scarcity. *See also* Simon Dalby, *Geopolitical Knowledge: Scale, Method and the “Willie Sutton Syndrome,”* 12 GEOPOLITICS 183 at 183-91 (2007); Idean Salehyan, *From Climate Change to Conflict? No Consensus Yet,* 45 J. PEACE RES. 3 (2008) at 316 and note 1 citing de Soysa, Collier & Hoeffler, Le Billon, and Ross.

<sup>39</sup> Narottam Gaan, *Environment and Conflict: The South’s Perspective,* 28 STRATEGIC ANALYSIS 827 (Sept. 1995) at 832-33.

<sup>40</sup> *Id.* at 21 defining adaptive capacity as the ability of a system to adjust to climate change (including climate variability and extremes) to moderate potential damages, to take advantage of opportunities, or to cope with the consequences. Vulnerability is the degree to which a system is susceptible to, and unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the character, magnitude, and rate of climate change and variation to which a system is exposed, its sensitivity, and its adaptive capacity. *See* Simon Dalby, ENVIRONMENTAL SECURITY 51 (2002) discussing the results of Gunther Baechler’s ENCOP project “finding that states with the lowest HDI’s had the highest proneness to warfare.”

<sup>41</sup> Narottam Gaan (1995) *supra* note 39 at 832-33.

<sup>42</sup> Bercovitch (2004) *supra* note 3 at 9 noting that there are 17 states in the Middle East.

<sup>43</sup> Bercovitch (2004) *supra* note 3 at 8-12.

<sup>44</sup> Bercovitch (2004) *supra* note 3 at 16.

<sup>45</sup> *Id.*

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States resort to armed conflict over threats to their sovereignty, territory and national security. Yet many international conflicts also involve disputes over territory and boundaries.<sup>46</sup> Underlying disputes about use of or ownership of natural resources are often a driving factor. Sometimes conflicts occur when nations send armed troops to border regions where local populations are struggling to exert control over a natural resource. In other instances internal demands for resources drive expansion, increasing potential for conflicts, especially in disputed boundary zones.<sup>47</sup>

Once conflicts break out, they can become entrenched if not resolved quickly, which makes timely and effective settlement venues critical. Seldom are there clear victories. Of the 343 total international conflicts occurring between 1945-2003, approximately 50 conflicts ended with a clear win for one side.<sup>48</sup> Meanwhile the costs of conflict are born by civilians and neutral states alike and continue long after the militarized fighting has ceased.<sup>49</sup>

## II. THE ARCHITECTURE OF GLOBAL DISPUTE RESOLUTION

Given such circumstances, is the international legal system - is any legal system - prepared to address the scope and nature of disputes that may arise in an era of climate change? This section argues in the negative, that the existing system lacks the capacity to adequately resolve international resource disputes. Due to the numerous forms of dispute resolution provided for under international law, the analysis here is limited to two: adjudication and mediation.

Historically, the international legal system and corresponding dispute resolution processes evolved in response to wars. In the wake of World War II, new laws were created to place prohibitions the use of force<sup>50</sup> and the UN Security Council was empowered to enforce these provisions.<sup>51</sup> Norms and institutions developed to protect civilians during wartime,<sup>52</sup> promote human rights and prevent mass atrocities.<sup>53</sup> Under the Rules on State

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<sup>46</sup> Diehl and Gleditsch (2001) *supra* note 46 at 256. *See also* Rongxing Guo, TERRITORIAL DISPUTES AND RESOURCES MANAGEMENT A GLOBAL HANDBOOK Preface (2007). Guo's methodology documented boundary and territory resource disputes around the world since WWII through a survey of nearly 200 "disputed areas." Guo presents a short narrative of the causes and consequences of each dispute and the subsequent conflict resolution efforts (xiii-xiv Introduction); offers various definitions of boundary including natural features (mountain, river, lake, sea or other water body) (3-4); supports the idea that resource scarcity and territorial disputes are linked (9); and lists approaches "successfully applied to the peaceful resolution of territorial disputes as well as to the management of natural and environmental resources in disputed areas."

<sup>47</sup> Guo at 9 citing Choucri (1979) and North (1989) suggesting that internal demands on resources cause expansion and increase likelihood of conflicts arising from "hostile lateral pressure."

<sup>48</sup> Bercovitch (2004) *supra* note 3 at 11.

<sup>49</sup> Hensel (2004) stating that resource poor regions will create highly competitive environments where the creation of institutions to manage conflict will be lacking or ineffective. Resource rich regions will be faced with fewer potential conflicts situations overall – enhancing prospects for the creation of institutions to manage conflicts that do arise. Demand-induced scarcity leads to supply induced scarcity (degradation) creating increased overall scarcity and therefore competition. When combined with inequality to resource access structural scarcity increases the chance for violence. *See also* Guo (2007) at 9 and Gleditsch (2001) at 253.

<sup>50</sup> UN CHARTER ART. 2(4).

<sup>51</sup> UN SEC. C. CHAPTER VI allows for coercive measures such as sanctions and the use of force.

<sup>52</sup> *See* the 1975 CONVENTION ON BIOLOGICAL AND TOXIC WEAPONS banning the use or stockpiling of biological weapons and the 1993 CONVENTION ON CHEMICAL WEAPONS banning the use, production or stockpiling of poisonous gas or lethal chemical weapons and requiring the disposal of existing stockpiles by 2010.

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Responsibility, if a state commits a wrongful act against another the parties engage in dispute settlement.<sup>54</sup> More generally, Article 33 of the UN Charter calls for all nations first to pursue peaceful means of dispute settlement and, if efforts fail, to refer the matter to the UN Security Council.<sup>55</sup> Many institutions now serve this aim.<sup>56</sup> In the treaty-making realm, nations include provisions governing dispute settlement in agreements,<sup>57</sup> which have been repeatedly noted in UN General Assembly Resolutions.<sup>58</sup> Dispute resolution terms have become so prolific that some states have argued against their inclusion on the grounds that the requirement is so obvious under international law that it does not need to be restated in the treaty.<sup>59</sup>

While these developments suggest that international law has encouraged a global norm of peaceful dispute settlement, significant conflicts prevail. Since 1945, there have been 228 interstate conflicts and 115 civil wars, not to mention numerous nonviolent disputes.<sup>60</sup> International adjudication and mediation alike reduce political tensions and settle legal disputes but seldom *resolve* conflicts. In describing how each of these methods work in the international context, the section below addresses some reasons for this as relevant to resource disputes.

## A. ADJUDICATION

### 1. *Definition, Sources of Law and Process*

International adjudication is generally defined as the resolution of legal disputes between states through the binding decision of an adjudicatory body.<sup>61</sup> The term refers to decisions produced through both judicial settlement and arbitration. Adjudication is a rights-based process designed to protect and enforce legal rules.

One challenge of this rights-based approach is that the sources defining and protecting rights related to natural resources are poorly developed in international law and, thus, receive poor treatment in adjudication forums. There is little consensus about the definitions of international environmental disputes<sup>62</sup> let alone the sources and functions of

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<sup>53</sup> See generally UNIVERSAL DECLARATION ON HUMAN RIGHTS; GENEVA CONVENTIONS OF 1949; THE RESPONSIBILITY TO PROTECT DOCTRINE.

<sup>54</sup> ART. ON STATE RESPONSIBILITY 42 and 48 noting the requirements for breach and standing (e.g. Did the state suffer a remediable injury? or did the international community suffer generally i.e. obligation to use water responsibly).

<sup>55</sup> UN CHARTER ART. 33(1) and (2) calling for the use of peaceful settlement *available at* <http://www.un.org/en/documents/charter/chapter6.shtml>.

<sup>56</sup> See PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS *available at* <http://www.pict-pecti.org>.

<sup>57</sup> See e.g., 1992 UNFCCC ART. 14 (reaffirmed in KYOTO PROTOCOL ART. 19) stating "...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"; THE CONVENTION ON THE PREVENTION OF MARINE POLLUTION BY DUMPING OF WASTES AND OTHER MATTER and the UN CONVENTION ON THE LAW OF THE SEA also reaffirmed the principle of peaceful settlement of disputes. See Dominique Alheritiere, *Settlement of Public International Disputes on Shared Resources: Elements of a Comparative Study of International Instruments*, 25 NAT. RESOURCES J. 701 (1985) at 703-05 citing ART. XI, MARINE POLLUTION (London, 1972) (entered into force 1975).

