Master's Thesis of Law

Application of Mediation in International Disputes Resolution

– Reconsidering Mediation for the Growing Complexity and Diversity of International Disputes –

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Abstract

The question of this thesis is, what is the role that mediation has to play, if any, in contemporary public international law. And if it does have a role to play, can it be presented as a system which is both compatible with public international law, and with a variety of international disputes.

The thesis looks at a variety of applications of mediation. It first establishes certain basic principles and elements of mediation. Next, it examines how mediation can exist in a complimentary manner to the ICJ and other forms of formal dispute resolution. The elements and principles of mediation are then further extrapolated by examining two particular cases as well as legal and scholarly writings with regards to mediation. Finally, the universality and applicability of mediation is discussed before the final conclusion is presented.

This research finds that while there is little which would prevent mediation to be applied to any international dispute, mediation is suited for disputes which have a politically complex character, and which involves groups with complex international legal personalities. Furthermore, in order for a mediation system to be successfully developed, the focus should not be on codifying standards and practices, but to reevaluate and confirm the principles thereof which are compatible with public international law, as well as representative of the elements of mediation.

I would like to express my gratitude to my dear friend Hyeon Minyeong. Her constant support and encouragement has made this journey much more bearable. I am forever grateful.

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Part I
A Backdrop
Chapter 1: History and Introduction

1.1. Historical Background

There has always been the need to settle a dispute in a peaceful manner wherever possible and so, mediation was a part of law and order in the cultures of the ancient world. In China it was popularised through Confucius[1], while in Greece, Plato referred to it in the Iliad,[2] and in the Middle East, there were instructions by the prophet Mohammed regarding this tool[3]. It was not merely a theoretical application but was well established in the legal systems of the time. As an example, we can look at "Ancient Greek Approaches Towards Alternative Dispute Resolution" by Kaja Harter-Uibopuu.[4] Greece in antiquity was not as we know it today. It was a collection of sovereign city-states (Poleis) which shared a common language, culture, etc. Disputes which arose between these states could thus be seen as international disputes. International arbitral awards would be engraved on stone tablets, and would often contain the awards, but at times also the factual matters of the case, the procedures and the composition of the court.[5] These literary traditions reveal a particularly interesting finding, which is that "...the first employment of arbitration in Greek history shows examples of compromissory arbitration", thus not a directed, coercive award, decided independently by a third party. It also reveals that "...consent between litigants (Poleis) was usually brought about by mediators…"[6] Harter-Uibopuu notes that at the time the difference between mediation and arbitration was not as clearly defined as today. Most notably, she states that "(a) short glimpse at Greek history shows that the experiment of compulsory arbitration failed. There never existed a superior and independent organisation strong enough to control the observances of the treaties (resulting from arbitration)."[7] Therefore, "It was by mediation that the litigant parties were moved to agree

[1] Judy Winn, *The Ancient Chinese Secret: A Comparative Analysis of Chinese & American Domestic Relations Mediation,* Vol. 1: 151, Ind. Int'l & Comp. L. Rev, 151, 01 January 1991.
[2] H. ANTHONY VERITY, and Barbara Graziosi, *The Iliad*, 09 August 2012.
[3] Negin Fatahi, *The History Of Mediation In The Middle East And Its Prospects ForThe Future*, Kluwer Mediation Blog, January 23 2018, Available at, http://mediationblog.kluwerarbitration.com/2018/01/23/history-mediation-middle-east-prospects-future/.
[4] Kaja Harter-Uibopuu, *Ancient Greek Approaches to Alternative Dispute Resolution*, Willamette Journal of International Law and Dispute Resolution 10, no. 1, pp. 47-69, 2002 http://www.jstor.org/stable/26211207.p. 52.
[5] Id. at 60.
[6] Id. at 61.
[7] Id. at 62.

on arbitration, and tradition shows that this mediation proved effective enough that it often made arbitration superfluous."[8] Here is highlighted one of the first advantages of mediation, namely that in the absence of an effective or coercive third party, mediation is a viable option. In the modern era, the effectiveness of a third party can often hinge on jurisdiction and the recognition of parties.

Judy Winn, writing "The Ancient Chinese Secret: A Comparative Analysis Of Chinese & American Domestic Relations Mediation" in the California Law review, 1966, highlights another advantage of mediation through the following quote:

> A lawsuit symbolized disruption of the natural harmony that was thought to exist in human affairs. Law was backed by coercion, and therefore tainted in the eyes of Confucianists. Their view was that the optimum resolution of most disputes was to be achieved not by the exercise of sovereign force but by moral persuasion. Moreover litigation led to litigiousness and to shameless concern for one's own interest to the detriment of the interests of society. [9]

While not directly addressing mediation, the quote concludes that agreement through mutual, moral persuasion and acceptance is oftentimes more effective (and always more desirable) than one reached through direction. This approach to dispute resolution is in line with the modern tenets and benefits of mediation.

These examples are introduced to illustrate that mediation as a form of dispute resolution have existed for hundreds of years and was recognised in different societies. They further highlight the utility and benefit of this form of dispute resolution; utility which still holds true today. In an ever-changing world, perhaps it is time to seriously reconsider this form of alternative dispute resolution (ADR). Though mediation is not as commonly or widely applied in public international law as other forms of dispute resolution, recent events are changing in that approach.

1.2 Motivations for the Study

On the 6th and 7th of August 2019, the "United Nations Convention on International Settlement Agreements Resulting from Mediation," (Singapore Convention), was opened for signatures by parties.[10] The Singapore Convention served as one of the motivations for this

[8] Winn, *supra* note 1 at 61-62.
[9] Winn, *supra* note 1 at 154.
[10] United Nations Convention on International Settlement Agreements Resulting from Mediation, opened for signatures 07 August 2019, C.N.154.2019.TREATIES-XXII.4 (entered into force 12 September 2020).

research. It brought sudden attention to the expansion of the utilisation of mediation at the level of private international law. Simultaneously, it served as motivation to ponder the state of mediation at the level of public international law (PIL). This, in turn, led the author to the discovery and exploration of the commentary by the incumbent UN Secretary General, Antonio Guterras, on the issue. This study illustrates his commitment to the development of mediation between States. This commitment has for example led to the relaunch of the UN Peacemaker program, which exists to actively assist parties in resolving conflicts through the use of mediation practices. The following quote from a UN Security Council meeting substantiates Mr. Gueterres' motivation for promoting mediation:

> War is becoming increasingly complex, and so is mediating peace. Today, internal conflicts frequently take on regional and transnational dimensions. Many feature a deadly mix of fragmented armed groups and political interests funded by criminal activities. Conflicts around the world drag on for years and decades, holding back development and stunting opportunities, and comprehensive peace agreements are becoming more elusive and short lived. Political will wanes, international attention drifts. [11]

The following can be deduced or inferred from the statement above. It is not just States that are playing a role on the international scene anymore, but increasingly so a wider range of international actors. The actions of these actors have a direct impact on international peace and security. An alternative (and possibly more flexible, low cost and time efficient) method of dispute resolution must be utilised to resolve these conflicts. This quote also hints at another factor that must be considered, namely the role of non-State actors on the international scene. The ICJ has taken an increasingly progressive view towards international actors (NSAs). Yet there is still a gap between the traditional concept of international legal personality, and the ICJ's "interpretation and application of treaty provisions that govern individuals directly".[12] Due to this gap, there exists a limit to the dispute resolution option between State and NSAs. The development of a specialised system of investor-state-dispute-settlement (ISDS) underscores this point. The complicated issue of dispute resolution in a world of complex legal personalities and battles takes on another dimension if we consider that some States are not recognised by others. The recent successful application of mediation to achieve the "Abraham Accords", a set of diplomatic normalisation treaties between Israel and the UAE and Bahrain respectively, illustrates that mediation has the necessary flexibility to resolve a complicated dispute. To this can be added the "The Kosovo and Serbia economic normalization agreements". These

[11] UN Secretary General Antonia Guterres*, UN Security Council 8334TH Meeting (AM)*, SC/13475 (29 August 2018).
[12] Astrid Kjeldgaard-Pedersen, *The International Court of Justice and the Individual*, iCourts Working Paper Series No. 169 in, RESEARCH HANDBOOK ON THE INTERNATIONAL COURT OF JUSTICE, (Achilles Skordas, ed. 2019), Available at SSRN: https://ssrn.com/abstract=3439323.

agreements serve as further and final motivation for this research. While the thesis will consider ADR mechanisms between State and NSAs when necessary, the goal is to remain focussed on State-to-State mediation in order to provide a foundation for fundamental principles.

1.3 Aim of the Research

The aim of this research is to grapple with the possible wider and nuanced application of mediation, to explore the conditions for the application thereof, and to explore the unique legal features of such a system in dispute between States. The preliminary questions to be addressed in this study are, firstly, what are the elements of mediation, and secondly, how could mediation be codified and applied in a manner that adds value to the current system of PIL, without losing its identity and advantages? Overall, through addressing these questions, I will argue that mediation can be developed into a more formal system that can be applied to a wide scope of disputes, particularly politically-complex ones. Concurrently there are certain notions that the research does not intend to advance. The study does not posit that the traditional forms of dispute resolution are obsolete, or even waning for that matter. Any emphasis on the shortcomings thereof is intended to suggest a space in which mediation might operate effectively. Mediation cannot fulfil the function of an arbitral or judicial dispute resolution process, which has its own advantages. This thesis will aim to illustrate that mediation has its own role to play in PIL. These aims will be achieved by researching the state of mediation in the 20th and 21st century at the hand of applicable cases, documents, publications, as well as convention and treaty clauses that refer to mediation. Next the research will identify and highlight relevant legal issues that must be considered when considering a renewed application of mediation, how these issues will fit into the field of PIL, and why it is necessary to reconsider.

1.4 Limitations

The first limitation is that there are very few universal theories of mediation in PIL to critically analyse. This is something that was even acknowledged in the repertoire of the UN General Assembly meetings. One of the few documents that directly addresses mediation as applied on a global scale, namely the “UN Guidance for Effective Mediation”, which will be discussed in chapter 5, barely deals with the legal aspects of mediation in PIL and focuses more on theoretical developments. Secondly, in instances where there is a more coherent application of mediation, they are very specific to one particular field such as commercial or conflict dispute. Finally, the application of confidentiality often limits and hinders the study or research of mediation in depth. The next chapter will introduce mediation by exploring the advantages and disadvantages thereof, as well as other key concepts and definitions. This will mostly be done with the assistance of regional systems of mediation, as these seem to be much more developed and codified by all accounts.

Chapter 2: Concepts of Mediation

This chapter will introduce the basic concepts of mediation and will rely on non-PIL sources where necessary. It will do so by looking at the fundamental advantages and disadvantages of mediation, examining relevant mediation process models and procedures, and highlighting confidentiality.

2.1 Introduction and Definition

First a definition of mediation that would sufficiently encompass the relevant norms applicable must be established. To get a broader view, it could be advantageous to list a few definitions and to cross reference them, so as to come up with the most comprehensive view. The first definition is provided by the CIL Bibliography on Investor-State Conciliation and Mediation in which the authors write:

> ... mediation is generally understood to be a process in which a mediator (i) assists the parties to focus on their real interests rather than legal rights, (ii) generally avoids making any merits-based evaluation of parties positions and (iii) facilitates meaningful dialog between the parties to reach an amicable settlement.[13]

The United Nations Guidance for Effective Mediation (UN Guidance), the document referred to in chapter 1 and which is the most comprehensive recent analysis of mediation by the U.N., provides the following description:

> Mediation is a process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements... it can improve their relationships and move towards cooperation... Mediation is a voluntary endeavour in which the consent of the parties is critical… mediators usually have significant room to make procedural proposals… mediation is a flexible but structured undertaking. [14]

Finally, we can refer to the Handbook on the Peaceful Settlement of Disputes between States:

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[13] Romesh Weeramantry & Brian Chang, *Bibliography on Investor-State Conciliation and Mediation*, 20/01 NUS Centre for International Law Project on Investor-State Conciliation And MediationWorking Paper, (December 2020) Available at: <https://cil.nus.edu.sg/publication/Bibliography_on_Investor-State_Conciliation_and_Mediation/>.

[14] United Nations, *United Nations Guidance for Effective Mediation* (2012) at 4. [hereinafter *UN Guidance*]

> Mediation is a method of peaceful settlement of an international dispute where a third party intervenes to reconcile the claims of the contending parties and to advance… a mutually acceptable compromise solution.[15]

The above definitions were chosen due to the relatively close proximity to PIL in which they were made. Though they introduce several notions, the core of these definitions is that mediation is an informal process. This means that there is no guaranteed outcome, and if there is an outcome it is reached through mutual agreement between the parties. Furthermore, there are no procedural guarantees, and procedure largely depends on the actions of the mediator. The process is voluntary at every stage and in this regard consent plays a pivotal role. Mediation is a flexible process which has the benefit of improving relationships. Another aspect of mediation that is crucially important is that of confidentiality. This notion will be introduced and explored in greater detail in section 2.6.

The CIL bibliography above states that mediation "assists the parties to focus on their real interests rather than legal rights". Yet to say that mediation is a process that takes places outside of a legal system does not take all scenarios into account. Every dispute resolution, such as mediation, starts with a breakdown in one legal relationship or another. For example, domestically mediation is often utilised in relation to a divorce or dismissal of employment. Mediation could also be required by particular terms of an agreement, contract or treaty. It is also becoming more common to find jurisdictions where mediation is required as the first course of action by the courts, before the parties proceed to litigation proceedings. Lastly, a successful mediation is one that ends in a settlement agreement which must be made enforceable by some judicial institution. This issue was in many ways at the heart of the Singapore Convention, and appears to be one of the reasons for the convention's popularity.

The above overview of mediation is fairly broad, and the following chapters will gradually explore it in more detail. Many of the issues are not as simple or straightforward as they may appear, particularly in the context of PIL. Before diving deeper into these issues, a better understanding of the formal aspects (for example procedure and methods) of mediation would provide a platform upon which these issues can be explored.

[15] Office of Legal Affairs Codification Division, *Handbook on the Peaceful Settlement of Disputes between StatesUnited Nations,* OLA/COD/2394 (1992) at 40.

2.2 Initiation of Procedure

The mediation definition by the UN Guidance, given in section 2.1, states that consent is a very important aspect of mediation, particularly in the initiation of the proceedings. This concept will be explained in greater detail in section 5.1. As an introduction, let us consider private international law. According to the ICC and Eun-Joo Min, Senior Legal Officer, Arbitration and Mediation Center of the WIPO, the important first step is that the disputing parties must have an agreement to mediate, either ex ante or ex post. This agreement may possibly be found in a contract, a treaty, or the rules and guidelines set forth by an organisation to which both parties belong, and which relates to the dispute.[16] [17]

Yet in certain regions there seems to be exceptions to the rule. In 2003 a study was done of the Civil, Roman, Common and Nordic legal systems, represented through European countries. It found that there were a total of six main and sub points of initiation of mediation proceedings. They are:

1. The parties themselves propose the idea for mediation as an option;
2a. The judge proposes the idea, in a non-committal manner;
2b. The judge proposes the idea, but accompanied by professional explanation;
3a. The judge initiates and the parties can refuse without a sanction being imposed;
3b. The judge initiates, but a sanction may be imposed upon refusal;
4. Access to court is denied, as long as mediation has not first been attempted. [18]

Often the mention of “mediation” may elicit the party-driven process of level (1) and (2a) above, possibly even (2b). Yet practice paints a different picture. The European Mediation Directive of 2008 was adopted by the European Parliament and the Council of European Union. It states that “...every judge (has) the right to invite the parties to a dispute to try mediation first if she/he considers it appropriate given the circumstances of the case.” Furthermore it “guarantees that the parties will not lose their possibility to go to court as a result of the time

[16] Eun-Joo Min, *Alternative Dispute-Resolution Procedures:International View*, *in* INTELLECTUAL PROPERTY MANAGEMENT IN HEALTH AND AGRICULTURAL INNOVATION: A HANDBOOK OF BEST PRACTICES 1415 (A Krattiger, RT Mahoney, et al. eds. 2007).
[17] International Chamber of Commerce, *Mediation Procedure* (January 2020) https://iccwbo.org/dispute-resolution-services/mediation/procedure/.
[18] The difference between level 2 and 3 referral is that level 2 requires the consent of both parties before the mediation option can be further explored; at level 3 the judge may refer without the consent of the parties, however parties can still halt the referral, but run financial risks.

spent in mediation". [19]

Yet, these rules generally amount to a 'soft imposing provision', which means that even if the judiciary prescribes mediation, parties can still opt out in favor of another form of resolution. Most States in continental Europe do not apply mandatory mediation and in cases where they do, it only relates to certain types of proceedings. Conversely, the UK seems to reflect practice more often used in the US, which is that courts are generally expected to encourage or even require mediation before proceeding to litigation.[20] As this thesis seeks to explore the lengths to which mediation can be developed into a more coherent system, functioning within PIL, it is important to take note of such developments, even if only at the regional or domestic level. A prescribed mediation will diminish one of the core values of mediation, which is expressed in PIL through consent. Being aware of such modes of prescribed mediation could provide valuable insight into the 'calcification' of mediation if the development of the process is left unchecked. This is not to be critical of domestic practices of mediation at all. Rather, it serves to show that there is precedence to argue for the development of mediation to such an extent, which, in my opinion, would not be workable in the field of PIL.

After this initial stage, there are two important components of the procedure, which can be summarised and categorised as the structural and the substantive. The fulfillment of the former component is the process whereby parties agree on the mediator or mediation body; which language the mediation will be conducted in; agreeing upon a meeting place; a time limit to the proceedings; transfer of payment, etc. Deciding upon the structural component should happen along with the filing or requesting of the mediation or early on in the procedure. The substantive component will be proposed and communicated by the disputing parties, with the help of the mediator. These could include introductions and opening remarks, a statement of the dispute; information gathering and sharing; joint discussions by all parties; private caucuses with the mediator; a joint negotiation and exploring of all options; and reaching a settlement agreement. Not all of these elements will necessarily transpire. Furthermore, it must be remembered that once a mediation begins, there is no requirement for the parties to complete the process. After the agreement has been reached, it must still be submitted to a relevant authority to be made 'enforceable', or be implemented by the parties themselves.

2.3 Models

A mediator is largely at the helm of the process, and can facilitate joint discussions, separate caucuses, determine problems and suggest appropriate solutions. The process of the

[19] European Commission, *EU overview on mediation* (December 2020), https://e-justice.europa.eu/content_eu_overview_on_mediation-63-en.do
[20] C. Wirth & D. Eckstein, *Mandatory mediation in the EU*, Financier Worldwide Magazine, Oct. 2015

mediation will very much depend on the strategy, technique or orientation (model) which the mediator follows or introduces. Below is an introduction of two of the main models of mediation which were introduced by Leonard L. Riskin in publications in 1994, “Mediator Orientations, Strategies and Techniques”[21] and in 1996, “Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed”.[22] These two models are also prevalent in mediation related to PIL, and will be explored further at the relevant time. The information provided here is derived from a study of domestic law, but in the absence of sufficient information from international law mediation, it serves as a proper introduction. Through these introductions we can get further insight into how mediation operates.

Before continuing, a quick evaluation of the terminology. On the one hand is the ‘facilitative’ technique. It best describes what would first come to mind if one has to explain the role of the mediator (consider the definitions above in 2.1). It has remained unchallenged and unchanged as time went by. On the other hand is what Riskin refers to as the ‘evaluative’ model. The name is somewhat problematic in that it might describe to some that the role of the mediator is to evaluate the situation and then act accordingly. Yet, it is more accurately explained as being ‘directive’. For now and out of respect for Riskin’s work, the term ‘evaluative’ will remain. However, later in the study, the term ‘directive’ will be used in reference to PIL. The change in terminology should not be seen as a change in content, but rather as an indication of the development of mediation models over the years.

Riskin explained the evaluative mediator as someone that the disputants “want and need to provide some direction as to the appropriate grounds for settlement… the mediator is qualified to give direction.”[23] Riskins' grid described the evaluative mediator as someone who urges parties to accept settlements; develops and proposes settlements; predicts outcomes and; makes probes and assessments of the parties’ interests and claims.[24] This model allows the mediator to play a much more active role.

The facilitative mediator is described as someone who assumes parties are “intelligent, able to work with counterparts, and capable of understanding their situations better than… the mediator.”[25] The facilitative model allows parties to evaluate the proposals; allow them to develop the proposals; ask parties about likely consequences, court outcomes and the strengths and weaknesses of their claims; assist parties to develop their options and; helps

[21] Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, Vol 19, No. 9, Alternatives to High Costs of Litigation, 111, (September 1994)
[22] Leonard L. Riskin*, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7, (1996), Available at http://scholarship.law.ufl.edu/facultypub/668
[23] Riskin, *supra* note 21, at 1.
[24] Id. at 3.
[25] Id. at 1.

them to understand and focus on underlying issues and interests.[26] This model grants the parties more control and freedom.

Very often though a dispute does not perfectly fit within one of these types of models, and so a mediator would have to apply the relevant aspects of each model as needed. Flexibility is very important. The mediator determines the process and must be aware of the models and to apply them without bias, confusion or even in a misguided manner. This aspect is very important and in fact mediators are often picked on the type of style they prefer or excel at.[27] Yet some will argue that the distinction does not matter, and that in practice the models cannot be divided. Kenneth Roberts wrote in response to the facilitative vs evaluative debate that "evaluative and facilitative methods are interdependent in successful complex commercial mediation".[28] This statement was made in reference to the fact that it is the goal of a mediator to provide disputing parties with information in order for them to make a more informed decision.