<sup>58</sup> *Id.* at 705.

<sup>59</sup> *Id.* at 705.

<sup>60</sup> Bercovitch (2004) *supra* note 3 at 8, Table 1: Characteristics of International Conflicts.

<sup>61</sup> Romano (2000) *supra* note 1 at 91.

<sup>62</sup> *Id.* at 13-29 discussing variations on definitions of the terms international, dispute and environment.

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international law pertaining to them.<sup>63</sup> For example, addressing problems of climate change under international law is difficult because the law does not adequately deal with global common areas – the atmosphere for instance - that do not directly affect legal rights or interests of any one state.<sup>64</sup> International customary law offers little clarification. The Rules on State Responsibility provide remedies for harms that did not directly impact a state claimant, but these remedies are limited, difficult to enforce and do not apply to non-state actors.<sup>65</sup> Article 48 supports *erga omnes*<sup>66</sup> or allowing “one state to invoke the responsibility of another state if the obligation breached is owed to a group of states and is established for the protection of a collective interest or if the obligation is owed to the international community as a whole” and, in this way, states may elect to trigger a form of *action popularis* complaint for an environmental matter.<sup>67</sup> However, in practice, there is no strong evidence to support that these provisions are accepted as customary international law.

Treaties require explicit state consent and agreements about natural resources are difficult to reach.<sup>68</sup> Stringent standards that achieve environmental protection are often sacrificed to attain increased participation.<sup>69</sup> As a result, provisions can be vague, leading to confusion about questions of breach or enforcement. For example, the 1997 UN Convention on Non-Navigational Uses of International Watercourses calls for equitable and reasonable use, cooperation, exchange of information and duty not to cause significant harm, but fails to clarify what constitutes an appreciable harm under the treaty. Furthermore, the 1969 Vienna Convention on the Law of Treaties allows parties to a multilateral treaty to suspend performance with the violating party upon proving that a material breach occurred, which is difficult to do and largely ineffective for the purposes of environmental protection.<sup>70</sup> Despite these limitations, environmental problems are increasingly handled through treaty-regimes and, consequently, are minimizing the role general international law

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<sup>63</sup> See generally U.S. Agency for International Development, Bureau for Asia and the Near East, *Resolving Water Disputes: Conflict and Cooperation in the United States, the Near East and Asia*, Gail Bingham, Aaron Wolf, and Tom Wohlgenant (1994).

<sup>64</sup> See generally Alan E. Boyle, *Remedying Harm to International Common Spaces and Resources: Compensation and Other Approaches* in HARM TO THE ENVIRONMENT: THE RIGHT TO COMPENSATION AND THE ASSESSMENT OF DAMAGES, Peter Wetterstein (ed.), (1997) at 83; Tullio Scovazzi, *State Responsibility for Environmental Harm* 12 YIEL 43 (2001).

<sup>65</sup> ILC Articles on State Responsibility 48.

<sup>66</sup> *Barcelona Traction* (Belgium v. Spain) (second phase) ICJ REPORTS 3 (1970) at 33 noting general obligations such as prohibition on acts of aggression, genocide, slavery and racial discrimination but environmental matters went unmentioned. See also Tim Stephens, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION 67 (2009) describing the relationship between the ILC's treatment, customary international law and the ICJ's treatment of *erga omnes* for environmental harms. See also James Crawford, INTERNATIONAL LAW AS AN OPEN SYSTEM 341-59 (2002).

<sup>67</sup> Tim Stephens, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION 67 (2009).

<sup>68</sup> See Stern and Druckman (2000) at 263 evaluating past conflict resolution interventions; why agreements on world agricultural prices are difficult to reach; international watershed basins; and weak international compliance on water issues.

<sup>69</sup> Stephens *supra* note 66 at 63 discussing the dangers of weakened environmental laws and how partial compliance with tough laws can lead to better protection than full compliance with less stringent laws.

<sup>70</sup> *Id.* at 70 noting that in the *Gabcikovo-Nagymaros Project* case the ICJ did not find that there was enough of a breach to warrant suspension or exclusion and Japan's expulsion from the 1946 International Convention for the Regulation of Whaling did not remedy its breach (hunting of whales despite the moratorium on commercial whaling) and instead likely resulted in non-regulation of its further whaling activities.

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plays in environmental matters.<sup>71</sup> In part, this can be attributed to the development of judicial features in environmental treaty regimes supplanting the need for general protections through state responsibility and judicial settlement bodies. However, the lauded successes of such developments in international environmental legal regimes also raise concerns about the integrity of the international legal order.<sup>72</sup>

In addition to the lack of appropriate and specific international laws, the *process* of international adjudication of resource disputes suffers from three failings. First, adjudication is state-centric and prohibits or limits the participation of non-state actors, who are often critical stakeholders in a dispute. Second, adjudication is ill-equipped to handle complex, multi-issue disputes involving political, social, environmental and ethical interests.<sup>73</sup> Third, adjudication forums have little experience in hearing, let alone resolving, international resource disputes. A review of the main international adjudication bodies illustrates these critiques.

## 2. *International Court of Justice*

The International Court of Justice is the only international adjudicatory venue with universal jurisdiction. Article 36 of the ICJ Statute, to which all states are a member, establishes the ICJ's universal jurisdiction over legal disputes between states concerning treaty interpretations, questions of international law, facts leading to a breach of an international obligation and subsequent matters of reparations. However, the statute does not mandate state acceptance of its jurisdiction. The ICJ assumes jurisdiction over an interstate dispute in a contentious case through the consent of the state parties, whether express or implied.<sup>74</sup> In this way, the nature of ICJ jurisdiction over contentious cases is subject to some form of state consent and thus is not entirely compulsory.<sup>75</sup> But non-state actors have no recourse to bring a claim before the ICJ in contentious cases although international governmental organizations, such as the UN, do enjoy the ability to seek advisory opinions from the ICJ on legal matters.

In practice, the ICJ lacks the capacity to consider all potential disputes over which it could assume jurisdiction. From 1946-1996, the ICJ assumed jurisdiction over 75 contentious cases and issued 62 judgments and 22 advisory cases and opinions.<sup>76</sup> Since 1996, the number of cases submitted to the ICJ has grown in size, scope and complexity. As of late 2009, the ICJ had thirteen contentious cases and one advisory case pending.<sup>77</sup> Despite such growth, the ICJ remains the venue of last resort,<sup>78</sup> with states preferring it the least to all

<sup>71</sup> *Id.* at 64 noting the reduction of referrals to the ICJ as a result of the rise in environmental treaties and treaty-based compliance mechanisms.

<sup>72</sup> For those who argue that this divergence is occurring see Stephens at 64.

<sup>73</sup> See Richard Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 VA. J. INT'L L. 1 (1982) at 4. See generally R. P. Anand, *STUDIES IN INTERNATIONAL ADJUDICATION* (1969); J. G. Merrills, *THE ROLE AND LIMITS OF INTERNATIONAL ADJUDICATION*, 169-181 (1987); G. Shinkaretskaya, *The Present and Future Role of International Adjudication as a Means of Peacefully Settling Disputes*, 29 INDIAN J. INT'L L. 87(1989).

<sup>74</sup> States may consent through a treaty or through acceptance for legal matters according to the provisions specified in Art. 36(2).

<sup>75</sup> For provisions on the ICJ's jurisdiction for contentious cases between two or more states see ART. 31.1 ICJ STATUTE.

<sup>76</sup> Damrosch et al (eds.) *INTERNATIONAL LAW* (5<sup>th</sup> ed.) (2009) at 583-84.

<sup>77</sup> ICJ docket available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&sort=2&p3=0>

<sup>78</sup> Romano (2000) *supra* note 3 at 92.

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other mainstream forms of dispute settlement.<sup>79</sup> ICJ proceedings are costly and slow, offering often unsatisfactory retroactive justice for a harm that was not prevented from occurring. Furthermore, concerns about diversity, equity and court bias remain.<sup>80</sup>

If these deterrents were not enough, credible arguments have been raised that the ICJ is an ineffective venue for resolving extra-legal disputes, particularly those involving environmental concerns.<sup>81</sup> The ICJ has heard cases about the legality of use of hazardous substances,<sup>82</sup> damages to territory from mining activities,<sup>83</sup> use of watercourses<sup>84</sup> and marine resources.<sup>85</sup> Closer analysis of how the Court approaches these types of cases is telling. In the *Fisheries Jurisdiction Case* (United Kingdom v. Iceland), *Fisheries Jurisdiction Case* (Spain v. Canada) and *Fisheries Jurisdiction Case* (Federal Rep. of Germany v. Iceland) the ICJ held that all states with an interest in fisheries surrounding Iceland had an obligation to monitor marine living resources of that area and to work together to adopt agreed upon measures for conservation and equitable allocation.<sup>86</sup>

An example of the ICJ's treatment of legal case involving an underlying water dispute was *In the Case Concerning Mali – Burkina Faso Border Dispute* involving Mali and Burkina Faso, then Upper Volta under British colonial rule.<sup>87</sup> On December 14, 1974, Malian armed forces attacked Upper Voltan armed forces, leading to intensified military operations on both sides. The initial attack was the result of underlying tensions that existed in the region over a chain of pools sourced by the Beli River. These pools, located along the border region between the two nations, are the only source of fresh water in the region. Complicating the affair was an ongoing dispute about boundary demarcation created by the French during colonialism.<sup>88</sup> Ivory Coast, Senegal and Guinea initiated mediation between the parties. The parties did not reach agreement. Upon appeal, the President of the Organization of African Unity (OAU) established a mediation commission to secure the disputed territory and oversee troop withdrawal. On June 18, 1975 the parties reached an agreement through mediation by the presidents of the commission and the OAU. The mediation agreement recommended an independent demarcation of the frontier zone.<sup>89</sup>

Additional attempts to settle this dispute through negotiation and mediation failed, leading to renewed tensions a decade later. The dispute was referred to the ICJ. While waiting for the verdict, Burkina Faso sent troops and “census takers” into four villages in the disputed Agacher Strip border region.<sup>90</sup> Interpreting the move as an act of aggression, Mali responded in kind, sending armed forces to the region. War broke out on December 25,

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<sup>79</sup> Bercovitch (2004) *supra* note 3 at 26.

<sup>80</sup> See generally Burgis *supra* note 6.

<sup>81</sup> See generally Romano (2000) *supra* note 1; Bilder at 4-5.

<sup>82</sup> *Nuclear Tests Cases*, Judgment, ICJ Rep 19.

<sup>83</sup> *Phosphate Lands in Nauru*, Judgment, ICJ Rep x.

<sup>84</sup> *Gabcikovo-Nagymaros Project*, Judgment, ICJ Rep x.

<sup>85</sup> *Fisheries Jurisdiction Cases*, (United Kingdom v. Iceland) Judgment (1974) ICJ Rep 3; (Germany v. Iceland) Judgment (1973) ICJ Rep. 175.

<sup>86</sup> Stephens *supra* note 66 at 73.

<sup>87</sup> Bercovitch (2004) *supra* note 3 at 77-78 and 92-93.

<sup>88</sup> Bercovitch (2004) *supra* note 3 at 92-93. Mali considered the area to be geographically and ethnically a part of Mali. Burkina Faso contested this on the grounds that the area was demarcated as belonging in their territory by the French colonial authorities.

<sup>89</sup> *Id.* at 78.

<sup>90</sup> Xiong Zhongqi, *Roundup: Peaceful Settlement of Mali-Burkinabe Border Dispute – Good Omen for Africa*, Xinhua General Overseas News Service, Nairobi, Dec. 28, 1986.

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1985 and air attacks and ground battles took place for five days. At least 400 people were killed. An agreement leading to the cease-fire and troop withdrawal was facilitated by the group Non-Aggression and Defense Aid (ANAD). ANAD members continued mediation in January 1986. Meanwhile, the parties awaited the ICJ's decision. The ICJ established a border commission that issued a settlement ending the conflict on January 18, 1986. The ICJ's commission granted the Beli region/Agacher Strip<sup>91</sup> to Burkina Faso and the village of Dioulouma and associated farming hamlets (approximately 40% of the disputed area<sup>92</sup>) to Mali.<sup>93</sup> President Sankara of Burkina Faso acknowledged that dialogue was a superior recourse to war for resolving the dispute and stated his satisfaction with the agreement and intent to honor it.<sup>94</sup> The reaction from Mali underscored the apparent legitimacy of the legal process through the ICJ while acknowledging the need for ongoing cooperation in the region to address the water issues.

In this case, the 1975 mediation was not enough to resolve the dispute and it recurred a decade later ultimately resulting in war. The resource aspect of the dispute (access and use of water) was resolved on legal grounds on the basis of territorial ownership. Ownership relied on the clear demarcation of the border between the two disputing states. Lack of clarity over the border was a factor leading to the armed conflict. This case study illustrates how an unresolved water dispute can lead to armed conflict and why efforts to stop the conflict were different than those required to resolve the dispute. It also demonstrates the complexity of inter-state resource disputes and highlights the need for methods that can address legal and environmental elements.

In this and other cases,<sup>95</sup> the ICJ did not resolve environmental aspects of disputes, nor did it intend to do. The ICJ does make declarations that certain acts are contrary to international law;<sup>96</sup> decides whether a method of delimiting a fisheries zone is valid; determines the violation of the sovereignty of the state over natural resources; decides if a state failed to comply with international environmental standards as a basis for state responsibility;<sup>97</sup> and determines if there has been an unlawful confiscation, destruction and detention of property.<sup>98</sup> These examples demonstrate that the ICJ's contribution to resolving complex disputes is to clarify facts, decide matters of law and, at times, order parties to engage in further methods of dispute resolution.

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<sup>91</sup> *Id.* According to local knowledge, the Agacher Strip is believed to be rich in mineral resources, notably uranium and natural gas.

<sup>92</sup> *Id.*

<sup>93</sup> *Malian and Burkinabe Statement on ICJ Ruling on Border Dispute*, BBC, Text of statements made by President Thomas Sankara, Burkina Faso, (Dec. 22, 1986) ICJ, The Hague.

<sup>94</sup> *Id.*

<sup>95</sup> See ICJ Reports. *Nuclear Tests Case* (New Zealand v. France); *Case Concerning Certain Phosphate Lands in Nauru* (Nauru v. Australia); *Request for an Examination...* (New Zealand v. France); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*; *Legality of the Threat of Use of Nuclear Weapons*.

<sup>96</sup> Ian Brownlie, *Causes of Action in the Law of Nations*, 50 BRIT. Y.B. INT'L L. 13 (1979).

<sup>97</sup> *Trail Smelter* (Canada v. United States of America) (1938 and 1941) 3 RIAA 1911. Further discussion of some broader applications of the Doctrine on State Responsibility in reference to environmental harms are discussed at Stephens *supra* note 66 at 66 reviewing the ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, Report of the International Law Commission, 53<sup>rd</sup> Session, UN Doc. A/56/10 (2001), 43-59 (noted in GA Res. 56/83, 12 December 2001) and UN Doc. A/RES/56/83 (2001).

<sup>98</sup> *Id.*

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### 3. *The Permanent Court of Arbitration*

The Permanent Court of Arbitration (PCA) is the longest standing international arbitration body, having been established by treaty in 1899.<sup>99</sup> Like the ICJ, the PCA offers parties a binding legal settlement process. Unlike the ICJ, arbitration before the PCA offers more procedural flexibility and is available to non-state stakeholders. Parties commonly agree in advance through a treaty or other international agreement that the outcome will be legally binding. Arbitration clauses provide the option of continuing the proceedings in contentious cases if a party fails to appear. The PCA is distinct from the ICJ in its allowance of claims from non-state actors where at least one party to the dispute is a state, state-controlled entity or international organization.<sup>100</sup>

In the recent *Abyei Arbitration* decision issued on July 22, 2009, the Government of Sudan brought a claim against the People's Liberation Army of Sudan. 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 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),<sup>101</sup> 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. Despite the concerns raised in Judge Awn Shawkat Al-Khasawneh's dissenting opinion, the parties accepted the PCA's ruling calling it legitimate, transparent and fair.<sup>102</sup> This arbitration over a regional resource dispute demonstrates one example of how dispute settlement was achieved through allocating ownerships rights and demarcating territory. However, even when legal disputes are resolved this way, other unresolved aspects of the disputes can cause conflicts to reoccur in the future.