Despite a growing understanding of mediation methods, the element of confidentiality means that there is very little self-reporting on procedures by mediators. This point is underscored by Kressel, Henderson, Kreich and Cohen. In reflection on previous studies on the topic they conclude that "While self-report data can provide useful information, there is also good evidence that mediator self-reports are highly unreliable guides to mediator behaviour." [29] Small sample sizes and close-ended questionnaires also contribute to the lack of data.

2.4 Advantages and Disadvantages

The previous chapter already introduced two advantages of mediation, namely that it tends to lend itself to the preservation of relationships, and that a dispute can generally be resolved in the absence of a supervening authority. This section will explore some other advantages as well as disadvantages in more depth. In the absence of ample information from PIL about the general application of mediation, this section will rely on relevant information from domestic law, for the purposes of an introduction.

2.4.1 Advantages

Mediation is a voluntary process from inception to implementation, which also means that the resolution must be agreed upon by the disputing parties. At first glance it might appear

[26] Riskin, *supra* note 21, at 3.
[27] *See* Kenneth Kressel, at al. *Multidimensional Analysis of Conflict Mediator Style,* vol. 30, no. 2, Conflict Resolution Quarterly, 135, (2012).
[28] Kenneth M. Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement*, 39 Loy. U.Chi. L. J., 187, 2007, Available at: http://lawecommons.luc.edu/luclj/vol39/iss1/5.
[29] Kressels et al., *supra* note 27

as though these aspects are detrimental to the validity of mediation, yet it is exactly this informality that is one of its greatest advantages. Often it may lead to preservation of relationships, greater flexibility, better control over the outcome by parties and more amicable results.[30] (The 'soft benefits'). Other benefits not yet mentioned include the minimal risk ensured by the option to opt out of proceedings at any stage; retention of autonomy supported by consent; and the ability to choose a mediator with relevant expertise and experience. [31]

Other aspects that are often mentioned as benefits of mediation are confidentiality as well as the time and cost saving nature of the process (the 'hard benefits'). The latter two are easier to quantify. At a regional level, the "Directorate Generale for Internal Policies of the European Parliament" published a report in 2008 titled, "Quantifying the cost of not using mediation – a data analysis" (EU Analysis). It stated in its abstract that "mediation saves both time and costs."[32] Globally, the OECD Economic Policy Paper entitled "Judicial Performance and its Determinants: a cross-country perspective"[33] (OECD Economic Policy Paper), describes three 'dimensions' which were used to 'benchmark' the relative performance of judicial systems. These were "trial length, accessibility to justice services and predictability of judicial decisions". The length of dispute settlement (and the inevitable cost) again features prominently in the study as effective measurements of the benefits of mediation.[34]

The time-saving aspect will be examined first. According to the International Chamber of Commerce (ICC) "...the average duration of (mediation) proceedings is four months from the date the Request for Mediation is filed until the end of the proceeding. The majority of that time is spent by the parties to set-up and prepare for the meetings with the Mediator. This includes deciding on the place, language, technique, appointing the Mediator and paying the deposit."[35] It reports further that, "the actual meetings with the Mediator usually last one to two days. However, in some cases, the parties might wish to meet more often." [36] Comparatively, the OECD Economic Policy Paper indicates that the average length of initial civil proceedings is around 240 days, but may be twice as long in some cases. This number increases with appeals,

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[30] Findlaw, *The Advantages of Mediation Cases over Traditional Lawsuits*, Findlaw.com (2016), https://www.findlaw.com/adr/mediation/the-advantages-of-mediation-cases-over-traditional-lawsuits.html [*hereafter Advantages of Mediation Cases*].

[31] Min, *supra* note 16.

[32] G. de Palo & A. Feasley, et. al, *Quantifying the cost of not using mediation – a data analysis*, Directorate General for International Policies- Policy Department C, 2011.

[33] G. Palumbo & G. Giupponi, et al., *Judicial performance and its determinants: a cross-country perspective*, Vol. no 5, OECD Publishing: Economic Policy Papers, 2013.

[34] It must be mentioned that the study focussed a lot on the electronification of judicial systems, and the benefits of being online or digitalised. These were related to saving time and money, and might not directly serve as advocating for mediation, but nonetheless underscores the value and importance of these benefits in dispute settlement.

[35] ICC, *Mediation Procedure*, (2020) https://iccwbo.org/dispute-resolution-services/mediation/procedure/.

[36] Id.

and proceedings could last as long as 7 years (although this is an extreme case, and the average based on data collected was a little over 600 days).[37] The difference here is significant. Comparatively, the entire process of mediation lasts around 120 days. Even when factoring in differences in subject matter, jurisdictions and the parties to the procedures, a potential difference between 480 days cannot easily be ignored by disputing parties.

Another valuable research when comparing the relative length mediation is the EU Analysis. The report looked at cases that employed a Two-Step approach. This is when disputants were required to first utilise mediation, and if this step failed, then they would proceed to court action. These cases compared the same parties, disputes and jurisdictions, going first through the process of mediation and then court action. "The number of days saved using the Two-step approach is calculated as a weighted average of the estimated duration of the mediation process and the duration of the subsequent court case in disputes where mediation has failed."[38] The EU Analysis indicated that the time to complete mediation in Belgium is 45 days, while in Italy it is 47. Conversely, the time it takes to complete litigation in Belgium is 505 days, and 1210 days in Italy. That is a difference of 460 and 1163 days respectively, well over a year in Belgium, and three years in Italy. [39]

Next is cost. Financial access can be expressed as the "cost borne by the litigants to achieve a resolution of their dispute through the court system"[40], and is based on court, expert and lawyer fees. The EU Analysis found "the average cost to litigate in the European Union is €10,449 while the average cost to mediate is €2,497." The study further found "cost figures correlating with a high mediation success rate (75% or 50%) are quite impressive (e.g., a 75% mediation success rate in Belgium can save approximately 330 days and 5,000 € per dispute; a 75% success rate in Italy can save 860 days… and over 7,000 € per dispute)." [41] The importance of being able to resolve a matter in a time and cost conserving manner can not be overlooked.

2.4.2 Disadvantages

Mediation also has its disadvantages. There are several which could be discussed, but the most prevalent issues may be divided into four categories. First there is the possibility that a settlement between the parties may not arise; next, the process lacks the support of any judicial

[37] Palumbo & Giupponi, et al., *supra* note 36, at 13.
[38] G. de Palo & A. Feasley, et. al, *Quantifying the cost of not using mediation – a data analysis*, Policy Department C: Citizens' Rights and Constitutional Affairs, 2011, at 15.
[39] Id. at 16
[40] Id.
[41] Id.

authority in its conduct; third, mediation proceeding lack any legal principle; and lastly the truth of an issue may not be revealed. [42] They will each be addressed below.

First, as indicated, mediation relies heavily on 'consent' and a settlement must be achieved by the 'meeting of the minds'. If there is no consensual agreement, then the process may be abandoned and an alternative method of resolution may be sought out. This of course leads to a sense of uncertainty and ambiguity which is not always desirable. It would mean that the dispute resolution process would have to start anew. Yet while a settlement agreement may not always arise, it is very likely that it would. Between 2018 and 2019 for a period of a year, the International Institute for Conflict Prevention and Resolution (CPR) and the Centre for Effective Dispute Resolution (CEDR) collaborated to analyse the situation regarding ADR in the US and UK. It found that mediation in the UK had an aggregate settlement rate of 89% and a similarly high rate in the US.[43] Another report was published by the Scottish government, on the 25th of June, 2019, entitled "Mediation in civil justice: international evidence review". It surveyed studies on mediation across 5 jurisdictions, and found that the rate of settlement varied significantly, ranging from 40-90%.[44] Tellingly though it found that in the US, the area with the strongest empirical evidence, settlements had a compliance rate of around 60-90%. Settlement and compliance are not always guaranteed, which may be understandably unnerving. Yet these studies indicate that mediation has an overall positive rate of resolution. The empirical evidence may thus abate the theoretical concern.

Secondly, a lack of judicial support. A lot of the hesitancy around mediation stems from a lack of a formal structure.[45] The level of expertise and a lack of uniform quality among mediators is a serious concern. And yet the CPR and CEDR reports suggest that parties often find that an adjudicator's lack of knowledge regarding the subject matter of a case means that they are not able to properly assess the facts. Disputants might also believe that they are in a better position and better equipped to come to a fair and equitable resolution. [46]

Third is the lack of legal principles. This is a very important issue. No effective system dispute resolution can exist without basic legal principles. The issue might be further exacerbated by the notion that applying too many rules would 'calcify' the flexibility of mediation too much. Yet mediation does not exist in a legal vacuum, and therefore cannot be entirely

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[42] STA Law Firm, *United Arab Emirates: Comparative Analysis Of ADR Methods With Focus On Their Advantages And Disadvantages* (February 2019), https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages [hereinafter *Comparative Analysis Of ADR Methods*].
[43] Graham Massie, *Insights into Alternative Dispute Resolution*, CPR, CEDR, 2018-19.
[44] APS Group Scotland, *An International EvidenceReview of Mediation in Civil Justice*, (June 2019).
[45] Id.
[46] Massie, *supra* note 43.

untethered from legal principles. The argument might be made that mediation does not have clear legal pronouncements; however, it would be entirely inaccurate to say that it does not rest on legal principles. Take for example the fact that a successful mediation will result in an agreement between the disputing parties. In this case, we could apply the principles of consensus ad idem, aggregatio mentium and assentio mentium. The principle of pacta sunt servanda (agreements must be kept) may also come into effect. Another concept is that of consent, which is a cornerstone principle in the process of mediation, and a principle which could easily be transferred to PIL. It might be more accurate to say that mediation does not have clearly defined legal principles, rather than lacking it altogether.

Lastly, confidentiality is a vitally important aspect of mediation. It encourages parties to be 'frank' and honest in their discussion. But it can also be detrimental for the development of the system overall. It is upon the parties on how much they want to reveal. It may also be that a disputant regards revealing the truth not worth the pay-off or an agreement, and may discontinue the proceedings in order to withhold information, which is an unfortunate reality of mediation.

2.5 Confidentiality

The concept has been referred to several times and before concluding the chapter, some examination of it will be provided. In mediation it refers to an undertaking not to share or disclose any information about what occurred, was said or shared in or during the mediation by the mediator or the parties involved. The term should not be confused with others such as "privilege", "without prejudice" and "non-compellability".

Confidentiality is often mentioned as a benefit or positive aspect of mediation. Article 7 of the 2008 EU Directive, for example, states that "mediation is intended to take place in a manner which respects confidentiality".[47] There is a good reason for the high regard in which it is held. Disputants must be encouraged to disclose as much relevant information as possible without fear of 'self-incrimination'. As mentioned above, mediation might not resolve the dispute and it might go to litigation. In such a scenario, that which was revealed or disclosed should not be used by or against the parties at a later stage. Disputants volunteer information entirely out of their own free will and it could include sensitive information. Confidentiality, if properly applied, should increase the willingness of parties to engage in mediation, and is thus a very important part of the process.

[47] The European Parliament and the Council, *Directive 2008/52/EC On certain aspects of mediation in civil and commercial matters*, Official Journal of the European Union, L 136/3 (2008) [hereinafter *On certain aspects of mediation*].

However, some commentators have asked whether a blanket application is always applicable or appropriate. The first criticism of confidentiality is that it curbs and hinders the progress of developing mediation. For example, Charlie Irvine from the University of Strathclyde questioned the impenetrability thereof when "those outside the mediation often have a legitimate interest in the outcome?"[48] He further raises the question of whether or not the practice of confidentiality would not hinder the progress of both the practice and the system of mediation. Based on suggestions by Susan Sturm and Howard Gadlin, Mr. Irvine proposes "that mediators around the world, or throughout a jurisdiction, (engage in long-term, anonymised reporting)." [49] The next criticism is that it could hinder public policy as well as safety and security. According to the EU Directive, Article 7(1)(a), confidentiality is relieved "where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person".[50] However, no definition or clarification is given for the concept of "overriding considerations of public policy", other than the protection of children or the physical or psychological integrity of people. Another exception is found in the UNCITRAL Model Law 2008 states that "Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law…". [51] It would seem that consent has the ability to dismiss confidentiality.

2.7 Final Remarks

Mediation is based on certain core elements and principles. Yet practice and application, influenced by the complexity of the disputes and the flexible nature of mediation, shows us that it is often more nuanced and intricate than at first glance. We cannot simply say 'consent and confidentiality are absolutisms in mediation and no one may touch it.' This simply does not reflect reality.

This chapter introduced the basic concepts, principles, definitions as well as advantages and disadvantages of mediation. It reveals that mediation is a party-driven form of ADR, which relies on consent, flexibility and confidentiality. Though a third party is present, and very important, the role of the third party is limited to the procedural aspect of the mediation. He or she cannot deliver a final resolution to the dispute. Such a resolution can only be achieved by

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[48] Charlie Irvine, *Mediation confidentiality: limitations and a proposal*, Kluwer Mediation Blog, 2012, Available at: http://mediationblog.kluwerarbitration.com/2012/09/12/mediation-confidentiality-limitations-and-a-proposal

[49] Id.

[50] The European Parliament and the Council *On certain aspects of mediation, supra* note 47

[51] United Nations Commission on International Trade Law, Annex II *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)*, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf

the disputing parties themselves, and is referred to as a settlement agreement. A mediation is deemed successful if it concludes in such an agreement. We also saw that different approaches to the mediation process have been developed over time, and that it can have an effect on the success of the process. The role of the mediator is vital. Furthermore, several of the overall advantages and disadvantages of mediation were elicited and briefly explained.

The flexibility of mediation makes it ideal for the diverse range of complex disputes it is applied to. The 'negative' side thereof, as alluded to in the section above on 'disadvantages', is that it is seemingly without principle, judicial backing, certainty and clarity. Finding the balance between these two perspectives (particularly in the field of PIL) is in many ways what this research is about. And due to the complex and largely undeveloped nature of mediation, it was important to first introduce mediation at a fundamental level, which was the purpose of this chapter.

The following chapter, and part III overall, will explore these basic notions in more depth, at the hand of PIL. Not only will existing principles and concepts be expanded upon, but new factors relevant to the discussion will also be introduced.

Part II
Mediation at International Level
Chapter 3: Formal Dispute Resolution and Mediation

This chapter will examine the relationship between formal dispute resolution (FDR) and mediation. The purpose is to indicate that mediation has a role to play in particular disputes, highlighted by a comparison with FDR, thereby contributing to the larger field of PIL. This chapter will largely focus on the International Court of Justice (ICJ) as 'representative' of FDR, given its prominence, longevity and influence in modern PIL.

The difference between formal and informal (mediation) dispute resolution does not denote sophistication or degree of development. Rather the distinction is that a formal dispute resolution must conclude in a binding decision by a neutral third party, such as in litigation or arbitration. In comparison informal dispute resolution may be completed by a mediated settlement agreement (MSA), achieved by the disputing parties themselves. The 'enforcement' of such disputes will be theoretically explored in relation to FDR.

This chapter will present that not all disputes are equal in nature, and that some are more suited for mediation, where others are better suited for FDR. This can be influenced by the substantive issue of the dispute, as well as the nature of the disputing parties.

The 'hard benefits' of mediation as indicated in the previous chapter will not be explored here for two reasons. First, in order to have an accurate comparison, the length and cost of both FDR and mediation must be presented. While there is enough information on the former, the information regarding the latter is insufficient (unlike in domestic mediation). Secondly, even if it was possible to indicate that mediation is more beneficial in this regard, it does not mean that it contributes to the field of PIL per se.

3.1 Enforcement of ICJ Decisions

FDR is oftentimes lauded and preferred for the fact that it provides disputants with binding decisions. However, if there are significant limitations to the enforcement of a resolution, the benefit that FDR provides seems to be negated. This section will explore the enforcement mechanism of the ICJ, problems it faces, and introduce the historical role of 'good faith'.

Article 94 of the UN Charter which deals with the ICJ. It states that:

(1) Each Member…undertakes to comply with the decision…in any case to which it is a party.

(2) If any party to a case fails to perform the obligations incumbent upon it…the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.[52]

Article 94(1) indicates that the implementation of a resolution is undertaken by the Member party to the case. This is the first 'mechanism' of enforcement. If a State does not comply with a ruling, the other "may have recourse to the Security Council, which may… give effect to the judgement", according to art. 94(2) of the UN Charter. The interaction between the ICJ and Security Council with regards to the enforcement of judgements is very important however, it will not be studied here in depth. Rather, the following section will aim to prove that the enforcement of ICJ judgements could still be problematic despite the guarantee provided by article 94(2).

3.1.1 Enforcement of ICJ Decisions

There have been 132 contentious cases that have gone before the ICJ (the Court). By and large, they have been successful, and the resolutions are generally accepted by parties. However, there are several examples of when the provisions by the Court were ignored and contested. The first regards the 'veto' principle, which has been with the United Nations (UN) since its formation. Former US President Harry S. Truman wrote in his memoirs "All our experts, civil and military, favored it, and without such a veto no arrangement would have passed the Senate."[53] However, the term "veto" is not to be found in either Chapter V (The Security Council) or XIV (The International Court of Justice) of the UN Charter. Rather, it is implied in the application of Art. 27(3) of the UN Charter which reads: "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members;"[54] Therefore if a permanent member of the UN Security Council (UNSC) does not vote in alignment with the other members of the UNSC, a decision cannot be made, and it has the implicit effect of a veto vote.

Article continues to say that "in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting." These particular votes relate to the pacific or peaceful settlement of disputes. It implies that a UNSC member shall abstain from

[52] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI Available at: https://www.un.org/en/sections/un-charter/chapter-xiv/index.html [hereinafter *Charter of the UN*].
[53] Volume 1, Memoirs, Harry S. Truman, *1945: Year of Decisions*, Reissue edition, 1999.
[54] United Nations, *Charter of the UN, supra* note 52.

voting in a resolution in which the UNSC attempts to advance a peaceful settlement of a dispute; that the veto power will not stand in the way of peaceful dispute settlement regarding regional arrangements, in whichever form.

As an illustration, consider the following two examples. The first example is the Corfu Channel Case, the first case of the ICJ and which was referred to it by the UNSC. The vote revolved around whether the dispute should be referred to the ICJ by the UNSC as per article 36 (3) of the UN Charter. The UK was a party to the dispute, and therefore had to abstain from voting, because doing so could prevent the pacific settlement of disputes as per Chapter VI and Art 52 of the UN Charter.

Secondly, consider the Military and Paramilitary Activities in and against Nicaragua Case (1986) (Nicaragua). In that situation, the ICJ had already settled the dispute from a legal perspective. All that remained was the enforcement of the ICJ judgement. In other words, the dispute was 'theoretically' resolved, and thus over. The US refused to comply with an adverse ruling of the ICJ in the case, and Nicaragua asked the UNSC to approve a resolution that would call for the US to comply with the ruling. [55] As a permanent member of the UNSC, the US vetoed the resolution. In fact, there were 5 vetoes between 1982 and 1985 regarding this case, and a final one in 1986. Note that in this case the US was able to veto the resolution because it did not hinder the peaceful settlement of a dispute, but merely the compliance with it. It was a technical distinction, but it had serious implications. Nicaragua had to take a different route, approaching the UN General Assembly to pass a resolution that would compel the US to comply. This approach was much more successful.[56] Nicaragua did eventually get restitution; however, it is clear that the application of the veto power could have a real and debilitating effect on the enforcement of the ICJ decisions. This case stands to illustrate that should any of the UNSC Members decide to veto the enforcement of an ICJ decision, for whatever reason, a deadlock is created, and no effect can be given to the resolution.

Aside from the deadlock created by the 'veto' power, other incidents serve to illustrate the limits of ICJ judgement enforcements. For example, France continued atmospheric nuclear testing in the South Pacific until such testing was no longer required, and in defiance of a 1973 ICJ provisional order[57]. In this scenario France indicated that it "could not accept the Court's

[55] Irene. Couzigou, *Enforcement of UN Security Council Resolutions and of International Court of Justice Judgments: The Unreliability of Political Enforcement Mechanisms* (October 2016). In THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE, (Andras Jakab and Dimitry Kochenov, eds, 2017) Available at SSRN: https://ssrn.com/abstract=2868135.
[56] Antonio T. Carpio, *Why the UNGA matters* (September 2020) https://opinion.inquirer.net/133261/why-the-unga-matters
[57] Nuclear Test, (Aus vs. France), Advisory Opinion I.C.J. 1974 I.C.J. Rep 99 (Dec. 20).

jurisdiction"[58]. In a separate case the US Supreme Court disregarded an ICJ order to stay the execution of a German national in Arizona in the LaGrand case. The Supreme Court ruled that "with regard to the action against the United States, which relies on the ex parte order of the International Court of Justice, there are imposing threshold barriers. First, it appears that the United States has not waived its sovereign immunity". [59] Lastly, in the Western Sahara case, the ICJ recognised Moroccan interests in the disputed territory of Western Sahara, yet found that the indigenous population had a superior claim to self-determination. Morocco rejected the opinion by sending 350,000 Moroccan civilians to Western Sahara.[60]

By illustrations of these cases, and by underscoring some vital limitations of the enforcement of the ICJ, we may be able to deduce the following; while it is presumed that a State would comply with the decision of the ICJ if it gave consent to the jurisdiction of the Court, it is far from a given, and enforcement can be a problematic issue. Aloysius P. Llamzon, writing for the European Journal of International Law in 2008 had the following to say:

> International institutions are plagued by too many expectations and too little power. One striking example is the International Court of Justice. Its malcontents criticize the Court as an ineffective player in achieving international peace and security, largely because of its perceived inability to control State behaviour. [61]

These are in fact strong words, and are not necessarily shared by everyone. In fact, the ICJ has been integral in developing PIL and remains an important role-player. Yet, based on the examples listed above, there are questions about the 'binding' effect of ICJ decisions. Yet there are more factors than enforcement-mechanisms that contribute to the binding effect of ICJ decisions.