### 4. *Treaty-Based Forums*

The creation of treaty-based subject-matter adjudicatory forums has become more pervasive.<sup>103</sup> The World Trade Organization (WTO) created by the Uruguay Round of trade negotiations and replacing the General Agreement on Trade and Tariffs (GATT), set up an

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<sup>99</sup> [http://www.pca-cpa.org/showpage.asp?pag\\_id=363](http://www.pca-cpa.org/showpage.asp?pag_id=363)

<sup>100</sup> Permanent Court of Arbitration available at [http://www.pca-cpa.org/shownews.asp?ac=view&pag\\_id=1261&nws\\_id=274](http://www.pca-cpa.org/shownews.asp?ac=view&pag_id=1261&nws_id=274) (last visited on Sept. 15, 2009).

<sup>101</sup> On January 9, 2005, the Government of Sudan and the Sudan People's Liberation Movement/Army entered into the Comprehensive Peace Agreement.

<sup>102</sup> See Peace Palace Report for summary and explanation of the *Abyei Award* available at <http://peacepalacelibrary-weekly.blogspot.com/2009/07/abyei-arbitration-award.html>.

<sup>103</sup> See INTERNATIONAL CONVENTION RELATING TO INTERVENTION ON THE HIGH SEAS IN CASES OF OIL POLLUTION CASUALTIES ART. VIII Brussels (1969) (entered into force in 1975).

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internal Dispute Settlement Body (WTO DSB) that has compulsory jurisdiction over trade disputes occurring between its 153 members.<sup>104</sup>

Similarly, the UN Convention on the Law of the Sea created its own subject-matter compulsory dispute settlement body, the International Tribunal for the Law of the Sea (ITLOS).<sup>105</sup> The Tribunal has experience with several environmental cases including the *MOX Plant* case where Ireland claimed the U.K. was in breach of the UNCLOS treaty for failure to protect the ocean and the ‘*Volga*’ case between the Russian Federation and Australia over the conservation of fish.<sup>106</sup> Despite its relatively extensive experience with natural resources as compared to other international tribunals, ITLOS ability to hear cases is based on the consent of states, so despite the compulsory treaty provision the Tribunal’s jurisdiction has not always prevailed. For example, in *Southern Bluefin Tuna*, where Australia and New Zealand brought a claim against Japan for overfishing Bluefin tuna in the South Pacific, the Tribunal found that it lacked jurisdiction.<sup>107</sup> The Tribunal’s ruling was based on its interpretation that the Law of the Sea (LOS) Articles 279-282 afforded Japan recourse under a preexisting regional fisheries convention that required Japanese consent to arbitration, thereby supplanting the LOS’s compulsory provisions.<sup>108</sup>

Adjudicatory bodies that derive jurisdiction through treaties are limited to those states who have consented and those subjects within the scope of the treaty. They are not designed to resolve complex, contentious disputes over resources that may involve extra-legal issues and stakeholders that lack standing or that are outside of the forum’s jurisdiction.<sup>109</sup> The difficulties arising from cross-cutting subject-matter disputes were displayed by the WTO’s Dispute Settlement Appellate Body’s ruling in the *Shrimp Turtles* decision and its handling of trade matters that also involved questions of environmental law.<sup>110</sup>

##### 5. Other Forums

Other forums, although not as relevant to the issue of resolving resource disputes, do demonstrate the increased role of non-state actors in international adjudication. For example, the Iran-U.S. Claims Tribunal, set up after the Iran hostage crisis by the 1981 Declaration of Algeria, assumed jurisdiction for claims by both states and private nationals.<sup>111</sup>

<sup>104</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) See Damrosch (2009) at 639. The WTO DSB does not allow a losing party to block adoption of the dispute settlement panel’s findings. States who choose not to comply face retaliation.

<sup>105</sup> See Damrosch (2009) at 638 noting that the Convention was created in 1982 and entered into force in 1994. The 130 plus parties agreed to compulsory jurisdiction that requires parties to submit disputes governed by the treaty to arbitration through the Tribunal.

<sup>106</sup> *International Environmental Law in International Tribunals*, Karen Lee (ed.) in 5 INT’L ENV. REP. (2007) at 421-444 and 445-465 respectively.

<sup>107</sup> For additional cases involving natural resources before the Tribunal see *The MOX Plant Case* (Ireland v. United Kingdom)(Request for Provisional Measures); *The “Volga” Case* (Russian Federation v. Australia)(Application for Prompt Release); *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore) (Request for Provisional Measures) and *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland v. United Kingdom).

<sup>108</sup> See Damrosch (2009) at 640.

<sup>109</sup> See Birnie, Boyle and Redgewell, INTERNATIONAL LAW AND THE ENVIRONMENT 252-53 (2009).

<sup>110</sup> See Damrosch (2009) at 639.

<sup>111</sup> John Collier and Vaughan Lowe, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW 77 (1999).

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In international trade and investment realms, mechanisms like those established under the International Convention for the Settlement of Investment Disputes (ICSID) allow for claims between a state and a national of another state.<sup>112</sup>

## B. MEDIATION

1. *Definition and Process*

Mediation is the dispute resolution method used more than any of the other forms<sup>113</sup> by states in international conflicts.<sup>114</sup> Mediation is a form of third-party dispute resolution that is interests-based, voluntary, confidential, non-binding and ad-hoc in nature.<sup>115</sup> Mediation provides “direct, positive contributions” by helping parties set an agenda, solve problems and deal with timing issues.<sup>116</sup> It can also abate constraints preventing parties from reaching resolution by lower political costs through face-saving and promoting flexible bargaining.<sup>117</sup>

Whereas adjudication is based on determining legal rights, mediation allows for the consideration of the underlying interests and identity often paramount to the dispute. Unlike adjudication, mediation can be used proactively and it is more flexible in its ability to include a variety of stakeholders including NGO’s and private actors. Mediation promotes problem-solving behavior that extends beyond agreement formation and compliance. Mediation enhances the formation of legitimate outcomes that exert normative restraints because participants adopt shared expectations.<sup>118</sup> Mediation also adjusts expectations as disputants conform to shared norms.<sup>119</sup> Mediation addresses underlying ‘human’ elements of conflicts such as emotional and psychological factors that drive decision-making.

Mediation has diminished or settled many international conflicts. Notable success stories include the World Bank’s mediation between India and Pakistan that resulted in the 1960 Indus Treaty and the Vatican’s mediation of 1981 Beagle Channel dispute between Argentina and Chile, which took place after the ICJ failed to resolve the matter.<sup>120</sup>

While international legal norms certainly prompt the widespread use of mediation,<sup>121</sup> like adjudication it seldom *resolves* international disputes.<sup>122</sup> Notable failures include the

<sup>112</sup> *Id.* at 61. See also ICSID at <http://icsid.worldbank.org/ICSID/Index.jsp> noting the provision for providing a venue for arbitration and conciliation of international investment disputes between states and nationals of another state.

<sup>113</sup> See Romano (2000) *supra* note 1 at 46-64 for detailed treatment of the use of negotiation, consultation, good offices, mediation, inquiry and conciliation in international disputes.

<sup>114</sup> Bercovitch (2004) *supra* note 3 at 26.

<sup>115</sup> Carrie Menkel Meadow, *The Trouble with An Advisory System in a Post Modern, Multicultural World*, 38 WM & MARY L. REV. 5 (1996) at 36 discussing how mediation falls between formal litigation and informal discussions on the spectrum of dispute resolution methods.

<sup>116</sup> Brecher and Wilkenfeld, A STUDY OF CRISIS 849 (2000).

<sup>117</sup> *Id.*

<sup>118</sup> Joaquin Tacsan, THE DYNAMICS OF INTERNATIONAL LAW IN CONFLICT RESOLUTION (1992).

<sup>119</sup> Lon L. Fuller, *Mediation-Its Forms and Functions*, in ALTERNATIVE DISPUTE RESOLUTION, Michael Freemant (eds.) 115 (1995).

<sup>120</sup> Guo at 14-15.

<sup>121</sup> Carolyn M. Shaw, *Conflict Management in Latin America*, in REGIONAL CONFLICT MANAGEMENT, Diehl and Leppgold (eds.) 149 (2003).

<sup>122</sup> Greg Mills and Terence McNamee, *Mission Improbable*, CONUNDRUM, Brett Schaefer (ed.) 57-64 (2009).

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efforts of UN missions to prevent new conflicts in Darfur (2007), Afghanistan (2006) and Georgia (1994).<sup>123</sup> Historically, efforts to mediate regional conflicts in Latin America have not been successful.<sup>124</sup>

### 2. *Euphrates River Resource Dispute*

The Euphrates River Resource Dispute between Syria and Iraq provides an example where mediation failed to resolve a resource dispute.<sup>125</sup> Relations between these two countries have involved recurring conflicts. In April of 1975, tensions renewed over the use of water from the Euphrates River with Iraq claiming that Syria's use was excessive and endangering the livelihood of Iraqi farmers. (Both countries were also in a propaganda war over political differences. Iraq took issue with Syria's for its support of the 1959 Mosul Revolt that tried to unseat the Iraqi government.)