3.1.2 Good Faith and the UN Charter

Historically, good faith has always been part of the conversation related to compliance with judgements of the ICJ. The predecessor to the UN, the League of Nations, stated the following in Article 13 of its Covenant that:

> (1) The Members of the League agree that whenever any dispute shall arise between them… they will submit the whole subject-matter to arbitration or judicial settlement.
> (3) For the consideration of any such dispute, the court to which the case is referred

[58] Id. at 5
[59] *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999)
[60] Western Sahara, Advisory Opinion 1975 I.C.J. 12 (Oct. 16)
[61] Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, Vol. 18 No. 5, European Journal of International Law, 815−852, (2007) at 815.

> shall be the Permanent Court of International Justice, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.
> (4) The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered... In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto. [62]

There are several similarities and differences between the Convention and the UN Charter. They could be discussed at another time. For now, it would serve the purpose of this section to point out that good faith was not just a 'principle' in early modern PIL, but a duty in the compliance with Court and other dispute resolution compliance. Though the Covenant was duly replaced by the UN Charter in 1945, the principle of good faith has followed it in many ways. If we consider the "Document of the United Nations Conference on International Organization San Francisco 1945" (UNIO), we will find references to good faith expressed in a similar way. In the documents in relation to International Law, the delegates from Netherlands[63] and Panama[64] both proposed the following amendment:

> Each State has a legal duty to carry out in full good faith its obligations under international law, and it may not involve limitations contained in its own constitution or laws as an excuse of a failure to perform this duty.[65]

Good faith is related to a legal duty. Yet, there is no direct reference of the enforcement of judgements by the ICJ itself. For such a proposal we will need to look at the submission by the delegation of Cuba, which proposed the following amendment to article 60 of the Statute: Each State which is a party to the Statute undertakes to carry out in full good faith the obligations which may be incumbent upon it under a judgment rendered by the Court.[66] This formed part of the Dumbarton Oaks Proposal, and related to the obligation to comply with decisions of the Court. Ultimately 'Committee 1: International Court of Justice' in the 13th volume of the UNCIO considered the proposals by Cuba as well as Australia to insert an express undertaking on the part of member States to carry out decisions of the Court. The Cuban proposal was withdrawn in favor of the Australian one. The Committee unanimously voted for the following paragraph to be added. "All members of the ·United Nations undertake to

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[62] Covenant of the League of Nations, *opened for signature*, 28 April 1919 (entered into force 10 January 1920)
[63] Commision IV Judicial Organisation, *Legal Problems relation to a General International Organisation,* Volume 1, Documents of the U.N. Conf. on Int'l Org (1945).
[64] Id. at 760.
[65] Id. at 238
[66] Id. at 507, 509.

comply with the decision of the International Court of Justice in any case to which they are parties". [67]

Though a provision for States to comply with a decision in good faith was ultimately not added to the UN Charter, we can still find such a general duty to the performance of all obligations under the UN Charter in article 2(2). From the UNCIO documents it can be deduced that the Australian proposal was preferred because it did not create an extra obligation on States, and that good faith was implied. In the next subsection we will discover how it is applied today. Nonetheless with regard to the compliance with ICJ decisions, the principle, though not directly expressed, has formed part of the history of the Court, whether expressly or implicitly, and undoubtedly has a lasting effect.

3.1.3 The General Principle Good Faith and Settlement Agreements

Good faith is a principle (often expressed through rules), but not a rule in and of itself. The difference was explained by Sir Gerald Ftzmaurice in 1957 as follow:

> By a principle... as opposed to a rule... of law is meant chiefly something which is not itself a rule, but which underlies a rule, and explains or provides a reason for it. A rule answers the question 'what': a principle in effect answers the question 'why'. [68]

As such it was also codified in the UN General Assembly (UNGA) Resolution 2625, "Declaration on Friendly Relations and Cooperation among States"[69] . In the Preamble it lists 7 'Principles of International Law', which includes "The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter". It explains that:

> Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations. Every State has the duty to fulfil in good faith its obligations under the generally recognized principle and rules of international law. Every State has the duty to fulfil in good faith its obligations under international agreement valid under the generally recognized principles and rules of international law.[70]

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[67] Id. at 297.
[68] Gerald Fitzmaurice, *The General Principles of International Law considered from the Standpoint of the Rule of Law*, p. 7, 1957.
[69] General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* , A/RES/2625 (24 October 1970), https://unispal.un.org/DPA/DPR/unispal.nsf/0/25A1C8E35B23161C852570C4006E50AB [hereinafter *Declaration on Principles of International Law A/RES/2625 supra*]
[70] Id.

The principle is related to the 'performance' or 'fulfilment' of a duty or obligation. It does not create a new obligation on a State, but relates to existing obligations. This point was reiterated in the 'Land and Maritime Boundary between Cameroon and Nigeria' case. It states that "The Court... notes that although the principle of good faith is 'one of the basic principles governing the creation and performance of legal obligations... it is not in itself a source of obligation where none would otherwise exist'."[71] ICJ 'Nuclear Test Case' also states that: "Just as the very rule of pacta sunt servanda in the law of treaties is *based on good faith*, so also is the binding character of an international obligation."[72] (emphasis added).

In the previous section we saw that good faith played a significant role in the considerations of the original drafting of the UN Charter. Here we find though that it goes beyond the obligation or duty to comply with a decision of a court or tribunal (as referred to by the Convention). It is inherent in all obligations under PIL. The question then is, does an MSA create an obligation under international law? This question will be addressed when considering the particulars of mediation itself in chapter 6. For now, we can say though that there is no strong evidence that points to the fact that there is no obligation whatsoever created from an MSA. It might not come to light via the same robust legal mechanisms as a decision by the Court or the ratification of a treaty. However, in theory, an obligation is created.

Therefore, with regards to the enforcement of an ICJ decision or an MSA, we find that preceding particular rules and mechanisms there is a common denominator, a common 'principle of first cause', even though the rules which give expression to it are quite different. This supports the argument that mediation and FDR can coexist in the field of PIL, even if they are applied differently, as both rely or can rely on the same principles upon which it can base enforcement. Yet, even if Court decisions and MSAs are driven by the same principle, they may alternately be preferred depending on the dispute. In the next sections we will consider the issues of jurisdiction and disputes of a "political" matter to answer this question, and to identify the distinctive role to be played by mediation.

3.2 Standing Before the ICJ

Article 34 (1) of the Statute of the ICJ reads: "1. Only States may be parties in cases before the Court." [73] Yet, as was indicated in chapter 2 above, mediation is often deployed when dealing with investor-State disputes, and in the chapters hereafter it will be illustrated that in conflict-mediation, oftentimes at least one of the parties is a non-State actor. The subsection will

[71] Land and Maritime Boundary between Cameroon and Nigeria,(Cameroon v. Nigeria), Judgment, Preliminary Objections, 1998, ICJ Rep 275, ICGJ 64 (11 June).
[72] Nuclear Test, (Aus vs. France), Advisory Opinion I.C.J. 1974 I.C.J. Rep 99 (Dec. 20) p. 253 para 46.
[73] United Nations, *Statute of the International Court of Justice*, 24 October 1945, 33 UNTS 993 [hereafter referred to at the *ICJ Statute*].

briefly explore the legal personalities under PIL, and suggest that perhaps for those actors who do not have easy access to FDR institutes but who are in dispute with a State actor, mediation is a sufficient option. This section will also introduce the utility of mediation with regard to disputes between two States where one does not recognise the other as a legitimate sovereignty (for example, China and Taiwan).

3.2.1 ICJ and Non-State Actors

Andrew Clapham provides the following definition of non-State actors (NSA) as: "The concept of non-State actors is generally understood as including any entity that is not actually a state, often used to refer to armed groups, terrorists, civil society, religious groups or corporations."[74] Conversely, the 'positivist' view of PIL posits that the world consists of "autonomous, sovereign States and sovereignty is conceived of maximally, such that the only limitations on sovereignty are those to which states have consented via their ratification of treaties or their participation in the development of custom."[75] This view leaves very little room for NSAs in the field of PIL. Yet, these actors are playing more and more of a prevalent role in the field of PIL. Such an increased role leads to a higher rate of interaction with States, which leads to a higher rate of disputes between the different international legal personalities (ILP).[76] If the 'positivist' view of PIL can be placed on the one end of the discussion, then the natural law theory can be placed on the other end. It is a lot more inclusive with regard to the interpretation of ILPs, and embraces the participation of individuals. The criticism of this view though is that it is too idealistic[77] With respect to the question of *ratione personae* in PIL, and particularly the ICJ, reality probably reflects a scenario somewhere between the two ends of the discussion. How has the ICJ addressed this question?

The jurisdiction of the ICJ with regard to the resolution of disputes, is limited to only disputes between States, as shown above. Yet, it regularly faces disputes involving one NSA both in its contentious and advisory capacity.[78] In answering the question with regards to the capacity to bring a claim before the ICJ, the summary of the Reparations advisory opinion[79], one of the most influential works on the topic, provide the following insightful paragraph with regards to ILPs in general:

> The Court goes on to consider what characteristics the Charter was intended to give to the Organization. In this connection, the Court states that the Charter conferred upon the Organization rights and obligations which are different from those of its Members. The

[74] A. Clapham, *Non-State Actors*, in POST CONFLICT PEACE-BUILDING: A LEXICON, p. 200-212 (Vincent Chetail, ed. 2009) Available at: http://ssrn.com/abstract=1339810
[75] Fergus Green, *Fragmentation in two dimensions: The ICJ's flawed approach to non-state actors and international legal personality,* vol. 9, Melbourne Journal of International Law, 2008, P. 4
[76] Id. at 2.
[77] Id. at 5.
[78] Id. at 7.
[79] Reparation for Injuries Suffered in the Service of the United Nations, Advisor Opinion, 1949, ICGJ 232 (11 April).

> Court stresses, further, the important political tasks of the Organization: the maintenance of international peace and security. Accordingly the Court concludes that the Organization possessing as it does rights and obligations, has at the same time a large measure of international personality and the capacity to operate upon an international plane, although it is certainly not a super-state.[80]

What can be deduced from this paragraph? First, that the Organisation (the UN) was 'given' certain rights and obligations in relation to PIL by its Charter. Furthermore, it emphasises the particular purpose of the Organisation which is the maintenance of international peace and security, similar to the formal objective of PIL. Yet despite these attributes, the Court stresses that the rights and obligations are not the same as those of a State; that they are only conferred upon the Organisation by its Charter (and are not inherently part of it); and that while it may 'operate on the international plane' it is not a super-state. The Court addressed the ILP of the UN in particular, but, as Green states "the Court's specific reasoning in relation to the concept of ILP is unclear."[81] Insofar as establishing specific criteria for the establishing ILP, and by extension a more inclusive development of *ratione personae* of NSAs, the Reparation opinion is not of any broad assistance.[82]

The Reparations opinion indicates the UN is "a subject of international law and capable of possessing international rights and duties"[83] However, what about NSAs in general? Did the ICJ in this case establish a general 'test' to determine ILP? In short, no. It addressed the ILP of an organisation in particular, and it only acknowledged that it has rights and obligation under PIL, because it was conferred upon it by its Charter. The same precondition may be applied to other international organizations in general, but that was not made clear. If anything, there are no proclamations with regard to individuals.

The result is that aside from specialised instances NSAs do not have sufficient legal footing to resolve disputes between itself and States. There are many other concepts that can be explored in relation to this topic such as sovereignty, self-determination and attribution of conduct to a State. However, what this section set out to illustrate was that in general NSAs do not have equal access to dispute resolution. Once again, in this regard mediation can play a vital role, as will be shown in subsequent chapters. But beyond individuals and organisations, mediation can potentially play a role in the resolution of disputes between States in cases where at least one of them does not recognise the other as a legitimate State.

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[80] Reparation for Injuries Suffered in the Service of the United Nations, Advisor Opinion, 1949, ICGJ 232 (11 April). at 1.
[81] Green, *supra* note 74, at 8.
[82] Id.
[83] Reparation for Injuries Suffered in the Service of the United Nations, Advisor Opinion, 1949, ICGJ 232 (11 April) at 179.

3.2.2 Non-Recognition

To reiterate, only States may be parties in cases before the Court. The question is, however, what about the incidents of non-recognition of a State, particularly when that State is indeed recognised by the majority of the international community and the UN itself. Several aspects may be considered here. First, the fact that one State does not recognise the sovereignty of another does not mean that they can or do not interact on an international stage. The University of Chicago Law Review points out that the United States (US) formally does not recognise any States created by conquest. Though it lists three examples where the US nonetheless did interact with such States, despite formal non-recognition.[84] Further, it also does not mean that the unrecognised State does not have jurisdiction ratione personae at the ICJ or other courts or tribunals. Consider for example article III of the Treaty of Basic Relations between Japan and Republic of Korea which reads: "It is confirmed that the Government of the Republic of Korea is the only lawful Government in Korea as specified in the Resolution 195 (III) of the United Nations General Assembly."[85]. Essentially, South Korea does not recognise the government in Pyongyang as legitimate. Yet, since 1991 both the Republic of Korea and the Democratic People's Republic of Korea were admitted as members of the UN, and thus have access to the ICJ, according to UN Security Council Resolution 702. This is just one example of several similar scenarios around the world.

What it does entail though is that resolving a dispute before the ICJ would be practically problematic, as it would inherently require both States to recognise the other as a *de jure* and *de facto* legitimate State. Yet, short of such a recognition, the resolution of disputes (often ironically related to non-recognition) is problematic for those involved. Once again mediation may provide a solution. In September of 2020 the Abraham Accords were signed by Israel on the one hand, and the UAE on the other. Bahrain, Morocco and Sudan, all States which previously did not recognise Israel, have since joined the agreement, thereby recognising Israel and normalising diplomatic and other relations. The agreement was mediated by the Trump Administration, and thus provides a very contemporary solution for States that do not initially recognise one another to not only do so, but to officially resolve many other disputing issues. Unfortunately, at the time of writing this thesis the Abraham Accord are only a few months old, and therefore very little is known about the proceedings. Another agreement in which Israel was involved is the Camp David Agreement, of which much more is known, and it will be discussed in more detail in subsequent chapters.

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[84] Editors, Law Review, *Non-recognition: a reconsideration,* volume 22, The Uni. of Chicago Law Rev. 261 (1954).

[85] Treaty on Basic Relations between Japan and the Republic of Korea, Japan-R.O.K., article 3, 22 June 1965, UNTS. No. 8471.

It is thus proposed that in instances where dispute resolution via the ICJ (and other institutions of FDR) is limited based on non-recognition, the involvement of NSAs or other issues regarding ratione personae, mediation seems to be a viable option.

Of course, the proposition of mediation instead of FDR is not flawless. In the subsection above, it was proposed that good faith is a sufficient binding force for the ICJ as it could be for mediation, despite the vastly differing compliance mechanisms between them. However, the principle of good faith as stated in the UN Charter, as well as UNGA Resolution 2625 and the ICJ cases listed, explicitly refers to this principle with regard to States. The obligation to comply with an MSA from that perspective thus only falls on one party in a State-NSA dispute. This is not to say that it is inaccessible for the NSA, or that it cannot be agreed upon in the MSA itself. But only that, as a principle of 'first cause', the State is at a disadvantage as it is pre-obligated. Simultaneously though, it may be said that given the vast resources that a State would generally have compared to a non-State actor, the latter is often at a disadvantage in that regard. Fortunately, the flexibility and the party-driven nature of a mediation process, including the MSA, would allow the parties to address these issues of compliance and implementation as they see fit.

3.3 Disputes of a Political Matter

In the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) Case (1986), the ICJ declared that the "Court has never shied away from a case brought before it merely because it had political implication or because it involved serious elements of the use of force."[86] Yet, in a separate opinion judge Lachs stated that even though most international disputes have political and legal elements and that political organs such as States are under an obligation to comply with international law, "This does not mean that all disputes arising out of them are suitable for judicial solution."[87] And even though the Court is willing to engage with disputes that have political implications, as it should, this does not mean they have the appropriate capacity to do so. In this regard Helmut Steinberger stated that:

> Experienced observers of international relation are right when they consistently note that the function of international law and of international jurisdiction in the area of the peaceful settlement of highly political disputes, and in particular of disputes containing a

[86] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Judgment, 1986 I.C.J. Rep. 14, p. 190 (June 27).
[87] Id. at 168

threat to peace or international security, is of necessity quite limited.[88]

Does this then entail that despite the Court's willingness to engage with disputes which involve political issues, they are unable to affect it in any way at all? According to Andrew Coleman, no. He concluded that:

> ...the ICJ should not be *expected* to find a political solution.... Instead, the role of the Court is to resolve legal questions so that a political solution can be found either by the parties themselves or by the appropriate organ of the UN. [89] (emphasis added)

Yet if anything, the above statement and conclusion only reiterates the main function of the court as indicated in art. 36(2) of the Statue of the ICJ, which establishes the jurisdiction of the Court with respect to "all legal disputes concerning the interpretation of a treaty; any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation."[90] The Court's competences thus lie in legal questions. Often, in addressing such questions, it may also resolve political issues as a consequence of the legal dispute resolution. Such a consequence of the Court's action should be welcomed and encouraged by the Court, the parties and observers alike. As long as the Court functions within its jurisdictional purview.

However, aside from the question of jurisdiction, it may be that States perceive the dispute to be too politically sensitive, or that they would simply prefer to avoid the Court (or other international courts and tribunals) altogether. It may also be that the States simply distrust the objectivity of the international courts and tribunals. These notions are not new, and can be traced back to the work of Hersch Lauterpacht titled "The Function of Law in the International Community"[91] It must be noted that the book was written at a time when the notions of sovereignty, subjects of international law and even the "honour" of States were seen in a very different light as today. Nonetheless, this work is still respected today and the arguments which are presented here may still be relevant.

Lauterpacht first submits a Memorandum by the Russian delegation at the First Hague Conference which reads "In introducing international (dispute resolution) into the life of States,

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[88] Helmut Steinberger, *The International Court of Justice* in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES INTERNATIONAL COURT OF JUSTICE OTHER COURTS AND TRIBUNALS ARBITRATION AND CONCILIATION, 193 (Mosler, H. et al. eds. 1974).
[89] Andrew Coleman, *The International Court of Justice and highly political matters*, Melbourne Journal of Int'l Law volume 4 (2003) 46.
[90] *ICJ Statute, supra* note 73.
[91] Sir. Hersch Lauterpacht, *The Function of Law in the International Community*, 2011 edition (1933).

we must proceed with extreme care in order not to extend unreasonably its sphere of application so as to shake the confidence which may be inspired therein or discredit (dispute resolution) in the eyes of Governments and peoples."[92] This submission is presented as an example of balancing the trust of States in settling issues of international law on the one hand, and non-interference in sovereignty on the other. The distinction between 'legal' and 'political' was introduced more and more, as a way of encouraging States to trust the international legal order.[93] It is this traditional lack of confidence in the impartiality of international courts and tribunals, that, for example, gave life to the concept of 'reservations'. The lack of confidence is not based on the inability of international jurists to deal with appropriate questions, but that there is a risk in exposing the interests of States to the decisions of judges or the judicial process, when impartiality cannot be guaranteed.[94]

What then is meant, according to Lauterpacht, by 'political' issues? First, it is pointed out that certain bilateral treaties during the earlier part of the 20th century indicated that a question on whether or not a dispute is political or not, shall be decided by the Tribunal in question. Such a question will require answering when a dispute involves "vital interests, the independence, or national honour of the disputants"[95]. Or, as stated in a treaty between Switzerland and Germany, disputes regarding the "independence, the integrity of its territory, or other vital interests of the highest importance". If the dispute does not fall within these categories, it is "mainly political and, for this reason, does not allow (for) a decision based exclusively on legal principles."[96] These examples are good indicators of what a 'political' dispute might be defined as. However, Lauretpacht raises two further points that are essential to the conversation. The first is that courts and tribunals of international law, generally have the ability to make a positive declaration as to what a 'legal dispute' *is*, or that the essential question of the dispute is indeed a legal one. This interpretation would suit the purview of article 36(2) of the ICJ Statute very well even today. Simultaneously, a court or tribunal cannot decide whether a dispute affects the security or vital interest of a State or not. Such a question is subjective and should be left up to the States themselves to determine.[97] There is thus a 'two-pronged' way of determining whether a dispute is political or not. First, that, in the view of the judiciary and by the application of international law, the core question of the dispute has a sufficient legal identity to it; secondly, that it would depend on the issues that States themselves subjectively submit to courts and tribunals via consent (or reservations), derived from the sovereignty of the State.[98] These are disputes which, though they could have a legal aspect, was described as those related to the "dignity and sanctity of national interests"[99]. The question of what national interest is will be examined in the following chapter.