The countries convened at an emergency meeting of Arab League foreign ministers where Iraq issued a claim against Syria. Syria responded by cutting off its airspace to Iraq, breaking diplomatic relations and threatening to bomb Aqua Dam. The first mediation attempt occurred on April 22, 1975 by a technical committee formed by the Arab League. Syria withdrew and the mediation failed. A second mediation attempt, tried by Saudi Arabia that May 3, did not produce an agreement. A third attempt, also by Saudi Arabia in June, did lead to a limited agreement about water allocation but the conflict remained unresolved and eventually lapsed.

As this case demonstrates, the process of mediation has limitations.<sup>126</sup> Mediation of international conflicts tends to focus on achieving short-term security goals,<sup>127</sup> as disputants develop cease-fire agreements, arrange for troop withdrawal and pursue other security measures. Achieving these goals detracts from or ignores altogether underlying causes of the dispute.<sup>128</sup> For this reason, critics argue that mediation and similar efforts sacrifice environmental protection in favor of diplomatic resolution.<sup>129</sup>

### 3. *Lack of Institutional Capacity*

Furthermore, international mediation efforts are hindered by a lack of institutional capacity. There is no institutional equivalent to the ICJ or the PCA for mediation. There are no universally accepted procedural rules for how to mediate or standards for qualifying international mediators like those that apply to their arbitrator and judge counterparts. The ad-hoc and confidential nature of mediation lends itself to lack of institutional knowledge. Successful mediations depend on the nature and timing of the dispute, skill and status of the

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<sup>123</sup> *Id.*

<sup>124</sup> Shaw at 149.

<sup>125</sup> Bercovitch (2004) *supra* note 3 at 284-85.

<sup>126</sup> Stephens *supra* note 66 at 72.

<sup>127</sup> See Priscoli and Wolf *supra* note 22 citing Giordano, Giordano and Wolf (2002).

<sup>128</sup> See E. Franklin Dukes, *What We Know About Environmental Conflict Resolution: An Analysis Based on Research*, 22 CONFLICT RES. QUARTERLY 191 (2004) at 192 -193.

<sup>129</sup> Stephens *supra* not 66 at 72.

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mediator and various additional criteria.<sup>130</sup> Without an institution to keep track of lessons learned, there is limited evidence for establishing what works when and why.

Despite being the preferred dispute settlement process by states, failed mediations can exacerbate disputes or make a conflict worse. In the case of the UN, states often seek assistance only when disputes become intractable and are least capable of being resolved.<sup>131</sup> Perhaps the biggest critique of this institutional void is that international mediation efforts suffer from the lack of power to encourage compliance or enforce agree-upon resolutions over the long-term.

### C. MIXED METHODS

Sometimes states engage in multiple methods of dispute resolution for the same matter as the following two cases show.

#### 1. *The Buraymi Oasis Resource Dispute*<sup>132</sup>

In this case, Saudi Arabia and Oman both sought sovereignty and use of a border region containing a fresh water oasis and land with potential oil. The disputed area had remained undemarcated since World War I and colonial times. In the 1940s Oman began oil exploration in the area and Saudi Arabia subsequently claimed sovereignty over the area.

Negotiations between the two governments in 1949-1952 did not resolve the dispute. Saudi Arabia send a small military force to the areas in August 1952 and Oman responded in kind. Armed conflict was avoided when the U.S. Ambassador to Saudi Arabia intervened and a stand-still agreement was reached on October 26, 1952. Continued aggression by both sides led to occupation by Oman and the UK and fatalities. An attempt to arbitrate the dispute in 1954-55 failed despite pressure from the Arab League. Negotiations remained ongoing. In 1959, the UN Secretary-General engaged the parties in mediation, which deescalated tensions and led the way for renewed diplomatic relations in 1963. Military conflicts ceased. The dispute remained ongoing until a settlement agreement was reached in 1975. Oman assumed sovereignty over the area and Saudi Arabia received land with potential oil reserves and sea access.

This case illustrates how mediation by the UN Secretary-General was helpful in deescalating tensions but ultimately the resource dispute resolved through direct negotiations by the parties. It also provides an example where states refused to submit their dispute to arbitration.

#### 2. *The Cameroon – Nigeria Border Incident*<sup>133</sup>

In 1994 conflict broke out between Cameroon and Nigeria over a border dispute over the Bakassi peninsula that also involved fishing rights and claims to offshore oil fields

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<sup>130</sup> Sam Kagel and Kathy Kelly, THE ANATOMY OF MEDIATION: WHAT MAKES IT WORK 114-15 (1989); Kenneth Feinberg, *Mediation: A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S16 (1989).

<sup>131</sup> Saadia Touval, *Why the UN Fails*, 73 FOREIGN AFF. 44 (1994).

<sup>132</sup> Bercovitch (2004) *supra* note 3 at 268-269.

<sup>133</sup> Bercovitch (2004) *supra* note 3 at 85.

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in the Gulf of Guinea.<sup>134</sup> Earlier border disputes in 1961 and 1981 resulting in armed conflicts were successfully mediated by President Daniel Moi of Kenya after negotiations failed. Cameroon agreed to compensate the families of Nigerian soldiers killed in the fighting and both parties agreed to establish an international arbitration panel to look into border delimitation.<sup>135</sup>

The fighting in 1994 continued intermittently until 2000, when leaders from both countries met to discuss peaceful settlement options and agreed to pursue recourse at the ICJ.<sup>136</sup> President Biya of Cameroon pledged to abide by the ICJ's ruling and, in anticipation of the decision, said "[l]et the law be stated."<sup>137</sup> In its October 2002 decision, the ICJ found that Cameroon had sovereignty over parts of the disputed area and delineated the undefined parts of the border.<sup>138</sup> A mixed-commission with representatives from Cameroon, Nigeria and the United States was set up to implement the ruling and facilitate Nigeria's release of 32 villages to Cameroon.<sup>139</sup> UN Secretary-General Kofi Annan was instrumental in supporting the peace process.<sup>140</sup> The Director-General of the National Boundary Commission Alhaji Dahiru Bobbo said "[t]he boundary is well-defined now. There is no ambiguity; and no gendarmes should come and harass people there."<sup>141</sup>

This case demonstrates how conflicts between the same parties over the same issues can reoccur over time. The combination of adjudication by the ICJ, facilitation by the commission and political support by the UN and the United States were all components of a successful process that led to resolution.

### 3. *Case Selection and Limitations*

These two cases were selected from a comprehensive study of 343 international conflicts occurring between 1945-2003.<sup>142</sup> International conflicts were defined as those occurring between states and involving actual military hostilities or significant shows of force.<sup>143</sup> This includes internationalized civil conflicts with verifiable and significant international aspects, including the use of foreign troops or territory to launch attacks;<sup>144</sup> militarized disputes within a country that had the potential to threaten wider regional or international peace and security;<sup>145</sup> and intense political incidents.<sup>146</sup> Of these, 11 cases were

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<sup>134</sup> Thomas Stauffer, *West Africans Skirmish – Over Oil?*, Christian Science Monitor, Mar. 22, 1994 Section Economy at 9.

<sup>135</sup> Bercovitch (2004) *supra* note 3 at 85.

<sup>136</sup> Lloyd's List, *Bakassi Talks*, June 15, 1994, at 12.

<sup>137</sup> Panafrican News Agency, *Cameroon Calmly Awaits Verdict on Bakassi*, *Global News Wire*, Oct. 10, 2002.

<sup>138</sup> Lisa Schlein, *Nigeria-Cameroon Dispute*, Federal Information and News Dispatch, Jan. 31, 2004.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> All African Inc. Daily Trust, *World Court Ruling: Cameroun Ceddes Villages to Nigeria*, Mar. 29, 2004.

<sup>142</sup> Bercovitch (2004) *supra* note 3 at 8.

<sup>143</sup> *Id.* at 7-8

<sup>144</sup> *Id.* at 7 defining internationalized civil conflict as a situation where a second state or states become involved in a violent civil conflict through direct invasion or indirect support of a faction within the country.