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[92] James B. Scott, The Reports of the Hague Conferences of 1899 and 1907 (1917), 5, in THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (Sir. Hersch Lauterpacht, 2011).
[93] Lauterpacht, *supra* note 89, at 5.
[94] Lauterpacht, *supra* note 89 at 202.
[95] Id. at 187.
[96] Id.
[97] Id. at 188.
[98] Id. at 144.
[99] Id.

How then shall such 'political' issues be addressed and resolved between States? As proposed by this thesis, the appropriate way of resolving such disputes of a political nature is by the mechanism of mediation. Laurepachts seems to agree, and quotes baron Descamps which "repeatedly" argued that "apart from the important (political) issues, which require the machinery of mediation, there are legal disputes".[100] The footnote to this particular quote also refers to Heinrich Lammasch, an Austrian Jurist. He argued for the application of "mediation for political i.e, grave disputes" and "arbitration (litigation) for other disputes" in "Die Fortbildung des Völkerrechts durch die Haager Konferenz." [101] It would thus seem that several of the early jurists of the modern PIL era proposed the idea of the application of mediation regarding political disputes. However, despite such early support, this idea has not taken root nor developed in the way that arbitration or litigation (via the Permanent Court of International Justice (PCIJ) or ICJ) have done. One has to remember that in the decades after the publications of these jurists there were several major international socio-political events, which undoubtedly had a major impact on the way international law was applied. Yet it would still stand to reason that mediation is an appropriate mechanism to address disputes, particularly if States themselves do not trust the judiciary (for whatever reason); if the core question of the dispute cannot be solved through the resolution of a legal question; or if the States insist that the dispute regards 'sensitive' interests. Though the world might have changed over the past century, this thesis would argue that these matters have not.

3.4 Final Remarks

The topics and themes that were discussed in this chapter have been extensively written on and researched elsewhere, and deserve their own thesis'. In so far as they were discussed in this chapter it was intended to serve as a general summary thereof in service of the argument for the application of mediation along with and relative to the ICJ (and indeed other international courts and tribunals). The topics were presented in support of the larger claim, which is that there is a particular role for mediation to fulfil in PIL.

The following chapter will discover how mediation has been practically applied and implemented. Not all of the concepts from chapter 3 will be covered, and new ones will also be introduced. But a like-for-like continuation is not the purpose here. Chapter 3 served to 'compare' the role of mediation to the ICJ with regard to PIL. The next chapters will focus only on mediation in its own right, and how it has been implemented in recent times.

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[100] Id. at 142.

[101] H. Lammasch, *Die Fortbildung des Völkerrechts durch die Haager Konferenz,* volume 11, Zeitschrift für Internationales Privat-und Strafrecht, 32, (1902).
Note that Lauterpacht's footnote on page 142 regarding Lammasch's opinion indicates that the title of the article includes the word "Staatrecht" and that the quote is from page 31. Though, the copy that I found had the title "Strafrecht" and if my translation is correct the different types of disputes were mentioned at the top of page 32, not on page 31 as Lauterpacht indicated.

Chapter 4: Identity and Examples of Inter-State Mediation

Mediation within the context of PIL has developed somewhat unevenly as different treaties, international organisations and practices have developed independently of one another. Similarly, the "identity" of mediation remains underdeveloped and incomplete at a PIL level. In the previous chapter it was shown that States are generally hesitant to submit political disputes to a mechanism which they do not trust. In the absence of a general identity of mediation with a solid foundation of principles, it might be equally hard for States to trust mediation.

However, through an examination of the modern application of mediation, this chapter will show that there are sufficient similarities across the board to form the foundation of a clear identity. This will be done by and large by presenting the procedural aspects of mediation, as well as keeping the formal aspects in mind.

4.1 Conflict and Dispute

Before presenting the principles of mediation a particular perception needs to be addressed. Art 33(1) of the UN Charter states that "parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall... seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement… other peaceful means of their own choice."[102] Mediation is presented as applicable to any and all disputes, ie, not just particular ones. However, practice reflects a slightly different picture. J. Bercovitch refers to mediation as "(a) process of conflict management… without resorting to physical force, or invoking the authority of the law."[103] The definition provided in chapter 2 from the UN Guidance also states that "Mediation is a process to prevent, manage or resolve a conflict."[104] Thus on the one hand mediation is presented as a mechanism for 'conflict' resolution and on the other hand for 'dispute' resolution. Is there a difference though? From the perspective of PIL, the Mavrommatis Palestine Concessions case PCIJ, provided the following broad definition "A dispute is a disagreement on a point of law or fact, a conflict of legal views or

[102] United Nations, *Charter of the UN, supra* note 52.
[103] J. Bercovitch, *The Structure and Diversity of Mediation in International Relations*, 1, in MEDIATION IN INTERNATIONAL RELATIONS: MULTIPLE APPROACHES TO CONFLICT MANAGEMENT (Jacob Bercovitch & Jerry Rubin eds. 1992).
[104] United Nations, *UN Guidance, supra* note 14, at 1.

of interests between two persons."[105] Note that the definition establishes that a dispute may be of law and a conflict of legal disputes however, it is not exclusive to it. A dispute can *also* be a disagreement of facts or, of *interests*. Note that the Mavrommatis case was concluded in 1924. In Chapter 3 (page 31, 32) the writings of jurists were presented to clarify that mediation would be applicable for 'political' disputes, which were described as those that revolve around the *interests* of States (among other possibilities). These publications happened in the period after the Hague Conventions and prior to World War II. Lauterpatch' work was published in 1933, and Lammasch' work in 1902, therefore both prior to and after the Mavrommatis case. It is thus entirely conceivable that when the judge in that case included the idea of a dispute as a conflict of interests, that it was done so with the meaning of 'interests' as understood by the listed jurists. A 'dispute' is thus the larger concept, and a conflict can be a disagreement related to the interests of parties. The definitions provided by Bercovitch and the UN Guidance would thus fall within the larger scope of the definition of the UN Charter, Article 33(1). For the purposes of this thesis 'conflict' should not exclusively be seen as a clash of violence, or of unrest (though it may be). It should be seen within the broader definition espoused by the PCIJ. From here on out the term "dispute" will be used in relation to mediations, as it is simply more inclusive. The term "conflict" will generally refer to disputes that involve an element of force.

In order to understand mediation better, focus will now turn to the effect of mediators and methods in international mediation. Doing so will reflect the concepts that were introduced in chapter 2, as well as create a backdrop for examining particular cases.

4.2 Mediators

International mediators can be a State, International Organisation (IO) or non-government-organisations (NGOs). Individual mediators such as former UN secretary-general Kofi Annan chaired the Panel of Eminent African Personalities that mediated the 2007–08 Kenyan election crisis. The advantage of such individuals is that they bring 'gravitas' and experience in dealing with groups with opposing ideas.[106] State mediators are often powerful actors on the international scene and may have a lot of resources and well-trained experts at their disposal. However, the State-mediator may have a pre-existing relationship with one or both of the parties in the dispute which creates bias. Furthermore, State mediators can be restricted due to international law obligations.[107] IOs are mandated by their

[105] Mavrommatis Palestine Concessions (Greece v. U.K.), Judgement, 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30)
[106] Jonas Baumann & Govinda Clayton, *Mediation in Violent Conflict,* No. 211, Center for Security Studies (CSS), ETH Zurich (2017), p. 2
[107] See Federal Foreign Office, *The Roles and Contributions of States in Peace Mediation,* Peace Mediation Germany, (2017).

member States and are often driven by a collective goal of their member-States.[108] They may also have significant financial and administrative resources and practical expertise that are greater than what an individual State can call upon. Because of the collective goal of IO members, bias is presumed to not be a hindrance. NGOs are more flexible and less bound by political constraints than States and IOs, and specialized NGOs have considerable expertise to offer. Yet, they often face limited resources, are dependent on donors and do not have the same gravitas as the other actors and therefore have more difficulties to engage directly with high-level State actors.[109]

All mediators have a very influential role to play in determining the mediation process. Bernd Beber from New York University writes that "mediators shape the informational environment faced by antagonists and actively engage in making proposals and drafting settlements."[110] Beber references Andrea Bartoli's analysis of Sant'Egidio's mediation efforts in early 1990's Mozambique where there was a need to "collect, assess, and strategically share (and withhold) information".[111] Bartoli assesses that ''time spent (by the mediator team) sharing information, commenting on and analysing it, suggesting new ideas, and making recommendations was invaluable'', and that ''information management was crucial ... in order to minimize a disruptive and possibly inflammatory diffusion of information''.[112] The role of the mediator must however be motivated and informed by the willingness of parties to actively participate in the mediation. Jackson completes his analysis of the Mozambique mediations with the following statement:

> A final lesson from Mozambique... is that there is no substitute for the parties' own willingness to seek a peaceful solution. Without it, all outside interventions are likely to fail. This willingness is thought to come from what has been called conflict 'ripeness'. [113]

Parties may signal such a willingness in what Jackson describes as the 'pre-negotiation' stage, which he presented after his assessment of the Mozambique mediation. It can be described as "the period when the protagonists begin to shift from a combative to a collaborative orientation, and start to accept that their goals will be better achieved through cooperation."

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[108] Baumann & Clayton *supra* note 104, at 2.
[109] Baumann & Clayton, *supra* note 104 p. 2
[110] Bernd Beber, *International Mediation, Selection Effects, and the Question of Bias*, Volume 29 No. 4, Conflict Management and Peace Science, p. 397 (2012).
[111] Id.
[112] Andrea Bartoli, *Mediating peace in Mozambique: The role of the community of Sant'Egidio*, In HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD, p. 247–273, (Chester A.Crocker et al. eds. 1999). 263.
[113] Richard Jackson, *Internal War, International Mediation, and Non-Official Diplomacy: Lessons from Mozambique,* Vol. 25 No. 1, Journal of Conflict Studies, (2005).

4.2.1 Bias in Mediation

Due to the fact that mediators play a definitive role in developing and guiding the proceedings of the mediation, it is required that a mediator remain unbiased. Beber writes that "Biased mediators are relatively less effective at resolving disputes than their unbiased counterparts, because only an unbiased mediator can credibly share conflict-relevant insights.[114] According to Jackson a biased mediator has a vested interest in "designing an agreement that allocates as much as possible to his preferred disputant."[115] The designing of an agreement by a biased mediator undercuts the mediation tenet of a 'party-driven' process. It would be ideal for the mediator to remain impartial. The UN Guidance describes impartiality as:

> ...a cornerstone of mediation... if a mediation process is perceived to be biased, this can undermine meaningful progress to resolve the conflict. A mediator should be able to run a balanced process that treats all actors fairly and should not have a material interest in the outcome… Impartiality is not synonymous with neutrality, as a mediator… is typically mandated to uphold certain universal principles and values... [116]

Considering the globalised world in which we find ourselves, true neutrality would be incredibly hard to find. However, by remaining impartial the mediator must act in such a way that does not create the perception that he or she created any intentional advantage for either party in leading the mediation process.

4.3 The Process

Mediators must pay special attention to the relevant dynamics of the disputes which they are overseeing and select the optimal methods applicable. This includes identifying the underlying issues and the dyadic characteristics that have brought the States to the point of dispute or conflict, and could lead to more violence in the future.[117] The method for the particular stage of the dispute is equally important and can change over time. The mediator can structure interaction by providing a procedural framework, which will be determined by the model they choose. It may include arranging negotiation sessions, prioritizing issues, drafting agendas, providing meeting places, setting deadlines, and assisting in managing media relations.[118] Furthermore, mediators can play a role in the flow of information by ascertaining facts and relaying information between the disputants and facilitating communications between

[114] Beber, *supra* note 108.
[115] Id.
[116] United Nations, *UN Guidance, supra* note 14
[117] Sara M. Mitchell, *Mediation in Interstate Disputes*, 19, Int'l Neg, 191 (2014)
[118] Beber, *supra* note 108

antagonists. Mediators can also selectively manage information at their own discretion by screening certain communications.[119] Lastly, mediators can recommend concessions, moderate extreme demands, propose possible settlements and suggest substantive compromises. The extent to which they execute these duties will be influenced by the method they choose. In chapter 2 the facilitative and directive methods were introduced in general terms. What follows is a brief reintroduction of them based on the research of international mediation.

4.3.1 Facilitative Method

It is the most common strategy in interstate dispute mediation, accounting for 43.7% of cases.[120] The mediator functions as a 'subtle' messenger with the focus on facilitating the flow of information and supporting communication between the parties. The communication may be direct or occur via shuttle diplomacy.[121] Furthermore, the mediator may convene the parties and help them to highlight possible points of agreement, support communications, reduce misperceptions[122], and even go as far as eliciting underlying motives behind the demands and positions.[123] Facilitative mediation is a slower method and therefore requires a longer period of time to be effective. This would be problematic in cases where there is a political emergency and it is imperative to quickly reach an agreement. Yet, the agreements developed in this manner tend to be durable, largely because of the participatory, reciprocal and 'mending' nature of the process.[124]

4.3.2 Directive Method

The Directive-strategy uses a lot more of a 'high-powered diplomacy' style, and accounts for 29.6% of dispute or conflict management efforts.[125] The mediator plays a more active role, including settling on the negotiation environment, timing, location and points of order.[126] This also allows the mediator to manage access to information and to introduce creative solutions, make proposals and provide incentives for settlement.[127] Directive mediation relies on using the mediator's position in order to elicit an agreement, which would require the mediator to have both strategic acumen and enough gravitas to direct the proceedings.[128] However, the mediator

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[119] Id.
[120] Scott S. Gartner, *Third-Party Mediation of Interstate Conflicts: Actors, Strategies, Selection, and Bias*, Volume 6, article 13, Y.B. Arb. & Mediation, 269 (2014), at 285
[121] Id.
[122] Baumann & Clayton, *supra* note 104, at 2.
[123] Federal Foreign Office, *Basics of Mediation: Concepts and Definitions*, (February 2017) Available at http://www.peacemediation.de/uploads/7/3/9/1/73911539
[124] Baumann & Clayton, *supra* note 104, at 2.
[125] Gartner, *supra* note 119. 285.
[126] Baumann & Clayton, *supra* note 104, at 2.
[127] Mitchell, *supra* , note 116.
[128] Federal Foreign Office, *Basics of Mediation: Concepts and Definitions, Supra* note 122.

may not dictate the content of the agreement.[129] The main advantage of this method is that due to its direct nature it is less time consuming and beneficial in cases where a continued dispute would be to the detriment of all parties. It is most likely to be employed in highly salient situations and intense conflicts.[130] Another benefit is that it may lead to the full settlement of the issues. The directive mediator can have a holistic view of the issues at hand, and influence the parties to consider these as well, beyond settling what is merely in front of them.[131]

Regardless of the methods deployed, mediation needs to place equal importance on the process and the relationship of the parties. [132] A "bad process will greatly impede agreement. It can even contribute to ultimate failure, no matter how well designed the outcome, simply because the way in which the talks were structured may cause *friction and distrust*…"[133] (emphasis added).

The following subsection will present several prolific mediations and illustrate how several of the concepts and principles that have been introduced thus far have been expressed.

4.4 Examinations of Mediations

This section will examine two particular mediation of disputes which will serve as examples for further discussion. These mediations were chosen due to the fact that comparatively quite a lot is known about them. This is in part due to the fact that they were successful. The content and procedures of mediations are unlikely to be made public if they were unsuccessful. Furthermore, because of their notoriety it received more public attention. Lastly, these mediations represent and illustrate various aspects of mediation that have been presented thus far; both are disputes which had elements of conflict; both represent various high-powered mediators as well as various mediation strategies; in both cases the mediating parties are States. Furthermore, these cases are also related to other mechanisms and institutions of PIL. Lastly, they represent two of the more common types of disputes in which mediation may be utilised, namely the status of borders and State-recognition.

4.4.1 Border Disputes - Papal Mediation in Beagle Conflict

More often than not, modern disputes in some way shape or form be related to territory, maritime boundaries or borders. These disputes are often compounded by the discovery of

[129] Mitchell, *supra* , note 116.
[130] Mitchell, *supra* , note 116.
[131] Id.
[132] Jackson, *supra,* note 111.
[133] Id.

natural resources and questions related to sovereignty. The Beagle Conflict is an example of such a dispute.

i Background and Mediation

The Beagle Channel connects the Atlantic and Pacific Oceans at the southernmost tip of South America.[134] Throughout the channel there are several islands, the ownership of which had been decided upon by the Boundary Treaty of 1881.[135] This was based on the border treaty of 1856 where Chile and Argentina had agreed to retain the borders of the Spanish colonial administration as per uti possidetis. The 1881 Boundary Treaty awarded Chile "all islands to the south of Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego."[136] It was considered that Argentina had an exclusive presence in the Atlantic Ocean, and Chile an exclusive presence in the Pacific Ocean. [137] By the 1970s the discovery of oil and mineral deposits on the islands, questions around fishing rights and other geopolitical considerations led both Argentina and Chile to seek a more explicit understanding of ownership. [138] On 22 July 1971 Salvador Allende and Alejandro Lanusse, the Presidents of Chile and Argentina, signed an arbitration agreement.[139] This agreement related to their dispute over the territorial and maritime boundaries between them, and in particular the ownership of the Picton, Nueva and Lennox islands.[140]

In 1977 this panel issued its decision, awarding Argentina navigational rights to its naval base in the channel, and Chile the three disputed islands.[141] Argentina rejected the decision and started to mobilize in the area. There were attempts to negotiate between the two States, but these deteriorated, military actions escalated along with economic sanctions, trade obstacles, and expulsion of immigrants. At this point in the conflict several mechanisms of PIL had been applied and had failed. Mediation was the last option to the peaceful settlement of a dispute which, if left unchecked, would have sparked a war between the two States, and had the potential to involve all of Latin America.[142]

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[134] Physical World Atlas (Tile F9) (Siteatlas.com https://www.sitesatlas.com/physical-world-atlas/F9f/)
[135] *See* Boundary Treaty of 1881, Chile and Argentina, 23 July 1881.
[136] Id.
[137] Id.
[138] Emma Altheide, *Vatican Mediation and the Venezuelan Crisis*, volume 2018(1) Article 15, Journal of Dispute Resolution (2018).
[139] *See*, Dispute between Argentina and Chile concerning the Beagle Channel, International Arbitral Awards Rep Volume XXI 53 (1977).
[140] Id.
[141] Id.
[142] M.C. Mirow, *International Law and Religion in Latin America: The Beagle Channel Dispute*, Vol. 28:1 Suffolk Transnat'l L. Rev. (2004).

The Chilean Foreign Minister Hernan Cubillos described the attributes required for a mediator for the crisis to be "influence, moral power, political power, economic power."[143] Argentina included "the King of Spain, the United Nations, the Queen of England, UN Secretary General Kurt Waldheim, Henry Kissinger, and the Pope" as possible candidates for the mediator.[144] When the foreign ministers met the Argentinians had decided that they would only accept the Pope as the possible Mediator of the crises, expecting Chile to reject the offer, which would have led to military conflict where Argentina would have had the upper hand.[145] Despite the Chilean foreign minister surprisingly accepting the Argentinian proposal, and due to internal political mechanisms, warships soon started to move towards one another in the Magellan. President Videla of Argentina announced that they would invade the disputed islands on the 21st or 22nd of December 1978.[146] Upon hearing the news the Pope, John Paul II sent a personal representative, Cardinal Antonio Samore to intervene. He arrived on Christmas day 1978 and hostilities between the States were halted. From this time until January 1979 the Cardinal flew back and between Buenos Aires and Santiago in an exercise of shuttle diplomacy, and with each trip got the parties to submit more information. This process was part of the prenegotiation, which culminated in the Act of Montevideo, where the parties officially agreed to mediation by the Vatican and to withdraw their forces status quo ante. [147] [148]

The official request for mediation was accepted by the Pope, and again Cardinal Samore was appointed as the Pope's official representative. Over the next 15 months hundreds of individual and joint meetings were held during which the important issues of maritime delimitation and territory were discussed. The States were in a deadlock during the negotiation, and the Pope made his own proposal, which Chile accepted by Argentina rejected.[149] In 1983 Samore died, and was replaced by Vatican Secretary of State, Cardinal Agustino Casaroli. Casaroli took a more direct approach than Samore, and was able to press the parties into an agreement, and on the 23rd of January 1984 they signed the Declaration of Peace and Friendship.[150] [151] War had been averted, the issues relating to the dispute had been resolved, future dispute settlement mechanisms had been agreed upon and economic relations had been

[143] Altheide, *supra*, note 137.
[144] Id.
[145] Mirow, *supra*, note 141.
[146] Mirow, *supra*, note 141.
[147] Id.
[148] Act of Montevideo by which Chile and Argentina request the Holy See to act as a mediator with regard to their dispute over the Southern region and undertake not to resort to force in their mutual relations (with supplementary declaration), Chile-Argentina, 8 January 1979, No. 17838.
[149] Mirow, *supra*, note 141.
[150] *See* Treaty of peace and friendship (with annexes and maps). Signed at Vatican City on 29 November 1984, Chile-Argentina, 17 June 1985, No. 23392 [hereinafter Treaty of Peace and Friendship].
[151] Mirow, supra, note 141.

improved. [152] [153] The proceedings were helped enormously by the fact that the Vatican generally operates from a position of secrecy vis-a-vi the outside world.[154] In fact, when the Pope received the delegates on December 12, 1980 he communicated to them that the terms of his proposal had been developed in secret and should be as such in order to avoid exhausting public debate that would lead to diminishing confidence in the proceedings and limit the candour and freedom of the representatives.

ii The Elements of Mediation

Regarding the process of mediation, Samore first employed a more facilitative approach, and after him Casaroli employed a directive method. The Pope, in directly suggesting a resolution proposal also employed the directive method. We also find that Samore used several different means of facilitating the mediation, by using 'shuttle diplomacy' and joint sessions. While the Pope was not neutral per se, the mediators could remain impartial. The Vatican played an important role here as it was able to ensure the secrecy of the proceedings (at least from its side) and thus confidentiality.

The Act of Montevideo serves a very important purpose as well. It provided a distinct moment of consent. The previous shuttle diplomacy of Samore, the offer of help from the Vatican, and even pressure by other States, did not at any point form the initiation of proceedings. Only by consensual agreement can States enter into mediation (as with any other form of dispute resolution). Through the agreement consent was provided, which sets the tone for the mediation. This can somewhat be juxtaposed with Argentina rejecting the Arbitral awards, as well as their withdrawal from a previous treaty that would have established ICJ jurisdiction over the dispute. The dispute essentially had its roots in a treaty from 1881[155] and therefore there were undoubtedly legal questions for a court or tribunal to consider. As indicated in the previous chapter, regardless of how political a dispute may be, if there is a legal question, it may be submitted for interpretation. However, mediation is a form of dispute resolution which is more sensitive to issues regarding States 'interests'. In this case the States did not have any reason to dispute over the islands, until political factors and motivations began to play a role. The mediation concluded with an MSA, which resulted in a treaty. Though the MSA in combination with good faith should be sufficient for the States to comply, the creation of a treaty adds legal-certainty. Through this process of 'treatification', the mediated settlement agreement achieves binding power.

[152] Chile and Argentina, Treaty of Peace and Friendship *supra* note 149
[153] Mirow, *supra*, note 141.
[154] Id.
[155] Chile and Argentina, Boundary treaty of 1881 *supra* note 134.

4.4.2 Normalisation of Relationship - Camp David Accord

Another issue which often flares up in the international community is that of 'recognition' or 'non-recognition' of States, as previously mentioned. The camp David Accords is one of the more prolific examples of a successful mediation regarding this issue.

i Background and Mediation

This mediation was conducted in secret at Camp David[156], and culminated in the signing of the 1979 Egypt-Israel Peace Treaty.[157] The mediation largely revolved around the implementation and recognition of UN Security Council Resolution 242, which dealt with three main issues. They were summarised as follow:

> Its basic premises call for withdrawal of Israel from the occupied territories and for the acknowledgement of Israel's existence and sovereignty--and its right to exist in peace--by all the nations of the world. And a third thing that it calls for is a just settlement of the refugee problem. [158]

Following the Yom Kippur War of 1973 Henry Kissenger preferred shuttle diplomacy between Israel and the Arab States, however US President Carter engaged in a comprehensive and multilateral approach. The leaders of Israel and Egypt, Prime Minister Menachem Begin and President El Anwar Sadat respectively, were the only two leaders to positively respond.[159] Both Begin and Sadat had become disillusioned with the alternative efforts at the time for different reasons. Sadat had become increasingly frustrated by the Geneva peace talks, which considered the implementation of Resolution 242, considering that they would not bear any fruit. Several disagreements also arose with some of his Arab counterparts.[160] Furthermore, he had other issues to contend with and a peace agreement with Israel would free him up significantly to attend those. At the same time, after Sadat showed interest in direct communication with Israel to find a solution, Begin had indicated that if Israel thought that Sadat would accept an invitation, Israel would invite him.[161] Finding a peaceful solution to the situation as it were, was high on the list of priorities for the newly elected Begin. As soon as it became clear to the US that Begin and Sadat were seriously willing to talk, President Jimmy Carter invited both men and their delegations to Camp David in Maryland, USA. The same issues that were dealt with in Resolution 242 were also addressed here but in more direct terms, along with the question of a

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[156] Camp David Accords, Egypt-Israel, 17 September 1978.
[157] The Egypt–Israel Peace Treaty, Egypt-Israel, 26 March 1979, UNTS 17813.
[158] Jimmy Carter, *Camp David Accords: Jimmy Carter Reflects 25 Years Later*, September 16, 2003
[159] Kenneth Stein, *Heroic Diplomacy: Sadat, Kissinger, Carter, Begin, and the Quest for Arab-Israeli Peace*, 229-228, (1999).
[160] Milestones: 1977–1980 *Camp David Accords and the Arab-Israeli Peace Process*, Office of the Historian.
[161] Israel-Egypt, Camp David Accords supra note 155

unified Israel.[162]

Despite a lot of optimism at the start, and by President Carter in particular, communications between Begin and Sadat had broken down completely at times during the Camp David mediations. Pres. Carter had to perform micro-shuttle diplomacy by relaying directly between one cabin and another.[163] President Carter also contributed significantly in the sense that he made several significant proposals.[164] Eventually the proceedings were a success, and three reasons can be elicited for it. The first is the sheer determination of President Carter. The second is the considerable resources and experts available to all the parties and the mediator. Finally, the entire proceedings were conducted away from the media and other political interest parties. This meant that the leaders could speak freely without fear of pushback from the opposition, or having to provide reassurance to political allies.[165] The result of the 12-day mediation between the 5th and 19th of September 1978 was the Camp David Accords, [166] which resulted in a peace treaty between the two States.

ii The Elements of Mediation

As with the Beagle dispute, this dispute was included in both political and legal issues. In this case the UN Security Council Resolution 242 provided the legal element. However, it is once again illustrated that the 'formal' procedures did not produce the result the parties had hoped for. A lot of diplomatic and political capital was invested in making sure that the Geneva Conference would succeed in resolving the Israel-Arab issue, particularly as it pertained to Palestine. [167]However, these meetings only seemed to stall, which led to the next element of mediation, namely the initiation of proceedings by the parties. It is established that both Prime Minister Begin and President Sadat were willing to engage. President Carter and his Secretary of State, Cyrus Vance played a major role in facilitating communications. However, the consent of the parties had to be established before the proceedings could formally commence.

During the proceedings, President Carter seemingly employed an overall facilitative method. However, there were strong elements of a directive approach as well, particularly in relation to the substantive content of the mediation. Consider an extract from a key-note speech by president Carter in 2003:

> The other issue that has been persistent throughout all these years has been the United States playing a very strong role. I personally used what was called a single document... to ultimately prepare a proposal that was presented precisely word by word to the

[162] Carter, *supra* note 157
[163] Israel-Egypt, Camp David Accords supra note 155
[164] Id.
[165] Id.
[166] Yale Law School, *Camp David Accords; September 17, 1978*, The Avalon Project, Documents in Law, History and Diplomacy, (2008) Available at: https://avalon.law.yale.edu/20th_century/campdav.asp
[167] Bernard Gwertzman, *U.S. Asserts Need For Palestinian Role At Geneva Meeting*, NY Times, (Sept. 13, 1977)

> Israelis, primarily to Prime Minister Begin, and to Sadat and to the Egyptians on the other side. We didn't have one document for one and one for the other. This was a very long and torturous effort to get everybody to agree on exactly the same document. [168]

Parties often prefer mediation exactly because it would allow them to consent at every step of the process. A mediator who is too actively involved may come across as a third-party adjudicator or judge, which the parties want to avoid. The Camp David mediation shows that this can lead to a "long and torturous" process.

Just as the Beagle mediations the mediation took place in secret, or at the very least away from the public eye, thus ensuring confidentiality. Finally, the mediation led to the creation of a settlement agreement, which resulted in a legally binding document, namely the Egypt-Israel Peace Treaty of 1979.[169] This is once again reflective of the Papal mediation. It illustrates that good faith is, as was previously established, a very important principle that leads to the appropriate mechanisms of resolution enforcement.

We find that both of these successful processes reflected nearly all of the elements of mediation that was previously discussed. Procedurally both had a definitive pre-negotiation phase by an impartial mediator who employed both the facilitative and directive methods at various times. Yet of more importance with regard to this thesis on PIL are the formal elements illustrated. These include the consent of the parties, confidentiality, acting in good faith, and establishing a mechanism of enforcement. These elements will be discussed and explored in the following chapters.

4.5 Final Remarks

In this chapter, several aspects of mediation were examined and presented by looking at both academic research and cases of mediation in the modern era. While the general process and elements of mediation were by and large presented, mention was also made of the formal aspects of mediation.

Presenting a detailed analysis is of course difficult due to confidentiality. This principle is vital for the protection of information related to the interests of a State, and for the procedure of mediation to have a higher chance of success. Certain documents are published, such as the MSA and any treaty or convention that may result from it. Furthermore, as we found with the Montevideo agreement between Chile and Argentina, certain pre-mediation documents may also be publicised and filed. Lastly, there are the reposts of the mediators and parties. Yet none

[168] Carter, *supra*, note 157
[169] Egypt-Israel, The Egypt–Israel Peace Treaty, *supra* note 156

of these present a full picture, and though a lot may be known about the dispute, the mediation itself is relatively obscured.

These examples also show that mediators themselves may at times forget their station. Richard Jackson in his review of the conflict mediation in Mozambique identified some approaches by mediators as particularly problematic. He proposes that there is an overreliance on a "diplomatic doctrine" which is "geared to managing the conflicts of states".[170]

Lastly, consider that there is also the opportunity for 'Machiavellian' tactics to emerge by the parties. In the Papal mediation of the Beagle Conflict, Chile presented a list of attributes which the mediator must possess. Conversely, Argentina presented a list of potential mediators. At a strategic point they sought to use the election of the mediator as an opportunity to gain an upper hand. Similarly, the Israelis agreed to invite the Egyptians to mediate, only if they thought that the Egyptians would accept such an invitation. Yet mediation can be very effective in disputes which revolve around sensitive interests, which may lead to military conflict or result from it. We also find that mediation is not entirely bereft of substantial principles, or has no potential into developing into a recognisable system of conflict or dispute resolution. The examination of the examples above (and indeed a lot of other reports on mediation) by and large only present the procedural aspects of mediation. For the purposes of this thesis though it is important to present the formal aspects, and to this end, the analysis will shift to the examination of documents related to interstate mediation. Nonetheless, the presentation of the Papal and Camp David mediation will still serve a purpose as we will be able to reflect on them as examples when dealing with the formal aspects.

[170] Jackson, *supra,* note 111.

Chapter 5: Documents Related to Mediation

This chapter will present documents and publications which addressed formal elements of mediation. It will by and large lean on the Hague Convention and the publications with regards to it. Considering that it is probably the single most significant legal document within modern PIL with respect to mediation, that the Hague Convention is considered as part of CIL, and that it is still being ratified in the current century, it has significant value.

5.1 Consent and Initiation of Mediation

The "Conventions for the pacific settlement of international disputes" (Hague Convention) originally had 26 signatories, and led to the creation of the Permanent Court of Arbitration (PCA), which exists to this day. During the Nuremberg Trials it found that by 1939 the rules laid down in the 1907 Hague Convention were recognised by all civilised nations and were regarded as Customary International Law.[171] While many treaties and conventions have formed in the century since the ratification of the Hague Conventions, their lasting influence on modern PIL cannot be overlooked, particularly in the field of dispute resolution.[172] Article (1) further underscores the commitment of the Hague Convention to the pacific settlement of disputes by stating that "...the Contracting Powers agree to use their best efforts to ensure the pacific settlement of international differences."[173] It is against this backdrop that we find the presentation of mediation as a viable option, as the Hague Convention goes into some detail to explain the operation of mediation in Title II. For the purpose of understanding 'consent' (and the role of States in the initiation of proceedings) in relation to mediation, attention turns to

[171] Yale Law School, *Judgement: The Law Relating to War Crimes and Crimes Against Humanity*, Avalon Project Documents in Law, History and Diplomacy, (2008), Available at https://avalon.law.yale.edu/imt/judlawre.asp

[172] There were two conventions, namely one in 1899 and one in 1907. Though they are very similar, and are often collectively referred to, in all the references in this thesis it will consider the Hague Convention of 1907.

[173] Convention for the Pacific Settlement of International Disputes (Hague Convention I), 18 October 1907 [Hereinafter the Hague Convention 1907]. Hague Convention 1907 *supra* note 172

articles 2 and 3. From the Hague Convention 1907 it reads as follow:

> Article 2. In case of serious disagreement or dispute, before an appeal to arms, the Contracting Powers agree to have recourse, as far as circumstances allow, to… mediation of one or more friendly Powers.
> Article 3 …the Contracting Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer… mediation to the States at variance. Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities. The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act. [174]

In the period after the Hague Convention of 1899, States were able to submit reservations. With regards to mediation, certain reservations were submitted at the Conference of 1899, and were presented in "The Hague Peace Conferences of 1899 and 1907" by James Scott in 1918.[175] These will serve to help explain articles 2 and 3, and in particular the approach by States regarding consent. Consider the following submissions:

> In the name of the Royal Government of Servia, we …declare that our adoption of the principle of ...*mediation does not imply a recognition of the right of third States to use these means* except with the extreme reserve which proceedings of this delicate nature require.
> We do not admit... mediation except on condition that their character of *purely friendly counsel* is maintained fully and completely, and we never could accept them in forms and circumstances such as to impress upon them the character of intervention.[176] (emphasis added).
> The Turkish Delegation… declares… the following conditions: 1. It is formally understood that recourse to ...mediation ...is purely facultative and could not in any case assume an obligatory character or degenerate into intervention. 2. The Imperial Government itself will be the judge of the cases where its interests would permit it to admit (this method) without its abstention or refusal to have recourse to them being considered by the signatory states as an unfriendly act.[177] (emphasis added).

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[174] Hague Convention 1907 *supra* note 172
[175] *See* Volume II, James B. Scott, *The Hague Peace Conferences of 1899 and 1907*: *A series of lectures before the John Hopkins University in the year 1908* (1909).
[176] Id. at 165, 167.
[177] Id. at 167.

The American reservation was one which underscored its policy of non-interference at that time. It did not list any specifics, though "(i)t is fully explained in the report of M. Descamp[178] that mediation was being understood as being "purely voluntary in its character".[179]

These articles and reservations combine to provide some valuable insight into the minds of States regarding the importance of 'consent' mediation. First, States in a dispute will have to *voluntarily agree* to mediation, and that it is up to those States to judge whether the interests in dispute would allow for mediation, or other forms of resolution. With regards to third party States, they had a right to offer mediation to disputing States. However, their involvement would have to be facultative as "purely friendly counsel", and they may not intervene as such. Third parties would also have to exercise their right to mediate with "extreme reserve". Though 'consent' is not mentioned in any of these documents, the basis thereof is presented. It can be argued that given the monumental influence of the Hague Convention until this day, that these provisions are still applicable in one way or another.

Yet how has consent in relation to mediation been expressed in the 21st century? Do they reflect the Hague Convention and the documents related to it? If so, to what extent? These questions are quite difficult to answer based on legal evidence as there are very few documents that present a universal explanation. In this scenario, we will have to rely on a 'non-legal' document, the UN Guidance. The forward of the Guidance, written by then UN Secretary General, included the following paragraph:

> The United Nations Guidance for Effective Mediation is designed to support professional and credible mediation efforts around the world. This concise reference document encompasses the wealth of experience of mediators working at the international, national and local levels. It also draws on the views of beneficiaries of successful mediation processes as well as those who have suffered from failed mediation attempt[180]

With respect to Consent, it states that:

> Mediation is a voluntary process that requires the consent of the… parties... Without consent it is unlikely that parties will negotiate in good faith or be committed to the mediation process.
> A range of issues can affect whether... parties consent to mediation.... However, the dynamics of the conflict are a determining factor, and whether parties consent to mediation may be shaped by an interest to achieve political goals…

[178] Id. at 59.
[179] Id.
[180] United Nations, *UN Guidance, supra* note 14 at 2.

> In some instances, parties may also reject mediation... because they... perceive it as a threat to sovereignty or outside interference. Moreover, even where consent is given, it may not always translate into full commitment to the mediation process… it may sometimes be given incrementally…it may be conveyed explicitly or more informally... Tentative expressions of consent may become more explicit… consent may later be withdrawn...[181]

This document is reflective of the notions presented circa 1900, if only in the negative. While the Hague Convention and related reservations focussed on limiting the role of third parties and paid less attention to the scope of application of State consent, the UN Guidance focuses more on the role of consent, with less focus on the limits of third parties. Read together, a more holistic interpretation of the application of consent vis-a-vis mediation can be arrived at. On the one hand it serves to protect third party States from encroaching on the sovereignty of a State. At the same time, it provides that State with certain competencies. Furthermore, a few more elements have been introduced. First, it states that if mediation is not a voluntary experience, parties are unlikely to engage in good faith. It also introduces a "threat to sovereignty" as a reason to reject mediation and not to provide consent.

Other publications which serve to further illustrate the interpretation and application of consent. The Repertoire on the Practice of the Security Council, 22nd Supplement (2019)[182] reports a somewhat insightful declaration by the representatives of China and Russia. China stated:

> … that conflict prevention must adhere to the purposes and principles of the Charter such as respect for sovereignty and territorial integrity, non-interference in internal affairs, non-aggression and the peaceful settlement of disputes. (Russia) added that international assistance in a mediation context should be provided only with the consent of the parties to the dispute and must be impartial and free of preconditions.[183]

Read together these declarations seem to underscore the link between sovereignty and consent on the one hand, and non-intervention and impartiality on the other. While also not a legally binding declaration, it does provide insight into how consent to mediate is perceived by certain States.

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[181] United Nations, *UN Guidance, supra* note 14 at 8
[182] Department of Political and Peacebuilding Affairs -Security Council Affairs Division Security Council Practices and Charter Research Branch, *PartVI Consideration of the provisions of Chapter VI of the Charter*, Repertoire of the Practice of the Security Council 22nd Supplement 2019, at 49 [hereinafter Repertoire 22nd Supplement].
[183] Id. 51.

It has thus been established that the decision to mediate falls on the parties to the dispute alone, and must be expressly provided for via consent. No third party may 'insist' that disputing parties mediate, and this extends to the UNSC. The Repertoire of the Practice of the Security Council, 21st Supplement 2018, provides a relatively up to date analysis of the Practices of the Security Council regarding the peaceful settlement of disputes. In particular chapter IV, the "Discussion on the interpretation or application of the provisions of Chapter VI of the Charter" is of interest, as it gives particular reference to, inter alia, the 'peaceful means of settlement in the light of Article 33 of the Charter'. In the period under review, on the 17th of May 2018 the Council convened a high-level open debate under the item entitled "Maintenance of international peace and security" and the sub-item entitled "Upholding international law within the context of the maintenance of international peace and security".[184] The Chef de Cabinet read in her statement on behalf of the Secretary-General, that the UN Charter did not make any prescriptions as to the use of any particular means of dispute settlement between Member States. Member States are free to choose between a wide range of options, including negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.[185] Regarding the question that was posed previously concerning the role of the Security Council, the Chef de Cabinet stated that the:

> Security Council could call on States to settle their disputes and draw their attention to the means available to them, recommend to States that they use a particular means of settlement, as well as support States in using the means they had chosen, or it could task the Secretary-General to assist them in trying to reach a settlement or even establishing a subsidiary organ for that purpose. [186]

The repertoire clearly instructs that the Security Council and the Secretary General should play a supportive role. Language such as "call on States", "recommend to States", and "support States in using the means they had chosen", indicates in no way that the Security Council instructs States which method of a peaceful resolution to use, or that it can 'override consent'. By extension this obviously directly applies to mediation as well.

[184] *See* Department of Political Affairs Repertoire of the Practice of the Security Council, *Part VI Consideration of the provisions of Chapter VI of the Charter*, Repertoire of the Practice of the Security Council 21st Supplement 2018. [hereinafter Repertoire 21st Supplement].
[185] Id. 306.
[186] Id.

5.2 Compliance with and Implementation of a Settlement Agreement

As with the previous subsection we will start this one with a look at the content of the Hague Convention, particularly article 6. It states that "...mediation undertaken either at the request of the parties in dispute or on the initiative of Powers strangers to the dispute have exclusively the character of advice, and never have binding force."[187]

This reiterates several principles. First, that the mediator is only to give "advice". Moreover, this article indicates that the result of this resolution does not have a "binding force".

At this point let us refer to a commentary on Hague Convention from 1917, "The Reports of the Hague Conference, 1899 and 1907"[188] (the Reports). In an introductory commentary of part (title) II of the Hague Convention, the Reports state the following:

> From the very fact that good offices and mediation assume the character of tactful intervention and are within the sphere of friendly conciliation, they offer the double advantage of leaving the *independence of the States to which they are addressed absolutely intact*, and lending themselves not only to the settlement of legal disputes, but also to the accommodation of conflicting interests.
> The conclusion must not be drawn from that that their application is endorsed without restriction. The natural sphere of good offices and mediation *is that of serious differences* which endanger the maintenance of peaceful relations. Beyond that, their use might constitute unreasonable interference, not without danger.[189] (emphasis added).

These texts were presented in their entirety to provide context, but the conclusion here is simple; mediation must remain respectful of the sovereignty of States, and that it cannot presume either as a mechanism or via the agency of a third party, an enforced or enforceable conclusion. Such a conclusion is not only supported by the multiple references to respect for sovereignty elsewhere in the Reports, but by the following commentary on article 6 in particular:

> Mediation is not intervention by authority, whether in the internal affairs of a State or in its foreign relations.