<sup>145</sup> *Id.* at 8 defined as a military stand off between two or more states that may or may not escalate into a war. (Cuban Missile Crisis of 1962; Zambia and Zaire in the early 1980's; U.S. and Cambodia in the Mayaguez incident in 1975.)

<sup>146</sup> *Id.* at 8 defining political incidents day-to-day diplomatic disputes that have escalated to a more intense nature observed through political demonstrations, ultimatums or diplomatic insults that pose a threat to international peace and security.

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identified as international resource conflicts, representing 3.2% of the total 343 international conflicts occurring between 1945-2003. Resources were defined as water (rivers, lakes, waterways), minerals (petroleum-based, uranium, other economically valuable ores) or sea (fish, access to waterways, sea-floor/shelf).<sup>147</sup>

The two cases discussed in this Article represent a small selection of international conflicts involving natural resources. Vast numbers of territorial and boundary disputes are not catalogued as resource disputes and therefore were not included in this study. Other natural resources (air, agriculture) not specifically identified in the comprehensive data set, are not represented here. The cases presented are geographically restrictive so direct links should not be attributed to how all nations engage in dispute settlement.

### III. WHERE DISPUTE RESOLUTION FAILS: STRUCTURAL DEFICIENCIES

#### A. REQUIREMENTS FOR EFFECTIVE RESOLUTION OF INTERNATIONAL RESOURCE DISPUTES

Despite the amount and variety of international dispute resolution activity, the system still fails to achieve some of the most important criteria for the effective resolution of resource disputes. Studies on conflict management of both inter- and intra-state resource disputes provide valuable information to this effect.

Resource conflicts arise both from scarcity and the lack of clarity about rights and ownership. In former colonies, where ownership rights of territory were often undefined, scarcity tends to lead to competition, not cooperation. Countries with high poverty and poor governance are more likely to respond to scarcity with conflict.<sup>148</sup> Water conflicts tend to be inter-jurisdictional and trans-boundary, because waterways often are, which can turn local disputes into inter-state conflicts. Violence often results from flashpoints - a single action by the riparian that gives rise to conflict.<sup>149</sup>

Preventing conflict requires resolving disputes before they escalate. Resolving underlying disputes requires solving the problems that are causing them. Designing an effective dispute resolution process requires addressing these various levels. Once armed conflict breaks out, the underlying dispute over natural resources becomes subsumed by concerns about security and “winning.” Removing armed forces from an area after a conflict is necessary to prevent future occurrences.

Once armed conflict has ceased, dispute resolution efforts can focus on building solutions. Because of the unique nature of resource disputes, problem-solving requires building solutions from the bottom-up with buy-in from the top.<sup>150</sup> In forming agreements, preference should be given to those closest to the water or other natural resource and to those responsible for managing it.<sup>151</sup> Although not a resource dispute *per se*, dispute resolution efforts in South Africa, the modern success story, were successful because they followed this method of creating local ownership of problem-solving.

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<sup>147</sup> *Id.* at 345-369. Resource disputes were identified from the total disputes by selecting keywords “water,” “oil,” or “resource” in the Index.

<sup>148</sup> *Id.* at 322.

<sup>149</sup> Priscoli and Wolf *supra* note 22 at 106-108.

<sup>150</sup> *Id.* at 95 and 106.

<sup>151</sup> Mills and McNamee *supra* note 122.

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Given what is required for effective resolution of international resource disputes, why do efforts often fail? And why is there such little understanding about how different dispute resolution methods and techniques work together?<sup>152</sup> What happens when adjudication fails? When and why do states refer disputes to mediation and at what stage? Do conflicts get worse after certain dispute resolution attempts?

**B. INTERNATIONAL DISPUTE RESOLUTION AS A DICHOTOMOUS SYSTEM**

One reason for the system's inability to meet these needs and answer these questions is a structural hurdle that inhibits the system from achieving the criteria for successful resolutions described above. There is an all too common and false perception that international dispute resolution options are dichotomous – dispute resolution is either legal or something else. The non-legal category includes mediation, conciliation, good offices and diplomatic means. The menu of international dispute resolution options encourages disputants to select one method at the exclusion of another. Because of this, there is little awareness let alone understanding of how these methods can and should work together as a system.

In part, this is a matter of description. The relevant literature on international dispute resolution reinforces this view, describing adjudication and arbitration as legally binding methods of dispute resolution as compared to other categories described (often pejoratively) as consensual or voluntary.<sup>153</sup> Such descriptions of international adjudication, mediation and the like reinforce this view because they often present each process as being distinct and also necessarily separate from the other. There is also the matter of limited resources of time, money and political will. In reality, these elements constrain which dispute resolution process and how many a nation can afford to engage in.

As mentioned in Part II, the architecture of the system also presents limitations. The ICJ's jurisdiction over contentious cases is restricted to states, so other actors are driven to arbitration and mediation out of necessity. This exclusion along with the procedural flexibility of arbitration and the subject matter availability of mediation promotes its attractiveness to non-state actors. Meanwhile, states also prefer to use mediation more than adjudication<sup>154</sup> and reserve the ICJ for formal legal matters.<sup>155</sup> The problem with this architecture is that it does not fit the multi-issue nature of international conflicts, which involve questions of legal rights; political, social and economic interests; *and* questions of national identity. The either/or system of dispute resolution does not fit the all-pervasive nature of conflict because none of these processes are designed to address all of the components of a conflict.

Such structural issues have a particular effect on natural resource disputes. Resource disputes involve many stakeholders, in part because natural resources can cross a variety of geographical dimensions and legal jurisdictions<sup>156</sup> and raise complex scientific questions.<sup>157</sup>

<sup>152</sup> See Bilder (1982) *supra* note 73 at 11.

<sup>153</sup> See generally REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA, Malcolm Evans (ed.) (1998) for articles that reinforce this point.

<sup>154</sup> Bercovitch (2004) *supra* note 3.

<sup>155</sup> Romano (2000) *supra* note 1 at 91.

<sup>156</sup> Priscoli and Wolf, *Managing and Transforming Water Conflicts* (2009).

<sup>157</sup> Gary C. Bryner, *FROM PROMISES TO PERFORMANCE: ACHIEVING GLOBAL ENVIRONMENTAL GOALS*. 4-5 (1997).

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Disputes caused by primary issues (resource scarcity) can lead to secondary issues (social effects, loss of livelihood) that drive conflict,<sup>158</sup> making it difficult to establish direct causality for harms. Tensions over natural resources touch upon issues of social, cultural, political and economic rights that are well beyond the scope of the law. Judicial proceedings offer sparse proactive measures to prevent harms from occurring and remedies that cannot compensate the true value of the loss.<sup>159</sup>

Viewed as a dichotomous system, the benefits of each process remain separate. The international legal system provides states and sometimes other actors access to an array of adjudicatory bodies – courts, tribunals, arbitration panels – that provide binding decisions on legal matters. Political matters are referred to a different set of institutions or individuals that provide mediation and other interest-based dispute resolution processes. Though relationships between these branches of the global dispute resolution system exist, they are ill-defined and ambiguous. While differences between dispute resolution processes and the particular strengths of each process are generally understood, comparative analysis is limited. When is one process better than another? When is a combination of methods ideal? What leads a nation to try one method over another? How does this influence outcomes and long-term compliance? It is to considering how to examine these questions that the following section turns.

### III. THE PROMISE OF GLOBAL LEGAL INTEGRATION

#### A. IN FAVOR OF GLOBAL LEGAL INTEGRATION

Climate change is a global problem that requires global solutions. The benefits of multilateral cooperation in the form of an international treaty – The Kyoto Protocol – for achieving global emission reductions have been well enumerated.<sup>160</sup> The benefits of global cooperation with regard to resolving climate change disputes have not. As the previous sections have shown, the existing global legal system of dispute resolution is not prepared, at least with regard to resources, for disputes likely to be more common in an era of climate change. In response, this Article seeks to raise awareness about why improved coordination is necessary and, to do so, introduces the concept of global legal integration.

The reasons why dispute resolution sometimes works and sometimes does not are not always clear. What is clear, however, is that a growing number of actors – states, NGO's, corporations and individuals – are seeking out peaceful ways to resolve international disputes. This is a positive development. But increased amount of global activity has led to pluralism of dispute resolution bodies, rules and outcomes. In the adjudication realm a system where multiple courts may exert jurisdiction over the same subjects and/or issues presents concerns about fragmentation.<sup>161</sup> Inconsistent findings by different judicial bodies

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<sup>158</sup> Gaan at 838 Fig. 2.