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[187] Art 6, Hague Convention 1907 *supra* note 172.
[188] *See* Carnegie Endowment for International Peace: Division of International Law, *The Reports of the Hague Conference, 1899 and 1907*, James B. Scott ed. (1917)
[189] Id. at 45.

> What is called ' armed mediation ' is not mediation. These two terms mediation and coercion are contradictory.
> Nations cannot deduce from the provisions of the present Convention concerning good offices and mediation any right whatever to exercise supremacy, to impose their individual or collective will by obligation or constraint. The sphere of mediation is and should remain the sphere of advice, offered or requested in a friendly way, freely accepted or declined.[190]

It can therefore be established that the conclusion to and compliance with a mediated settle must be free from third party interference. The role of the mediator (as established previously) must remain, according to the Hague Convention, limited to that of "advice, offered or requested in a friendly way, freely accepted or declined". This conclusion is in line with the conclusion in the previous subsection, i.e., the start of the proceedings must be consented to in a manner that respects sovereignty. The same applied to the settlement agreement.

Despite not being a legally-binding document, the Guidance is once again the most holistic publication available on the topic, and seems to be in agreement with the general notions of the Hague Convention. With regard to the conclusion and implementation of an MSAs it states:

> They should also respect international humanitarian, human rights and refugee laws. Its durability is generally based on the degree of political commitment of the conflict parties, … and whether it can withstand the stresses of implementation... The implementation of peace agreements is often highly dependent on external support. The early involvement in the process of implementation support actors as well as donors can help encourage compliance with sometimes difficult concessions made during the negotiations. Although external support is critical to ensure that conflict parties have the capacity to implement the agreement, too much dependency on external assistance can undermine national ownership.

Therefore, the agreement must include a "degree of political commitment of the conflict parties", and though there is a large emphasis on the dependence on external support and external support actors, too much of such dependency "can undermine national ownership." An observation regarding both the Guidance, Reports and the Hague Convention, is that there seems to be more of a negative obligation on any third-party States or actors to limit their involvement to a supportive role. It has clearly been expressed that they should not overreach

[190] Scott, *supra*, note 187 at 48.

their office, and that as with Consent, the legacy of the mediation or the MSA is by and large dependent on the (political) will of the disputing parties.

It may have been noted that this subsection is not titled ‘enforcement’. This was very much intentional. In PIL (and indeed in most fields of law) it is natural to refer to the enforcement of a law, treaty or obligation. However, such a term would not be appropriate with regards to mediation and an MSA, as it could invoke an idea of greater involvement by third parties. Therefore, the terms ‘implementation’ or ‘compliance’ have often been used. It may be suggested though that an MSA becomes enforceable. But that would also need to depend on the will of the parties to the dispute, and this concept will be explored further in the next chapter. For now, consider the treaties that resulted from the Papal mediation and Camp David Accords outlined in chapter 4. The MSA and the enforceability thereof and other aspects will be explored in more detail in chapter 5. At this point with regard to the conclusion of a mediation, it would seem that as far as the available texts are concerned, there are no predetermined requirements for the conclusion of a mediation, other than the respect for sovereignty, and the supportive role of third parties.

The conclusion is that mediation is essentially a balance between political considerations and PIL normative principles. Fortunately, several treaties between States have clauses of mediation, which might give us a more solid grounding. The next section contains excerpts from the US-Mexico-Canada Treaty (USMCA) Chapter 31 related to Dispute Settlement.

5.3 Confidentiality and Good Faith

With regard to confidentiality, both the Hague Convention and the Guidance do not discuss it at length. Yet there are some publications in which we can find this principle. The first is in article 31.5 of the USMCA specifically deals with ‘Mediation, Conciliation and Good Offices’. It reads as follows:

> Good Offices, Conciliation, and Mediation
> 1. Parties may decide at any time to voluntarily undertake an alternative method of dispute resolution, such as good offices, conciliation, or mediation.
> 2. Proceedings that involve good offices, conciliation, or mediation shall be confidential and without prejudice to the rights of the Parties in another proceeding... [191]

It is not the only treaty that refers to confidentiality in relation to mediation, however this is one of the more prolific examples. Unfortunately, the treaty article does not provide much

[191] Agreement between the United States of America, the United Mexican States, and Canada, U.S.A, Mexico & Canada, Art. 31.5, 12 December 2019, 7/1/20.

insight into how confidentiality is assured. It does establish a link between confidentiality and mediation in relation to PIL dispute resolution. The principle will be discussed at further length in chapter 6 below.

For a reference to the relationship between good faith and mediation one may consider the Repertoire of the Practice of the Security Council 21st Supplement. Representatives of the Member States present at the meeting delivered statements that may serve to elaborate certain issues related to article 33 of the Charter. The representative of Argentina stressed the importance thereof that parties to a dispute comply with the calls for negotiations made by UN bodies in good faith. Simultaneously States outside of the dispute also act in good faith, and refrain from conduct that could sabotage a peaceful settlement.[192] The Repertoire does not have any legally binding power however, it provides some insight into how certain concepts are perceived and accepted by States.

5.4 Final Remarks

This chapter was presented to illustrate the codification of the formal principles of mediation. The presentation of these principles is complicated by two factors, namely that confidentiality obscures a lot of the potential knowledge of mediation, and secondly, that there is no 'universality' with regards to mediation as well as its related principles. In order to achieve the goal of this chapter, the Hague Convention and the UN Guidance were by and large consulted. Aside from the content of these texts, and the revelations that they provide regarding the formal aspects of mediation, another interesting development presented itself in the commentaries related to them. Consider first the following commentary of the Hague Convention:

> Arbitration and mediation must be included among these means. *Diplomacy long ago admitted them in its practice*, but diplomacy has not laid down definite rules for applying them; it has not specified the cases to which they may be applied.[193] (emphasis added).

With regard to the UN Guidance, consider the following paragraphs from the 'Foreword' and 'About the Guidance' sections respectively:

> This concise reference document encompasses the wealth of experience of mediators working at the international, national and local levels. It also draws on the views of beneficiaries of successful mediation processes as well as those who have suffered from

[192] Repertoire 21st Supplement, *supra* note 183, at 307
[193] Scott, *supra*, note 187 at 9.

failed media-tion attempts.[194]

> The Guidance draws on the experience of the international community. Inputs from Member States, the United Nations system, regional, subregional and other international organizations… (NGOs), women's groups, religious leaders, the academic community, as well as mediators and mediation specialists, informed its development.[195]

These paragraphs illustrate that as far as mediation is concerned, the authors of the texts which they are respectively referring to, depended by and large on practice regarding mediation at that time. It only codifies what is, and does not present what can be. At the turn of the 19th century the practices of mediation were presented based on the practices of diplomacy. Nearly one-hundred years later, the application of mediation has greatly expanded, and the knowledge presented in the Guidance is provided and performed by many different types of NSAs. Yet in both scenarios, these texts as well as the Repertoires merely present to us the practice of the day, or at best how States interpret the practice. The principles laid out above are laid out in 'report' form, and not so much by way of theoretical development.

At this point the next argument for this thesis may be presented. As utilised as mediation is, much of its development seems to revolve around its substantial aspects. This would include the methods of mediation, the different types of mediators, etc. In the previous chapters, it has been illustrated that a lot of research has also been done on these topics. However, with regards to the formal aspects, and especially how it is related to PIL, seems to be somewhat lacking. As was discovered, jurists, researchers and authors for well over a century seem to have been led by practice, instead of prescribing the principles of meditation. And there might be a good reason for this. Flexibility is after all one of the biggest, if not the biggest, advantages of mediation. It is what allows States to withdraw consent at any stage. In order to maintain such flexibility there might be a reasonable hesitancy to "codify" mediation.

But consider the following quote from a summary report from a 2011 informal meeting, titled "United Nations Mediation: Experiences and Reflections from the Field":

> The panellists agreed that lessons from a mediation process may not be easily transferable to other situations, but they welcomed the Mediation Support Unit's commitment to act as a reservoir of knowledge and experience acquired... Ideally mediators should be briefed on lessons from other cases, and prepared well for their assignments, in full recognition that their future actions will need to be tailored to the context. *Every conflict is different and... the mediation process has to be adapted to the*

[194] United Nations, *UN Guidance, supra* note 14 at 1.
[195] Id. 3.

circumstances. Mediators have to distinguish between contextual knowledge and universal knowledge.[196] (emphasis added).

At this point two proposals will be resented. The proposition is that the flexibility of mediation is and should be more related to the substantial matters than to the formal matters. Secondly, developing mediation with respect to its principles in line with that of PIL would not hinder its development, but only strengthen it. As the quote suggests, there is a difference between contextual and universal knowledge. Universal knowledge may include principles of mediation, which may in turn be standardised to a degree, without necessarily sacrificing flexibility. The following chapter will present a theoretical application of formal mediation principles in relation to PIL principles, as opposed to the largely practice led developments seen in the Hague Conference and the Guidance. The second proposal is that, in order for mediation to successfully grow, more needs to be done to develop it from a theoretical perspective, and not just a singular reliance on practice. Such an approach could maintain the flexibility of the process, while providing (more) certainty or the legal principles.

[196] United Nations, *Summary Report United Nations Mediation: Experiences and Reflections from the Field,* An Informal Meeting Organized by the President of the General Assembly (9 November 2011) [hereinafter Summary Report UN Mediation].

Part III
Development of Mediation
Chapter 6 Developing Legal Principles

Chapters 2 to 5 of this thesis explored mediation practices, applications, documentation and related research. In chapter 5 it was proposed that many, if not the majority of the development of mediation in modern PIL has been focussed on the codification and documentation of standard practices such as mediator behaviour as well as the procedures and methods employed. Much has been written about the advantages and disadvantages of a '"bias" mediator, and mediation as a whole. Yet the formal (legal) principles of mediation seem somewhat absent. Put differently, it is not obvious how mediation relate to the principles of PIL as documented in the General Assembly Resolution 2625 (XXV), also known as "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" [197]

This chapter will compare the formal elements of mediation with the principles of PIL, particularly as expressed in Resolution 2625 (XXV). Having a legally-secured foundation will not diminish the advantage of flexibility that mediation offers, but will indeed strengthen it by presenting States with more security and certainty, while still offering procedural flexibility.

6.1 State Consent and Sovereignty

A commentary on the Guidance declares the following regarding consent:

> "The UN Guidance considers consent by the parties to be an essential component for effective mediation engagements, as without consent the process would be imposed and therefore not mediation at all. Viewing consent as a fundamental principle... helps to further distinguish mediation from the more traditional, diplomatic approach to peacemaking...." [198]

[197] General Assembly *Declaration on Principles of International Law A/RES/2625 supra* note, 68
[198] M. Alvarez et al. *Translating Mediation Guidance into Practice: Commentary on the UN Guidance for Effective Mediation by the Mediation Support Network*, No. 2, Discussion Points of the Mediation Support Network (MSN), (2012)

It has been presented previously that States must initiate the proceedings. There is nothing preventing the international community to encourage the parties to mediate, nor is there anything preventing would-be mediators offering their services. However, at which point does international pressure take over and the parties' engagement in mediation is no longer described as voluntary? According to one commentary, a "key factor to consider is whether the pressure is being used to get the parties to the table and remain there, or if it goes so far as to influence the content of the agreement."[199] Reviewing the UN Charter once more may be beneficial. Returning to Article 33, it states that:

> (1) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
> (2) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means. [200]

There is thus a clear mandate on States to settle their disputes peacefully by means of mediation, among other options. This does not create an expectation on States to mediate, but rather presents it as an option. Furthermore, consider that with regards to arbitration and judicial settlement jurisdiction must be established by consent given. With all the dispute resolution mechanisms placed in the same context, there is no reason to suggest that consent is exclusive to arbitration or judicial means. The role of the Security Council was addressed in Chapter 3 in the context of enforcement.

However, consent in mediation goes beyond the initiation of proceedings. The success of the resolution largely depends on the disputing parties freely consenting to it at every step. A clear will by the parties to participate implies that they accept responsibility not just for the substantive aspects of the procedure, but the implementation thereof as well. To quote Scott S. Gartner writing for Arbitration Law Review:

> Unlike domestic legal systems that have enforceable obligations, international conflict resolution occurs in a world of international anarchy with no guaranteed enforcement mechanisms. As a result, all outcomes have to be self-sustaining. That is, meditation

[199] Alvarez, *supra*, note 197.
[200] United Nations, *Charter of the UN, supra* note 52.

> success requires that after a voluntary agreement is reached, actors continue to believe that it remains in their interest to implement the peace settlement. [201]
>
> International dispute mediation is a completely voluntary process – no judge can order belligerents or a third party mediator to participate... the belligerents must be willing on their own accord to accept the third-party's offer to mediate. [202]

To further illustrate the importance of consent in interstate mediation, we turn to two guides namely the Organisation for Security and Cooperation in Europe's "Mediation and Dialogue Facilitation in the OSCE: Reference Guide" (OSCE Guide) and the UN Guidance. The OSCE guide states:

> A clear mandate is mandatory for OSCE mediation efforts. All OSCE structures, institutions and field operations are strictly guided by the respect for their mandates, which have been formally agreed by participating States through decisions of OSCE Summits, Ministerial Councils or the Permanent Council... [203]

According to the UN Guidance:

> Mediation is a voluntary process that requires the consent of the conflict parties to be effective. Without consent it is unlikely that parties will negotiate in good faith or be committed to the mediation process [204]

Consent with regard to procedural aspects has thus been well established. Yet how does it relate to sovereignty? Commentary on the UN Guidance states that "...given the principles of national sovereignty and non-interference that are enshrined in the UN Charter, it is not surprising that UN member states consider consent of the parties to mediation to be critically important." [205] Sovereignty is further referred to in article 2.1 of the UN Charter which states that "The Organization is based on the principle of the sovereign equality of all its Members." [206] In chapter 5 it was also referred to in the commentary on the Hague Convention.

Under classic sovereignty States are free to determine their own domestic and foreign policies (a position which is repeatedly endorsed by Russia and China), and this freedom takes precedence over international commitments. However, when a State ratifies a treaty or convention, it consents that either the international community or litigious institutions may direct

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[201] Garter, *supra* note 119, at 270.
[202] Garter, *supra* note 119, at 288.
[203] OSCE Secretariat, *Mediation and Dialogue Facilitation in the OSCE: Reference Guide*, (November 2014).
[204] United Nations, *UN Guidance, supra* note 14, at 8.
[205] Alvarez, *supra*, note 197.
[206] United Nations, *Charter of the UN, supra* note 52.

its actions, regardless of its own internal policy decisions; as long as the legal mechanism is in force vis-a-vis the State, it must adhere to the obligations thereof, lest it commit an internationally wrongful act. If a State is thus willing to provide consent, it is essentially committing to suspend its own sovereignty with regards to the issue in question. A clear motivation to provide consent must therefore exist. Previously the advantages of mediation have been discussed, and any of the advantages can serve as the appropriate motivation. It will entirely depend on the will of each State. The starting point remains that the States provide consent. Furthermore, it goes beyond the initiation of the proceedings and through the implementation of the agreement. Overall, agreements that stem from coercive or manipulative tactics are less durable. [207]

The next question is, how is consent provided? Does it require a formal document, or merely a verbal agreement? Taking into account the Papal Mediation and the Camp David Mediation, it would appear that there is no particular method that is required for the mediation to be successful, given that these instances each utilised one of the options. Article 31 of the USMCA simply states that "Parties may decide at any time to voluntarily undertake an alternative method of dispute resolution, such as… mediation." The only requirement is that a commitment to the process is voluntary.[208] Furthermore, the 'Guidance' specifically indicates that:

> Consent may sometimes be given incrementally, limited at first... before accepting a more comprehensive mediation process. Consent may be conveyed explicitly or more informally... Tentative expressions of consent may become more explicit... Once given, consent may later be withdrawn... Some… groups may pull out of the mediation all together and seek to derail the process. [209]

With regards to nearly every other international commitment by a State (such as the ratification of a treaty or convention, or the submission to the jurisdiction of an international court or tribunal) the determinable moment of provision of State's 'consent' to such legal mechanisms is of utmost importance. With that in mind, the seeming ambiguity around this step with respect to mediation is surprising. If mediation is to be applied more broadly and provide wider assurances to States, it stands to reason that it must be able to provide certainty as to whether (a) a State has indeed volunteered its commitment to Mediate and (b) the moment of that commitment.

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[207] Baumann & Clayton, *supra* note 104
[208] Art. 31.5, Agreement between the United States of America, the United Mexican States, and Canada, *supra* note 190.
[209] United Nations, *UN Guidance, supra* note 14

The success of a mediation (at all levels) hinges largely on the commitment of the parties; the voluntary or consensual aspect of the process. There should be a definitive moment as the official start of the proceedings. An example of such a moment is the signing of the Act of Montevideo between Chile and Argentina.[210] By it, the States requested "the Holy See to act as a mediator with regard to their dispute over the Southern region and undertake not to resort to force in their mutual relations..."[211]

Consent can be given incrementally. A commentary on the Guidance states that the "concept of 'sufficient consent' in the UN Guidance is pragmatic, acknowledging that fully-fledged consent is rarely attainable..."[212] States therefore do not have to fully commit to the entire process from the start; that would be antithetical to mediation. As the commentary on the Guidance indicates, a "minimal degree of consent is necessary for a mediation process to be called mediation... the greater the degree of consent, the more legitimate and sustainable the outcome will be." [213] Mediation will need to consolidate this concept with that of the principles of State initiation, voluntary proceedings and the general application of consent as it is broadly viewed in PIL.

6.2 Confidentiality and Essential Interests

During the discussion of the Camp David Accords and Papal mediation, one of the factors that were highlighted was that the mediations took place in a protected environment, and that confidentiality played an important role in both the mediations. This section will build on the reasons why confidentiality is so important, particularly in PIL.

6.2.1 Motivation for Confidentiality

Confidentiality is an integral part of mediation. The Uniform Mediation act 2003 states that a "frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and adjudicatory processes."[214]

The Working Paper #4 of the International Center for Settlement of Investment Disputes (ICSID) describes confidentiality as follows under Chapter XI. Rules of Mediation Proceedings

[210] Act of Montevideo, Chile and Argentina, *supra* note 147, at. 1.
[211] Id. at 1
[212] Alvarez, *supra*, note 197
[213] Id.
[214] National Conference Of Commissioners on Uniform State Laws, *Uniform Mediation Act*, Vol. 2003, Iss. 1 [2003], Art. 4, Journal of Dispute Res. (2003).

(ICSID Mediation Rules):

> "Rule 10 Confidentiality of the Mediation
> (1) All information relating to the mediation, and all documents generated in or obtained during the mediation shall be confidential, unless: (a) the parties agree otherwise; (b) the information or document is independently available; or (c) disclosure is required by law.
> (2) Unless the parties agree otherwise, the fact that they are mediating or have mediated shall be confidential" [215]

Diplomacy, as Jackson pointed out, is often "conducted in an intensely public environment".[216] In public the parties may be required to address the media and adhere to their constituencies. In mediation these requirements could hamper communication between the parties, and confidentiality stands as a protective measure against it. Confidentiality allows conflicting parties to be 'frank' and without the pressure of public scrutiny. This aspect of honesty is integral to the concept of open communication, and trusting the substantial aspect of Mediation to the participating parties. Mediators must be able to elicit baseline positions from the parties, which would be impossible if the parties were not able to freely communicate. [217]

> L. Freedman and M. Prigoff also suggests that:
> "the safeguards present in legal proceedings, qualified counsel and specific rules of evidence and procedure, for example, are absent in mediation. In mediation, unlike the traditional justice system, parties often make communications without the expectation that they will later be bound by them." [218]

Yet there is a particularly important reason for confidentiality. It is vital in protecting information related to sensitive political issues. It was previously established that mediation lends itself to disputes that deal with State interests. The issue of sensitive interest in relation to mediation has been prevalent for well over a century. It is this reason, more than any other, that confidentiality in mediation between States is vitally important. The next section presents the "essential interests" of States to highlight the application and importance of confidentiality.

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[215] International Center for Settlement of Investment Disputes, *Working Paper #4 Proposal for Amendment of ICSID Rules,* Volume 1 (2020) at. 215
[216] Jackson, *supra,* note 111.
[217] Lawrence R. Freedman & Michael L. Prigoff , *Confidentiality in Mediation: The Need for Protection*, volume 2:1, Journal on Dispute Resolution, 37 (1986).
[218] Id. at 38

6.2.2 Essential Interest

The notion of 'essential interest' is introduced in article 25 (1)(a) of the Responsibility of States in Internationally Wrongful Acts (2001). (ARSIWA) It reads:

> "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
> (a) is the only way for the State to safeguard an *essential interest* against a grave and imminent peril and;
> (b) does not seriously impair an *essential interest* of the State or States towards which the obligation exists, or of the international community as a whole." [219] (emphasis added)

The context in which 'essential interests' are referred to here is of course different from the substantive considerations related to Mediation. Here 'essential interest' relates to grounds for a State to not act in conformity with international obligations, i.e., grounds for precluding a wrongful act. Yet, ARSIWA still introduces the concept in relation to States. It does not provide a definition, however there are several other sources to help unpack the concept.

It must first be pointed out that an essential interest is not the same as the 'essence' of a State. It's continued existence or not, is not equal to the continued existence or not of the State. Ago declared in the Addendum to the Eighth Report that "it should be stressed that the concept of self-preservation and necessity are in no way identical, nor are they indissolubly linked in the sense that one is merely the basis and justification of the other". [220] An interest can be essential to the state without the State's existence being threatened. This interpretation opens the potential definition for 'essential interest' to wider interpretation.

According to the ILC's Fifty-third Session, 2001, Annex note 2, the appeal to necessity has been invoked to preclude wrongfulness of acts not in conformity with an international obligation to protect a wide variety of interests. These include safeguarding the environment or ensuring the safety of the civilian population. The ILC in note 2 further discussed that there is not much benefit to give an exact definition of what an 'essential interest' is or to give a definitive list. As far as it pertains to the interpretation and application of ARSIWA, it should be done on a case-to-case basis, with consideration of the particular facts. 'Essential interest' could be applied to particular interests of a State and its people, as well as to the international community

[219] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 A/56/10, (November 2001). [hereinafter *ARSIWA*].
[220] Robert Ago, *Addendum to the Eight Report on State Responsibility*, vol. II(1), Yearbook of the International Law Commission, 14, (1980).

as a whole. [221]

Article XX of GATT 1994 provides a finite list of interests to which the measures of the treaty should not be applied in an "arbitrary or discriminatory" manner. Within the context of the article these can be seen as further examples of 'essential interest'. They include, inter alia, 'public morals'; 'human, animal or plant life or health'; appliance to laws and regulations in compliance to the Agreement; the protection of "national treasures of artistic, historic or archaeological value'; 'the conservation of exhaustible natural resources'; and the overall protection of a local market or economy. [222] In reference to the 'National Treatment Instrument of the OECD Declaration on International Investment and Multinational Enterprises.' The OECD adopted a recommendation in 1986 that suggests the countries apply the concept of essential interest in a limited way, particularly as it pertains to Bilateral Investment Treaties (BITs). Of particular value is article XXI of GATT 1994. Article 32.2 reads as follow:

> "Essential Security
> 1. Nothing in this Agreement shall be construed to:
> (a) require a Party to furnish or allow access to information the disclosure of which it determines to be contrary to its essential security interests; or
> (b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests." [223]

We find that essential interest is not a particularly defined concept, even if certain treaties provide a particular list of interests relevant to the context of the treaty. We find that States may self-determine whether an interest is essential for security matters, but that they are also encouraged to apply the interpretation as narrowly as possible, and not in an arbitrary or discriminatory way. These interests may require protection for the benefit of national security or the maintenance or restoration of international peace and security.

With regards to its application in mediation, essential interest is potentially a very wide concept, and even if it is applied conservatively, it must still be protected under confidentiality. Within the context of mediation, it may be assumed that all substantive matters form part of essential interest, and deserve protection for the duration of the process. Sans a protective mechanism for information related to 'essential interest', States may rightfully be hesitant to engage in the proceedings. The value of the protection of confidentiality over these interests can

[221] International Law Commission *ARSIWA, supra* note 218.
[222] General Agreement on Tariffs & Trade, 15 April 1994, 33 I.L.M. 1153, U.N.T.S. 190.
[223] Art. 32.1, Agreement between the United States of America, the United Mexican States, and Canada, *supra* note 190.

thus not be overstated. Its presence might not only provide legal protection for the States, but could encourage them to be more 'frank' and 'candid' during the Mediation proceedings. This approach may be considered a bare minimum and that all matters that are considered 'essential interests' by the States are protected by Confidentiality. It would strengthen the credibility of mediation. There are, however, some exceptions. To illustrate these further, one would have to look at rules and agreements that relate to international commercial law.

6.2.3 Exceptions to Confidentiality

The rules of the WIPO and ICC, stipulates three specific exceptions to confidentiality. Articles 16 through 18 of the WIPO Mediation Rules repeatedly states the parameters of confidentiality "Unless otherwise agreed to".[224] This indicates that unless the parties take an affirmative action that indicates that they waive confidentiality, it is applied. Not only the substantive aspects of the mediation process that need to be agreed to, but also the procedural, unless otherwise indicated or established. Though it is highly unlikely that States would waive protection of issues regarding their essential interest, it is not beyond the application of consent.

Another exception to confidentiality is that it may not be applied if so, determined by an applicable law. The ICSID Mediation Rules above indicates that confidentiality may not be relied on if "disclosure is required by law". The ICC Mediation Rules, Article 9 also states that:

> 1 In the absence of any agreement of the parties to the contrary and unless prohibited by *applicable law*:
> a) the Proceedings… are private and confidential;
> b) any settlement agreement between the parties shall be kept confidential, except that a party shall have the right to disclose it to the extent that such *disclosure is required by applicable law*
> 2 *Unless required to do so by applicable law* a party shall not in any manner produce as evidence in any judicial, arbitral or similar proceedings…[225] (emphasis added).

These articles indicate that there are two ways in which applicable law would limit the effect of confidentiality. It may either prohibit the application thereof in the first place, or it may require disclosure of particular information. In terms of public international law, this may be expressed through the existence of a prior treaty between the States, Customary International Law, or Peremptory norms and Jus Cogens. Of course, participating States may require that

[224] World intellectual Property Organisation, *WIPO Mediation Rules* (January 2020). https://www.wipo.int/amc/en/mediation/rules/#15a
[225] International Chamber of Commerce, *Mediation Rules* (January 2014). https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/

such a prohibition or disclosure requirement must be balanced with their own essential interests.

The final limit on confidentiality is more theoretical and has less of a legal basis than the first two. As previously indicated, confidentiality can be an obstacle in the development of mediation. In this regard, some have argued that mediators and other role players apply it selectively.

6.2.4 Parameters of Confidentiality

In subsection 6.2.1, the ICSID Mediation Rules regarding confidentiality was stated. This provides a good example of how this principle has been codified. The ICC Mediation Rules article 9, and the WIPO Mediation Rules articles 15 through 18 apply a similar set of regulations for the application of confidentiality.

The above mentioned Rules unanimously agree that confidentiality specifically applies to: any views expressed or suggestions made by a party within the proceedings with regard to the dispute or a possible settlement of the dispute; any admissions made by a party in the course of the proceedings; any proposals or views put forward by the mediator within or during the proceedings; the fact that a party had or had not indicated within a willingness to accept any proposal for settlement made by the mediator or by the other party; any settlement agreement between the parties, except to the extent that it is required for purposes of its implementation or enforcement. [226] [227] These rules are mostly with respect to the procedural aspect of mediation, and do not qualify or redefine essential interests. However, they do provide an example of the method in which confidentiality may be applied.

6.3 Binding Nature and Implementation of a Settlement Agreement

The implementation of and compliance with an MSA was discussed in chapters 2 and 5. In this section, the MSA will be discussed in relation to PIL, as well as the binding nature of a mediation.

All forms of international dispute resolution leads to the creation of rights and obligations for the States involved. For this to be possible, there must be a binding legal instrument, and this in turn must come from a competent authority, or through consent. Mediation does not employ a third-party authority to deliver a verdict on the dispute, and it does not result in an automatic binding instrument. A settlement agreement is generally not enforced, but 'implemented'. The distinction relates once again to the fact that mediation is a dispute

[226] World intellectual Property Organisation, *WIPO Mediation Rules, supra* note 223.
[227] International Chamber of Commerce, *Mediation Rules*, *supra* note 224

resolution process which depends on the active participation of the disputing parties, with the guidance of the mediator, at every stage of the resolution process. Does this indicate that an MSA is essentially non-binding or unenforceable? The following sections will explore this question further.

6.3.1 Competent Authority

In litigation or arbitration, a tribunal or court will often hand down a decision which is then binding on the disputing parties. In mediation, the situation is vastly different. In the process of mediation, the third party is the mediator. The mediator's role is limited to that of 'supporter'. As UN secretary General Antonia Guterres puts it in his report:

> "To be effective, mediation efforts require sophisticated and flexible operational, logistical, security, administrative and financial support. The ability to structure and organize multi levelled meetings, often at short notice, requires specialist support. Mediation teams may also need additional surge resources to manage the movement of delegations, breakout rooms, working groups and various other elements." [228]

The sentiment here echoes the role of the mediator as previously expressed; they play an administrative and procedurally supportive role. There are also various other tasks which have been suggested through reports and interviews with people involved in conflicts. These tasks include communicating and cooperating with local and regional leaders, as well as considering other conflicts and or mediations taking place in that region or area. It may even occur that the mediator is requested (via consent of the parties), to present a solution in the event of a deadlock.[229] However, there is no suggestion that mediators should deliver a definitive and final settlement.

The only authority with the competence to arrive at a settlement agreement are the disputing parties themselves, which happens via consenting to an agreement. As previously indicated, the authority of States to consent to an internationally binding agreement stems from the principle of State sovereignty. A "meeting of the minds" in the process is vitally important. This expression is often used in the creation of contracts to ensure that parties have a clear and unimpeded understanding of one another's view of the agreement. But can only be done if the parties are clear, not only on the agreement, but that their consent is given without force, manipulation, deceit or any other undue influence.

The disputants' adherence to any settlement agreement needs to be self-asserting and self-sustaining in order to endure. The voluntary aspect of mediation extends to the MSA. This non-binding result may appear provisional and limited in and of itself. However, the commitment provided through consent by States at the point when disputing parties have reached

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[228] United Nations, Report of Secretary General, *United Nations Activities in Support of Mediation*, A/72/115 (27 June 2017). [hereinafter *UN Activities in Support of Mediation*.]
[229] United Nations, *UN Guidance, supra* note 14.

consensus on the resolution of a dispute, should not be disregarded. Mediation is in many ways, the most powerful and profound form of international conflict resolution, peace-making and conflict prevention, due to the interests States have invested into the agreement, the success of which will be measured by its implementation.[230]

6.3.2 Binding Instrument

A settlement agreement is in and of itself not binding per se. To understand the process of how an MSA may become more binding, a more indirect approach may be required. In this scenario by way of treaties. The creation of a treaty and the process of a mediation both involve an element of negotiation, however, the purposes thereof are quite different. Consider first of all the following from the Vienna Convention on the Law of Treaties (1969):

> The States Parties to the present Convention,
> Considering the fundamental role of treaties in the history of international relations, recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems… [231]

Several of the intended purposes of a treaty relate to that of an MSA, such as the maintenance of international peace and security, developing friendly relations among nations, promoting the principles of PIL, etc. However, the main purpose of a treaty is that it should be a 'source of international law'; law-creating and establishing new rights and obligations for the 'contracting states' or 'parties' to the treaty or convention.

Conversely, the main purpose of an MSA is to bring to an end to a dispute and to codify a process of a dispute resolution, thereby reapplying or applying for the first time, previously established public international law rights and obligations. In the former scenario, rights and obligations are created vis-a-vis two or more independent States. In the latter scenario, there have always existed a right and obligation vis-a-vis the participating States; however, due to an internationally wrongful act a new or additional right and obligation have been created in addition to the previously existing one. The previous rights and obligations exist, as well as additional rights and obligations flowing from the internationally wrongful act (as per Part II of ARSIWA 2001)[232] Consider for example the situation between Chile and Argentina in the Papal Mediation.

In the scenario where the dispute is related to a treaty, it is important to remember article 31(3)(a) of the VCLT 1969. It reads that "3. There shall be taken into account, together with the context (a) any subsequent agreement between the parties regarding the interpretation of the

[230] Garter, *supra*, note 119 at 274
[231] Vienna Convention on the Law of Treaties, United Nations, 23 May 1969, UNTS vol.1155.
[232] International Law Commission *ARSIWA, supra* note 218.

treaty or the application of its provisions;".[233] If an MSA is a subsequent agreement regarding the treaty, it becomes admissible in the interpretation of said treaty. In such a case, the MSA may lead to an interpretation of the treaty, or of alteration in the legal relations between the parties to the treaty in question. The efficacy of the MSA in such a scenario is related to a previously existing binding agreement and is not in and of itself binding. Next, consider the creation of a treaty and the role of consent. Article 11 of the VCLT 1969 states that:

> The consent of a State *to be bound* by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." [234] (emphasis added)

The above article of the treaty indicates that the consent given in relation to the conclusion of a treaty is directly related to the intention to be bound to it. Conversely, the consent provided to conclude an MSA is not as straightforward. Consider the following opening statement from the "Framework for Peace in the Middle East agreed at Camp David":

> Muhammad Anwar Al-Sadat, President of the Arab Republic of Egypt, and Menachem Begin, Prime Minister of Israel, met with Jimmy Carter, President of the United States of America, at Camp David from September 5 to September 17, 1978, and *have agreed on the following framework* for peace in the Middle East. [235] (emphasis added)

Therefore, the State indicated that they have agreed on a framework. There is no commitment to be 'bound' per se. And yet, this document was a precursor for a later treaty. Following this agreement (and the overall conclusion of the Camp David Accords), the Treaty of Peace between Egypt and Israel (UNTS 17813) were concluded. In its preamble it states the following:

> Reaffirming their adherence to the "Framework for Peace in the Middle East Agreed at Camp David," dated September 17, 1978; Noting that the aforementioned Framework as appropriate is intended to constitute a basis for peace not only between Egypt and Israel but also between Israel and each of its other Arab neighbors which is prepared to negotiate peace with it on this basis... [236]

The MSA indicates that it is a settlement of a dispute (the consensual basis for this settlement) and that it is a 'framework' for a future agreement. Furthermore, the preamble of the Treaty of Peace between Egypt and Israel directly refers to the MSA as the basis for its

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[233] Vienna Convention on the Law of Treaties, 1969, supra note 230.
[234] Id.
[235] Israel and Egypt Framework for peace in the Middle East agreed at Camp David (with annex), Egypt-Israel, 17 September 1978, No. 17853.
[236] Egypt-Israel, The Egypt–Israel Peace Treaty, *supra* note 156.

creation. The MSA and treaty is thus undoubtedly linked, the former being the cause of the latter, and the latter essentially giving binding effect to the former.[237]

The consent to conclude a MSA is therefore not an automatic consent to be bound by it, but rather to conclude the mediation. With such a conclusion of the MSA, parties could preliminarily agree in good faith to 'convert' the MSA into a treaty at some point in the future. The purpose of that treaty would be to create a legal instrument which would both clarify a previous dispute and create new and related rights and obligations related to that dispute. The Commentary on the UN Guidance for example stated that "Peace agreements (MSA) should be seen as paths to peace, rather than as end goals." [238]

Finally, an MSA may also form part of what is called "soft law". Professor Marcel Brus writes the following:

> Soft law in international law is a complex phenomenon as it serves various purposes and takes various forms. It is possible to distinguish at least five different purposes, as has been elaborated upon amongst others by Alan Boyle and Christine Chinkin:1) as an alternative to treaty law; 2) as an authoritative interpretation of treaties; 3) as a guidance on the implementation of a treaty; 4) as a step in the development of international legal principles; 5) as evidence of opinio juris in the formation of international customary law. [239]

An MSA could be applied to points (1), (3) and potentially (4).

6.3.3 Mediation Settlement Agreement Implementation

As previously stated, this thesis intends to focus on mediation in a holistic manner, and not in the narrow application of only conflict. However, depending on the situation, the implementation of an MSA can differ greatly. This section will look at two scenarios in which mediation has been implemented and complied with.

i Conflict Mediation

The Guidance must once again be considered as it is representative of much research into mediations around the globe. The 'Commentary on the Guidance' states that "respect for basic international norms and legal parameters are essential…" [240] and the Guidance itself states that "National ownership requires adapting mediation… while also taking into account

[237] Note that a similar scenario played itself out in the Papal Mediation. This example is this not an isolated case or an exception to the rule.
[238] Alvarez, *supra*, note 197
[239] Marcel Brus, *Soft law in public international law: a pragmatic or a principled choice? Comparing the Sustainable Development Goals and the Paris Agreement,* 6, (2015).
[240] Alvarez, *supra*, note 197

international law and normative frameworks." [241] When resolving a dispute between two States, regardless of the method, the principles of PIL will always be applicable. The deference to it by the Guidance and related documents is an affirmation thereof.

In dealing with the implementation or enforcement of an MSA related to resolving a conflict, the Guidance specifically refers to the notion of 'national ownership'. The Commentary on the Guidance explains that in order for an agreement to be successfully implemented 'national ownership' is vital, but it admits that this concept is still not well defined and there is uncertainty on how it is achieved. In footnote 22 it states that:

> In some contexts, "nations" can refer to ethnic groups; thus, there may be hundreds of nationalities in one country, which renders the concept of "national ownership" useless. In the UN Guidance, a different meaning is used, referring basically to local ownership by all actors in the area who are affected by the conflict.[242]

For its part, the Guidance does not provide a clear definition of what 'national ownership' entails. It merely states that "National ownership implies that conflict parties and the broader society commit to the mediation process, agreements and their implementation." [243] The role that both States and NSAs play in terms of mediation was previously explored in chapter 3. At this point it bears repeating that even though NSAs may not participate in the creation of international laws and obligations, they may interact with other International Actors in a variety of ways. In this case, a rebel group within a State may take 'national ownership', and may be assisted by individual benefactors, NGOs, IOs and even States in their implementation of an MSA. Once again, the flexibility of mediation is a major advantage.

In settling and implementing an agreement related to conflict resolution, the more relevant stakeholders are consulted, the higher the odds of success. The Commentary on the Guidance refers to the cases of Syria, Burundi, Darfur and Somalia to illustrate this point.[244] With regards to successful implementation of an MSA, conflict related mediation seemingly requires a decentralised approach, as opposed to the centralised approach applied by formal dispute resolution mechanisms. It requires that actors of international law, or at the very least a broad interpretation of subjects of international law, be involved in successful enforcement of an agreement. Consider this extract from "The Changing nature of International Mediation" by Jose Pascal da Rocha:

> Currently, we can distinguish four arenas that are interconnected complementary: the first is that of *state diplomacy*; the second, that of *individuals or institutions* cooperating with governments but without the benefit of official authority or status; the third is *public dialogue*...; and the fourth involves *civil society* more broadly through actions for the

[241] United Nations, UN Guidance, supra note 14.
[242] Alvarez, *supra*, note 197 at 15.
[243] United Nations, *UN Guidance, supra* note 14, at 14.
[244] Alvarez, *supra*, note 197 at 15.

promotion of peace and education without violence. To be effective, the peace process must be pursued in a complementary way… These attempts are interlinked with *a range of state-based* conflict management tools… This complex web of interactions was characterized by effective communication and coordination… [245] (emphasis added)

A UN report by the Secretary General titled "UN Activities in Support of Mediation" states that:

"The implementation of peace agreements and settlements is highly dependent on external assistance. The United Nations Guidance for Effective Mediation calls for the early involvement in the process of implementation support actors as well as donors to facilitate planning for implementation and help encourage compliance with the sometimes difficult concessions made during the negotiations." [246]

A more inclusive and decentralised approach, which involves the cooperation of many different parties, would lead to a higher chance of successful implementation. None more so than the 'ownership' taken by the disputing parties of the dispute themselves. This approach is in conformity with the flexibility associated with mediation in general. For this approach to be successful, a great deal of good faith must exist between all the international law actors involved. As the range of actors able to interact with PIL expand and grow, so do the application and relevance of good faith.

Furthermore, documents related to 'the Guidance' that have been mentioned thus far, as well as 'the Guidance' itself, repeats the notion that "agreements should have an implementation plan and mechanisms for evaluation and monitoring the implementation, which should be clarified before signing." [247] Based on such an approach it can be determined that regardless of the 'personality' of the actors involved in the implementation, they ultimately derive their authority to play a role in the enforcement of the MSA, from the agreement itself, which is determined by the consent of the disputing parties. The multitude of actors can thus only act within the parameters determined by the MSA to implement it. This creates a sort of 'self-contained' system. Conflict-related disputes are thus complied with not by good faith and backed by the agreement, consented to by the disputing parties themselves.

ii Commercial Mediation.

Though the consensual element of the settlement agreement by and large ensures implementation of the agreement, according to Christoph Miers it is still subject to matters such as:

[245] Jose Pascal da Rocha, *The Changing Nature of International Mediation*, Vol. 10. Issue Supplement 2, Col. Uni. Global Policy, 101 (2019) at 103.
[246] United Nations, *UN Activities in Support of Mediation, supra* note 227.
[247] Alvarez, *supra*, note 197

> Change: a change of opinion, or change of circumstance, by one or more of the parties, leading to a reluctance to follow through with the agreed settlement terms; Outside influence: a party being influenced by a third party prior to the implementation of the settlement agreement, to seek different terms; Tactical delay: a party mis-using the mediation process to delay proceedings, by reaching a settlement and then failing to implement it thus bringing the dispute back to a continuation of negotiations, proceedings and potentially a further mediation. [248]

Several treaties and conventions exist between States that assists in the regulation of international commercial mediation. These mediations can be between legal persons or with respect to an investor-state dispute. In this particular field of international law once a mediated agreement is reached the next step is to convert the MSA into an enforceable instrument. Several approaches have developed over the years to this end. It must be kept in mind that these enforcement solutions apply to mediation within the realm of private international law, the treaties and conventions on which they are based make them relevant to PIL.

Even though mediation is a voluntary process in most jurisdictions an effective enforcement process is essential to support the settlement. Currently there are three main bases for making an MSA enforceable.