<sup>159</sup> See *Threat or Use of Nuclear Force* case where the ICJ found that the threat alone constituted a remediable action, the harm did not have to occur.

<sup>160</sup> Andrew Guzman, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 65-66 (2008).

<sup>161</sup> See Crawford (2004) at 36. See generally Tim Stephens, *Multiple International Courts and the Fragmentation of International Environmental Law*, 25 AUST. YBIL 227 (2006); Y. Shany, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (2003); and Vaughn Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUST. YBIL 191 (1999).

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lead to fragmentation of international legal jurisprudence.<sup>162</sup> For example, The International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case departed from the earlier standard of effective control used by the ICJ in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*.<sup>163</sup> The lack of coherence and consistency raises concerns about the legitimacy of international law.

In response, some have called for a supreme legal system, an approach known as universalism that would manage and control hybrid legal spaces. The ICJ, the only existing body with the authority to take on such a universalist role, lacks the resources and capacity to do so.<sup>164</sup> Universalism could also reduce the diversity of norms, rules, institutions and people operating in the global legal system.<sup>165</sup> It could promote a hegemonic order by creating an institution that unilaterally dictates core purposes and functions of international law (i.e., should the state have primacy) or implements Western notions of global justice.<sup>166</sup> As an alternative approach, Judge Rosalyn Higgins of the ICJ has argued in favor of integration.

**B. THE CONCEPT OF GLOBAL LEGAL INTEGRATION**

But what does global legal integration mean? The concept of integration would necessarily call for legal rules, processes and global institutions that coordinate efforts to maximize outcomes. For dispute resolution, it would mean coordinating the use of multiple methods in a manner that leads to better resolution of disputes. If the ICJ orders parties to mediate and the parties reach an agreement, that outcome should be documented by and consistent with the Court's decision, subsequent implementation by institutions and any other dispute resolution efforts. Integration calls for conflict assessment and process design to develop resolution efforts that effectively respond to the relevant needs. The goal is to critically examine the interplay among dispute resolution processes (primarily adjudication and mediation) to understand what works when and why. It calls for recognizing the menu of options and making informed decisions about how to integrate two or more processes to address the problem. It should be accessible to all critical stakeholders, particularly those in highly vulnerable nations with the least capacity to prevent conflicts. The system should raise awareness about the true costs of conflict, promote coordination and set up an *effective* international system for dispute resolution.

Integration embraces subsidiarity, the principle that processes should be managed at the local level of authority. The importance of subsidiarity in legal systems has been well

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<sup>162</sup> Higgins *supra* note 2 at 18 noting (but disagreeing with) other findings of conflicting international jurisprudence in: ECHR case *Loizidou v. Turkey* (1995) 10 EHRR 99 paras. 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 and New Zealand v. Japan) and *Southern Bluefin Tuna Cases* (New Zealand v. Japan, Australia v. Japan) available at [www.worldbank.org/icsid/](http://www.worldbank.org/icsid/) where an arbitral tribunal revoked earlier provisional measures granted by the Tribunal.

<sup>163</sup> Higgins *supra* note 2 at 19.

<sup>164</sup> Higgins *supra* note 2 at 18-19.

<sup>165</sup> Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2006) at 1190-91.

<sup>166</sup> See Burgis *supra* note 6 challenging the lack of third-world representation at the ICJ and in international judicial institutions.

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recognized.<sup>167</sup> It encourages diversity in settlement procedures and ensures the availability of culturally and contextually appropriate practices.<sup>168</sup> This in turn creates a flexible system capable of adapting to new circumstances and avoiding undue constraint from legal precedents that diverge from demographic and other realities.<sup>169</sup> It also helps mitigate regional differences between judicial forums (e.g., the EU’s emphasis on compliance with the rule of law through courts as compared to the ASEAN focuses on non-judicial dispute settlement) that highlight differences in normative approaches.<sup>170</sup> In the *Gabčíkovo-Nagymaros Case*, ICJ Judge Weeramantry referred to local customary law and negotiation practices on traditional water management in Bali as guidance for the case.<sup>171</sup> In demonstrating subsidiarity, Weeramantry’s opinion also introduces new conceptions of international law in a world of climate change by noting that “...the first principle of modern environmental law is the principle of trusteeship of Earth resources” and the principle of *sic utere tuo ut alienum non laedas*.<sup>172</sup>

Another argument in favor of integration is its ability to promote complementarity. Complementarity is the concept that differing characteristics of dispute resolution processes that can enhance one another. Under the principle of complementarity, integration of dispute resolution mechanisms creates a more effective system.<sup>173</sup> As discussed in Part II, each dispute resolution process has its strengths. Adjudication provides legal settlement that parties generally consider to be legitimate and fair. Mediation is capable of addressing the full array issues that are present in resource disputes. However, each dispute resolution process has its weaknesses. 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 lacks the power, institutional capacity and authority to constrain state behavior and enforce outcomes over the long term.

Through complementarity, the strengths of one system can address the weaknesses of another. The ICJ can enhance the problem-solving qualities of mediation by providing the institutional capacity of a “power framework” that establishes a protective environment as parties engage in the cooperative and sometimes vulnerable venture of solving problems. 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. In the United States, for example, this type of integration occurs through the ‘multi-door courthouse.’<sup>174</sup> Such “process chain” approaches enhance the complementary dynamics

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<sup>167</sup> See 1992 TREATY OF MAASTRICHT establishing the foundations of the European Union, 1985 European Charter of Local Government, European Community Treaty Protocol 30. See also Anne Marie Slaughter, A NEW WORLD ORDER (2004).

<sup>168</sup> Burgis *supra* note 6.

<sup>169</sup> Priscoli and Wolf *supra* note 22.

<sup>170</sup> Higgins *supra* note 3 at 12-15.

<sup>171</sup> Eyal Benvenisti, *Asian Traditions and Contemporary International Law on the Management of Natural Resources*, 7 CHINESE J. INT’L L. 273 (2008) at 277.

<sup>172</sup> *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, I.C.J. Reports 197, 7; Separate Opinion by Judge Weeramantry, 88.

<sup>173</sup> Duke at 194 identifying the benefits and weaknesses of environmental conflict resolution processes used in the U.S. 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 illustrating the reasons why isolation causes ineffective, poor results.

<sup>174</sup> Pioneered by Professor Frank Sander, Harvard Law School in the 1970’s.

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of power and cooperation.<sup>175</sup> In this way, the complex, interdisciplinary and inter-jurisdictional nature of climate change disputes can be well-served through integrating dispute resolution processes.

Thinking about integration means trying to better understand the relationships already exist between international adjudication and mediation. Mediation efforts culminate in judicial settlement and international tribunals refer parties to mediation. For example, in the Aegean Sea Dispute between Greece and Turkey<sup>176</sup> at issue was the ownership of a section of the Aegean Sea. On August 25, 1976 the UN Security Council in Resolution 395 ordered the parties to negotiation and to reach a successful agreement. When negotiations failed, the ICJ assumed jurisdiction over the case and on Sept. 11, 1976 ruled that the Aegean Sea was beyond the territorial waters of both states. The legal matter was decided, but tensions remained between the parties. The 1976 Bern Agreement created a code of conduct to govern future negotiations and the status of this dispute is ongoing. In the Amur River Dispute between China and Russia at issue was the unclear boundary demarcation along a portion of the Amur River and several islands.<sup>177</sup> Although seemingly a legal question, Russia claimed that ownership rights were granted under the 1858 Treaty of Adigun and the 1860 Peking Treaty, the parties resolved the dispute through a joint field-mapping exercise of the disputed area where they agreed to divide the islands in half. This process worked so well, they followed a similar arrangement in the Argon River Dispute.<sup>178</sup>

However, the nature of the relationships between different institutional frameworks and principles and how integration influences certain outcomes is less clear. For example, in the *Laguna del Desierto Dispute* the ICJ's opinion led to a negotiated settlement.<sup>179</sup> But in *Honduras v. El Salvador Dispute*, referral of the dispute to the ICJ temporarily led to the escalation of tensions while the case was pending.<sup>180</sup> While there is a lack of knowledge about integration, where it takes place and how it occurs,<sup>181</sup> recognition of the value of mixed processes is emerging. International treaties, including UNCLOS and the Kyoto Protocol, offer parties a menu of dispute resolution options not just one. This shows that there is not one right approach for dispute resolution. Mapping out how dispute resolution processes and the global institutions that provide them can and should work together remains the focus of future work.