The EU Directive:

The EU Parliament and Council Directive 2008/52/EC (EU Directive) offers an opportunity to render MSAs enforceable, based on enforcement mechanisms created by national legislators themselves. The introductory text of the EU Directive states that:

> "Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the goodwill of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable *if the content is contrary to its law,* including its private international law, or its *law does not provide for the enforceability of the content of the specific agreement*…" [249] (emphasis added).

Under the EU Directive member states are obliged to ensure MSAs are enforceable as if they were court judgments.[250] The EU Directive does not prescribe a uniform system, but remains flexible and leaves the choice of the form and the competent authority to the Member

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[248] Cristoph Miers, *Enforcement of International Commercial Mediation Settlement Agreements* (June 2016) https://www.probyn-miers.com/perspective/2016/06/enforcement-of-international-commercial-mediation-settlement-agreements/

[249] The European Parliament and the Council *On certain aspects of mediation, supra* note 47

[250] Id. Art. 6

States. The different methods of enforcement can be summarized as follows: “enforcement as a contract, via a further court procedure; enforcement via specific statutory provisions recognising the settlement agreement as equivalent to an arbitration award, where such legislation exists; or enforcement via an arbitration award.” [251]

Paragraph 19 of the EU Directive lists a few requirements for the enforceability of an MSA, which are expanded upon in Article 6. Firstly, an agreement must be in writing and resulting from mediation in a cross-border (i.e. not domestic) dispute. Secondly, the request for making an MSA enforceable can be made by either both the parties to the dispute or by one of them with the explicit consent of the other. Thirdly, the content of an MSA cannot be made enforceable if it is contrary to the law of the Member State where the enforcement is sought, or if “the law of that Member State does not provide for its enforceability”.[252] Furthermore, art. 6(2) states that “The content of the agreement may be made enforceable by a *court or other competent authority* in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.” [253]

The Directive is not a complete and final solution though. For example, it does not provide a standard on how to prove that an MSA results from mediation. Requiring an additional request to render an MSA enforceable after it was concluded provides an opportunity for an unwilling party to withdraw from the proceedings. Integrating the consent for enforcement into an MSA itself would circumvent this problem though. Lastly, the EU Directive was built on the foundations of previous regulations, which had already established trust between the Member States and assisted in a smooth transition. [254] Such a pre-existing basis would not exist in every context.

Arb-Med-Arb:

Article I provides the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) applies to “the recognition and enforcement of arbitral awards”.[255] The article also states that ‘arbitral awards’ shall include “not only awards made by arbitrators appointed for each case, but also those made by permanent arbitral bodies to which the parties have submitted.”[256] This implies that the New York Convention covers only the awards rendered in ad hoc or institutional arbitrations, and by arbitrators, not mediators, associated with the proceedings. So how is it possible to associate Mediation to this process?

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[251] Cristoph Miers, *Enforcement of International Commercial Mediation Settlement Agreements, supra* note 247.
[252] The European Parliament and the Council *On certain aspects of mediation, supra* note 47, Article 6.
[253] Id.
[254] *See* Miglė Žukauskaitė, *Enforcement of Mediated Settlement Agreements,* vol. 111, Teise, 205 (2019).
[255] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).
[256] Art. 1, New York Convention, available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf

One of the main mechanisms used to enforce international MSAs is referred to as an Arbitration-Mediation-Arbitration (Arb-Med-Arb) procedure, which is offered by the Singapore International Arbitration Centre (SIAC) in combination with the Singapore International Mediation Centre (SIMC). They rely on the framework created for enforcement of arbitral awards by the New York Convention.[257] The UNCITRAL Model Law on International Commercial Arbitration, allows arbitration institutions to issue a consent award, which records the terms of the MSA reached between parties to a dispute. The consent award acquires the status of a final award, and can therefore be enforced under the rules of the New York Convention.[258] This process is a three-phase procedure. The dispute is first brought in front of an arbitration institution where an arbitration tribunal is established. Next, the arbitration proceedings are immediately stayed, and the dispute is then transferred to mediation for a resolution between the parties. Lastly, after the settlement is reached the process is transferred back to the previously established arbitration to be recorded as a consent award. In the scenario where the dispute was not settled, it could be referred back to the arbitration proceedings to be concluded there.[259]

There is a very particular reason why the procedure has to be formally started in arbitration, and an MSA cannot simply be submitted to an arbitration proceeding. The New York Convention. Article 1 states that the "Convention shall apply to the recognition and enforcement of arbitral awards... arising out of differences between persons…"[260] If the parties approach the arbitration panel after an MSA was reached, it means that no difference exists between them. Such a consent award would fall outside the scope of the New York Convention and cannot be enforced. However, if the procedure is initiated as an arbitration, it is started at the point where the dispute still exists, even though only formally or momentarily so. Furthermore, such an approach provides the 'safety net' that the dispute could still be settled by arbitration if the mediation fails. For some Arb-Med-Arb might be a tactical ploy, in that they always intended to go to arbitration, but only agreed to add the element of mediation to placate the other party. Regardless of the motivation, such a two-pronged approach could potentially add costs and consume more time. [261]

The Arb-Med-Arb approach is a creative way of translating an MSAs into an enforceable instrument using the others already in force. However, it is not a final solution which addresses the problems with mediation enforcement in and of itself. At best it is merely 'working around' the issue. At worst, it negates some of the biggest advantages of mediation (time and cost efficacy) and merely 'kicks the can down the road.'

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[257] Žukauskaitė, *Supra*, note 253, at 209.
[258] Žukauskaitė, *Supra*, note 253, at 209.
[259] Id.
[260] Art. 1, New York Convention, available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf
[261] Žukauskaitė, *Supra*, note 253, at 209.

There is another factor that should be considered. For an MSA to be successful, it should incorporate several issues. The more encompassing the MSA is, the larger the change of future success. At least with regard to conflict resolution. However, in an award rendered in June 2014 under the Rules of the International Commercial Arbitration Court (ICAC) at Russian Chamber of Commerce and Industry, the parties (a Latvian and a Russian company) reached a settlement agreement and asked the arbitral tribunal to render an award on the terms agreed by the parties. However, the arbitrators discovered that in the MSA the parties settled more issues than listed in the dispute submitted to the ICAC. The MSA included disputes related to other issues. With the initial application for arbitration, those disputes were not included.[262] The arbitrators rendered a consent award which included only the dispute issues indicated in the arbitration application. A higher court sustained this judgment. This case suggests that if parties wish to resolve a dispute using the Arb-Med-Arb method, either a lot more due diligence would have to be done during the preparatory phase, or that the mediation itself could be limited by the scope of the arbitration application.

UNCITRAL: the Singapore Mediation Convention

The Convention uses a relatively broad and open-ended definition of mediation.[263] The effect of such an interpretation is that it could make it more difficult to determine whether a resolution results from mediation or not.[264] This is potentially so that the Convention would be more 'acceptable' to all the various and differing jurisdictions it is aimed at. What determines whether or not a dispute resolution was indeed a meditation relies heavily on the one criteria, the Convention does provide in art. 2(3), i.e., the mediator's lack of authority to impose a solution upon the parties to the dispute.[265]Furthermore, the Singapore Convention deliberately does not recognise MSAs that have been recorded as an arbitral award i.e. consent awards, or that have been approved by a court and are enforceable as a judgment in the state of that court.[266]

What then are the criteria laid out by the Convention for parties to be able to rely on the MSA as an enforceable document? The main requirements are broadly laid out in art. 4 and 1[267] of the Singapore Convention, and could be broadly summarised as follows: it has to be an

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[262] Yarik Kryvoi & Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement,* Volume 40 Brooklyn Journal of Int'l Law, 827 (2015) Available at SSRN: https://ssrn.com/abstract=2580572.
[263] Clemens Treichl, *The Singapore Convention: Towards a Universal Standard for the Recognition and Enforcement Of International Settlement Agreements?*, Volume 11, Journal of Int'l Dispute Settlement, 409 (2020) at 421.
[264] Id.
[265] Id. 422
[266] Art 1(3)(a)-(b) Singapore Convention, 2019, available at: https://treaties.un.org/doc/Treaties/2019/05/20190501%2004-11%20PM/Ch-XXII-4.pdf.
[267] Art. 4. Singapore Convention, 2019 available at: https://treaties.un.org/doc/Treaties/2019/05/20190501%2004-11%20PM/Ch-XXII-4.pdf.

international agreement; it has to be concluded in writing, signed by the parties and that it must result from mediation. [268]

In article 5 of the Singapore Convention is listed a range of reasons for refusing grant relief.[269] Adding more safeguards can prevent unlawful agreements from being enforced, and thus increase the possibility of more States being prepared to become parties to the Convention. Conversely, determining such grounds for refusal would require in-depth analysis of the facts of the mediation. In turn, this could render the MSAs created under the Convention somewhat ineffective, as attempts to conclude the process in a timely manner could be upended by time-consuming post MSA contentions. This would undermine and possibly negate one of the biggest advantages of Mediation. In order to make the process less complicated, Miglė Žukauskaitė recommends that:

> ...the process of granting relief should be stayed upon presentation of a proof that the fairness of the process of mediation or validity of its outcome is challenged in front of a judicial authority having the jurisdiction over the substance of the matter. Relief should not be granted if the judicial authority in question renders a final decision that the mediation process was not fair, or the settlement agreement is not valid. [270]

Mingle argues further that only three grounds of refusal should have been retained, namely that it should be compliant with the national law of the State where enforcement is sought, related to concerns of public policy and that the subject matter of the dispute incompatible with settlement by mediation under the law of such a State; Where it is clear from the MSA text without further determination that the relevant MSA is not binding or final or is incomprehensible; Determining that the MSA is irrelevant either because of subsequent modifications or because the validity or fairness of the mediation process or MSA was subsequently challenged before a competent authority.[271] Once the MSA has been determined as valid and enforceable, the parties are bound to it, if not by good faith, then by public authority.

In summary, in nearly all cases there are a uniform set of requirements, such as that the MSA should not be contrary to relevant law, that it must be in writing and that it must result from a mediated dispute, etc. These elements would easily be reapplied to an MSA resulting from an interstate dispute. The vehicle of implementation or enforcement is a different manner though. The Singapore Convention relies on an international agreement between States. Currently such an agreement to render an MSA resulting from mediation enforceable does not exist, and none is being drafted. While a treaty would be the most direct way of addressing enforcement, it is not applicable for now. The EU Directive relies by and large on the domestic development of mediation systems. However, currently mediation is still very much in the development stages in

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[268] Žukauskaitė, *Supra* note 253 at 212
[269] Art. 5. Singapore Convention, 2019, available at: https://treaties.un.org/doc/Treaties/2019/05/20190501%2004-11%20PM/Ch-XXII-4.pdf.
[270] Žukauskaitė, *supra* note 253 at 213.
[271] Id.

most States around the world. An international lack of uniform understanding and implementation thereof renders the approach of relying on domestic support very problematic.

Under the current structures of PIL, the Arb-Med-Arb approach might be the most plausible, as the Permanent Court of Arbitration (PCA) is already an established platform for settling disputes by arbitration. The PCA was established on the 1899 Convention for the Pacific Settlement of International Disputes (1899 Convention). Much like the Arb-Med-Arb procedure above, it requires that the dispute must be active or predicted. At the very least, it must not have been resolved. Furthermore, article 31 of the 1899 Convention reads that "The Powers who have recourse to arbitration sign a special Act ('Compromis'), in which the subject of the difference is clearly defined, as well as the extent of the Arbitrators' powers." [272] Furthermore, there does not seem to be anything in the 1899 Convention which explicitly prevents the PCA from formally adopting an MSA if that is the intention expressed by the disputing States in the Compromis, nor does it acknowledge such a procedure. More research and judicial development will be required to further explore and develop this option.

International MSA enforcement mechanisms related to the EU Directive, Singapore Convention and other options may at this point serve as inspiration for the development of the enforcement of MSAs between States, and not a direct application.

6.4 Disadvantages of Mediation

Before concluding it would be helpful to highlight and expand on some of the disadvantages of mediation that were referred to throughout this thesis. Mediation is not without its flaws, some of which are inherent, and it is important to take note of them.

It was already pointed out in chapter 4 that mediator bias is an issue which some see as a real threat to settlement of a dispute. While there is substantial support in favour of 'bias', as illustrated, the reality remains that mediators can often come with pre-existing relationships and or agendas to a mediation. This issue can be compounded by the absence of properly trained mediators and mediator selection procedures.

Even though it has been established that mediation is a "party-driven" process, the involvement of the mediator has also been made clear throughout the study. Mediators are not only responsible for facilitating communication between the parties, but also to make suggestions, to select appropriate methods for the mediation, and to establish a sense of fairness and honesty between the pastries. Selecting an appropriate mediator is thus hugely important. However, as pointed out in chapter 4, mediators are often heads of States, religious leaders, internationally recognised persons, and so forth. Without challenging the efficacy of such people, it must be noted that they are not necessarily trained in the discipline of mediation.

[272] Art. 31. Hague Convention 1907 *supra* note 172

Furthermore, the selection of a mediator itself can be used as leverage by one of the disputing parties. In the Papal dispute example in chapter 4, Argentina particularly chose the Pope as mediator, because they calculated that this option would be unacceptable for Chile, thus forcing the situation in their favour.

Parties do not only have to consent (agree) to the mediator, but as pointed out in chapter 6.1, consent is part of nearly every step of the process. This, in theory, provides both of the parties with unlimited 'veto' capacity in the process to conclude an MSA. Moreover, it could be deployed as a stalling tactic by one party, if a delay would ultimately be in its favour, due to constant change in extenuating circumstances. What is therefore a core element of the process could also be used to essentially undermine it. However, it is also worth pointing out that mediation is to be conducted in good faith, and such a tactic would be in clear contradiction and violation thereof.

It is entirely possible that the parties to the mediation may ultimately determine that the dispute cannot be concluded via mediation, and then proceed to other, formal forms of dispute resolution. Much have been made of the time and cost saving benefits of mediation, yet in such an eventuality, these advantages are negated and even reversed due to the fact that the resolution will now take much longer than if the parties had simply consented to a formal or binding form of dispute resolution in the first instance. Furthermore, the MSA is a non-binding agreement. When parties achieve the settlement, the agreement between them needs to be enforced. This issue was explored in greater detail in chapter 6.3 above. It needs to be highlighted that, though very unlikely, States may always rescind their commitments, until it is converted into a treaty. Yet there is as much guarantee that the MSA will be represented in a treaty as there is of States performing its obligations under it. Should a State effectively 'default' on its commitments under the MSA, parties are effectively in the same position as if an MSA was never reached.

Finally, the concept of confidentiality could also be a disadvantage to mediation. For the overall development of a system of mediation it is certainly a disadvantage, as scholars and practitioners have little or no access to the substantive process of a mediation. This in turn leads to a retardation of the overall progression of the method of dispute resolution. Moreover, if the process was unsuccessful and further litigation or arbitration is pursued, the information shared during the mediation process, however vital, may not be open to discovery, thus potentially hindering subsequent dispute resolution processes.

Most of the disadvantages of mediation seem to be borne from the essential elements thereof. The only conclusion is that in most cases the effects of these disadvantages can only be negated or diminished, but never truly overcome. Whether or not these considerations weigh heavier than the potential advantages of the process would be up to each disputing party to determine for themselves.

6.5 Final Remarks

This chapter has ventured to take a look at the various PIL principles that might be applied to the principles of mediation. In an international society with an ever-growing number and variety of international actors, more complex disputes and ever growing disputes related to recognition and territory, mediation has a valuable role to play in PIL dispute resolution. In order for mediation to play a larger role, it needs to be developed, but not based on codification and documentation alone, but more so by the advancement of fundamental principles. This chapter explored ways in which mediation could apply certain practices and principles already established in PIL in order to not only advance its own cause but to grow and develop it.

Chapter 7
Conclusion

Inspired by the Singapore Convention on Mediation and other recent developments regarding dispute resolution, this thesis set out to explore the potential application of mediation in PIL. The proposal of this thesis is that meditation does and will have a particular role to play in PIL, and needs further development and consideration. Its particular role was discovered in chapter 3; mediation may be more effective when disputes are more politically-weighted, and, or disputes which involve one or more NSA. The efficacy of meditation with regard to the former was particularly illustrated in chapter 4. The purpose is not to suggest that mediation replace any existing form of dispute resolution, but that it plays an actively supportive role. How mediation is to be developed was discussed in chapters 5 and 6, through the introduction of previously established or documented principles, and the further development thereof in line with the principles of PIL. Prior to this, various elements of mediation were revealed, through a variety of methods, advantages & disadvantages as well as theories in chapter 2.

There appears to be a lot of support for mediation going forward in the 21st century. The UN has relaunched the “Peacemaker” initiative in 2019, which is an online tool meant to assist parties in international conflicts. The incumbent Secretary General of the UN, António Guterres, has also given a significant amount of support for the development of mediation. He wrote in the conclusion of a 2017 report on mediation that:

> My strategy for mediation involves strengthening the United Nations capacity and ensuring that the Organization maximizes its assets in support of mediation across the peace and security, development and human rights pillars. I strongly believe that the United Nations can do a better job if it acts in an integrated manner and with predictable funding supported by the membership at large. [273]

It would appear that Mr. Guterres is convinced that mediation is the most effective tool in tackling the many conflict-disputes around the world. And this thesis would agree with his assessment in no uncertain terms. However, there is a great need for mediation to be further developed. Scott Garter writes that “(a) central attribute of international dispute mediation is its lack of formulaic procedures and the wide variation in procedures and practices conducted by mediators in different disputes and management efforts.” [274] Many publications with respect to

[273] United Nations, *UN Activities in Support of Mediation, supra* note 227.
[274] Garter, *supra* note 119, at 271

mediation suggest, as this quote does, that there must be a 'universal' approach developed. It would appear though that this always refers to the procedural aspects of mediation, and this is problematic. This point was indirectly raised in chapter 6, and bears repeating. Flexibility of mediation is one of (if not the) strongest aspects thereof, and therefore over-prescribing or 'calcifying' the procedural aspect could possibly stunt this crucial advantage. As was discovered, consent at nearly every stage of mediation is not only possible, but required, and so even with the most experienced mediator and best practices available, a mediation program must still have consent from disputing parties. Flexibility of a mediation process allows for consent to be applied to a wide range of aspects, as well as at regular intervals. The expertise of the mediator and the sophistication of the mediation system is only applicable in so far as the disputing parties agree to it. Indeed, an 'overdevelopment' of the rules may run counter to many of the principles of mediations. Therefore, this thesis suggested and explored in the final chapter that it is not the rules of mediation that needs development, but the principles thereof, particularly in relation to the established principles of PIL. Many of these principles are already in existence. This thesis did not introduce anything new that was previously unknown, and the same principles of consent, confidentiality, good faith and compliance are still intact. This thesis concludes that these principles, the core foundational elements of mediation, must be considered and further developed in its relation to PIL. As was illustrated, rules are driven by principles. If the development of mediation can move away from the ad-hoc codification of existing practice and procedures to a holistic development of its foundation, it could see major growth.

Unfortunately, there are still some perceptions that stand in the way of a holistic embrace of mediation. As it stands, it is still by and large applied to all areas of conflict. As pointed out in the chapter above, there are several international actors involved in conflict-mediation, but not all are necessarily subjects of international law, which complicates an integration with PIL principles. Secondly, it was established in the thesis that mediation is often applied to resolve conflicts that are politically weighted. In these cases which involve sensitive issues, parties and even mediators might be hesitant to rely too heavily on legal principles. The risk exists that developing mediation may create the impression that this form of ADR has lost its flexibility, which may deter parties from using mediation. Lastly, the term 'conflict' is often also related to mediation, which often leads to the assumption that there is an element of violence involved in mediated disputes. It may lead many to think that mediation is only applicable to particular disputes. This is not the case though. Meditation is particularly effective in certain cases, and those cases are becoming more common, as this thesis has argued. But that does not logically conclude that mediation is effective in only those types of disputes.

What meditation offers is that it can address and has the potential to address particular disputes which cannot be readily or effectively resolved by traditional FDR. Its benefits lend itself to be a reliable alternative. For this ADR to be properly developed it cannot remain stuck in the revolving door of codifying practices and procedures. To break free from this cycle, the development of principles and not the rules and practices must first be addressed. Such a development must simultaneously consider the principles of PIL and those of mediation.

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Abbreviations

ADR	Alternative Dispute Resolution
ARSIWA	Responsibility of States for Internationally Wrongful Acts
BITs	Bilateral Investment Treaties
CEDR	Centre for Effective Dispute Resolution
CIL	Customary International Law
CPR	Conflict Prevention and Resolution
EU	European Union
FDR	Formal Dispute Resolution
GATT	General Agreement on Trade and Tariffs.
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
ILC	International Law Commission
ILP	International Legal Personalities
IO	International Organisation
ISDS	Investor-State-Dispute-Settlement
MSA	Mediated Settlement Agreement
NGO	Non-Government Organisations
NSA	Non-State Actors
OECD	Organisation for Economic Co-operation and Development
OSCE	Organisation for Security and Cooperation in Europe
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PIL	Public International Law

UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNCIO	United Nations Conference on International Organization
UNCITRAL	United Nations Commission on International Trade Law
UNGA	UN General Assembly
UNSC	UN Security Council
UNTS	United Nations Treaty Series
US	United States
USMCA	US-Mexico-Canada Treaty
VCLT	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organisation