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<sup>175</sup> Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Change in a Common Law Legal System*, 86 IOWA L. REV. 601 (2001).

<sup>176</sup> Guo at 42-43.

<sup>177</sup> Guo at 45-47.

<sup>178</sup> Guo at 50-51.

<sup>179</sup> Guo at 16.

<sup>180</sup> Guo at 16 citing M. Orozco, *Boundary Disputes in Central America: Past Trends and Present Developments*, 14 PENSAMIENTO PROPIO 99 (2001).

<sup>181</sup> See Higgins (2008) *supra* note 2 making the case for legal integration of international judicial bodies but not addressing mediation or other non-legal dispute resolutions methods. For prominent literature on global legalism and related topics see Louis Henkin, *HOW NATIONS BEHAVE* (2d. 1979); Harold Koh, *Why Do Nations Obey International Law* 106 YALE L. J. 2599 (1997) for earlier treatment of the underpinnings of global legalism; Eric Posner, *THE PERILS OF GLOBAL LEGALISM* (2009) for a comprehensive and recent treatment of the subject.

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## IV. ANTICIPATED PERILS

While integration can increase global capacity to respond to disputes in an era of climate change, doing so presents challenges to the existing international legal system. This section addresses three areas of tension - state-centricity, sources of legitimacy and scope - in order to provide an accurate perspective about the challenges of reform.

## A. CHALLENGING THE STATE-CENTRIC SYSTEM

First, pursuing global legal integration will require reconsidering international law as a state-centric system. Global problems are difficult to deal with because they demand effective international cooperation<sup>182</sup> and that sometimes requires overriding particular political interests of individual nations. For the sake of international solutions, states may have to submit national interests to the interests of the global public.<sup>183</sup> Yet international law as presently conceived is state-driven and generally requires state-consent. The international legal system lacks the necessary power and authority to make powerful nations submit to the law when they choose to do otherwise. In the face of such challenges nations have often responded through hegemony, whether regional or unitary.<sup>184 185</sup>

Effective dispute resolution necessitates the inclusion of the myriad of non-state stakeholders affected by climate change. This is not what the existing system is set up to do. Traditionally, states were the only actors recognized as subjects under international law. Only states could participate in creating international law (e.g., through treaty negotiations and state practice recognized as customary law).<sup>186</sup> Only states were entitled to the protection of certain rights (e.g., through rules on state responsibility and diplomatic protection) or to enforce those rights in international dispute settlement forums.<sup>187</sup> Today, this state-centric system is becoming increasingly porous as new actors pierce through the old veil. Through participation in treaty-making and enforcement, international organizations 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.<sup>188</sup> NGO's heavily influence the development of norms. This opening up of the system results in more actors and more participation. 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.

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<sup>182</sup> For early treatment of this topic see Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965) and Russell Hardin, *COLLECTIVE ACTION* (1982). See also Scott Barrett, *WHY COOPERATE? THE INCENTIVE TO SUPPLY GLOBAL COLLECTIVE GOODS* (2007) addressing the distinction between collective action problems and coordination problems.

<sup>183</sup> Todd Sandler, *GLOBAL COLLECTIVE ACTION* 5-6 (2004).

<sup>184</sup> Eric Posner, *THE PERILS OF GLOBAL LEGALISM* 14-16 (2009) describing the use of hegemony as a response to collective action problems.

<sup>185</sup> *Id.* at 24-25 describing the concept of global legalism and its application through multilateral treaty-making, international courts and international legal institutions.

<sup>186</sup> See Vienna Convention on the Law of Treaties art. 53 where states collectively determine the status and content of preemptory norms.

<sup>187</sup> James Crawford, *INTERNATIONAL LAW AS AN OPEN SYSTEM* 35 (2004).

<sup>188</sup> Formerly, individuals (persons and corporations) could only seek recourse against foreign states through their own state via espousal. Today, international legal forums allow private actors to engage in dispute settlement independent of their governing state (e.g. ICSID, IUSCT, ECHR and the ICC).

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In order for international dispute resolution to be effective, it cannot be state-centric in the way that international law traditionally has been. Institutional inability to address all of the stakeholders will paralyze dispute settlement efforts. Currently, the International Court of Justice's universal jurisdiction only applies to states so it is unclear how the Court can deal with other stakeholders appearing in a prior or subsequent mediation. As resource disputes involve individuals and their very livelihoods, so too must the global legal system. In this way, integration calls for the end of a state-centric system.

**B. THE SOURCE DEBATE: LEGITIMACY, AUTHORITY AND POWER**

Second, effective dispute resolution raises questions about the source of legitimacy, authority and power in international law. Under the laws of nations, states could not be bound by international law without their consent. Consent, whether explicit or implicit, thus formed the basis upon which the law had authority. This reinforced the primacy of the sovereign state in the system. Despite its flaws, this afforded states the protection of maintaining power and not being subject to a supreme global authority. Absent an international enforcement body, international law is limited in its ability to force states to obey. Yet recent developments suggest that things are changing. UN Security Council resolutions have imposed obligations on states in regard to peace and security absent consent, effectively serving as a form of international legislation. The Responsibility to Protect Doctrine calls for an expansion of humanitarian law that allows for intervention into a sovereign state when that state has abrogated its duties to protect its civilian population from genocide and other crimes against humanity.<sup>189</sup> These developments suggest that there is a basis of legitimacy other than or in addition to state sovereignty.

A shift in the architecture of the dispute resolution system through global legal integration will require sources of legal authority and legitimacy that extend beyond the state. State consent is not an effective basis for authorizing global governance over matters that affect the public good. Disputes over natural resources strike at the core of individual and state identity. States may elect to opt out of dispute settlement, arguing that it is their sovereign right to do so and that absent consent, participation is not compulsory. Circumstances may require otherwise. Protecting, managing and distributing scarce natural resources requires extensive vertical and horizontal cooperation. A system that allows states to opt out of cooperating in this way will not be capable of resolving disputes and preventing conflict. An effective global dispute resolution system will demand a new paradigm that is based upon interests, not just power.

**C. RECONSIDERING SCOPE: TOWARD A PUBLIC SYSTEM**

Third, integration will advance the debate about the scope of international law. To what extent should international law prioritize public interests over those of the state? And who should decide what is in the public interest? Climate change demands reconsidering what is at stake. International law perpetuates a romanticized notion that the state protects its internal subjects. When people are suffering from water scarcity, how should one state protect its constituents from the misuse of the upstream river located in another state?

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<sup>189</sup> <http://www.iciss.ca/report-en.asp>

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The resulting disputes are inter-state, intra-state and involve individuals. The system will have to address questions about the appropriate venue, who gets to decide and how outcomes from different venues should be coordinated. For example, should a state's decision to take the claim to the ICJ preempt a community's decision to pursue mediation with another community across the border? How should court rulings and mediation agreements about the same dispute be interpreted and enforced? To avoid fragmented or conflicting outcomes, should dispute settlement venues be required to coordinate processes or harmonize rules? In attempting to address important questions such as these, reform through global legal integration will necessitate amending the scope of international law in an era of climate change.

**CONCLUSION**

No one can predict what the world will be like in the future. But we do know that, as in the past, human inclinations toward conflict and cooperation are often prompted in times of change. A warming world and all the impacts that it will bring is certainly a changing world. In this future world of increasingly scarce natural resources the world can ill-afford conflicts that further degrade what remains.<sup>190</sup>

This is why we need to begin thinking about ways to promote cooperation and prevent conflict between borders and across cultures. To be sure, there is not one right way to do this, but many. This is why the concept of integration is so necessary and a shift in the architecture of international dispute resolution is so important. Many aspects of the system are working. Some are not. Looking for the tensions and synergies between different methods of dispute resolution and the institutions that provide them forges a path toward improvement. The concept of global legal integration embodies this idea.

This Article also embraces the ideal of global participation in solving global problems. The international community of nations must find new ways to allow civil society to participate in creating, improving and implementing new laws and solutions. Climate change provides a powerful example. With thousands of civil society delegates traveling to Copenhagen for the COP 15 round of climate talks, the message to the world is clear. Whether or not governments are prepared to take global action to address the challenges of climate change, the people are. Perhaps this discrete event signals a larger and hopeful shift for the future of international law and for the future of our precious world.

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<sup>190</sup> Priscoli and Wolf *supra* note 22 at 21.