

Penn State Journal of Law & International Affairs

Volume 2 | Issue 1

April 2013

Mediation – Its Potential and Its Limits: Developing an Effective Discourse on the Research and Practice of Peacemaking

Dennis C. Jett

School of International Affairs, Pennsylvania State University

Follow this and additional works at: <https://elibrary.law.psu.edu/jlia>



Part of the Diplomatic History Commons, History of Science, Technology, and Medicine Commons, International and Area Studies Commons, International Law Commons, International Trade Law Commons, Law and Politics Commons, Political Science Commons, Public Affairs, Public Policy and Public Administration Commons, Rule of Law Commons, Social History Commons, and the Transnational Law Commons

ISSN: 2168-7951

Custom Citation

2 Penn St. J.L. & Int'l Aff. 103 (2013).

The Penn State Journal of Law & International Affairs is a joint publication of Penn State's School of Law and School of International Affairs.

Penn State
Journal of Law & International Affairs

2013

VOLUME 2 NO. 1

**MEDIATION—ITS POTENTIAL AND ITS
LIMITS: DEVELOPING AN EFFECTIVE
DISCOURSE ON THE RESEARCH AND
PRACTICE OF PEACEMAKING**

*Dennis C. Jett**

The articles in this issue of the [*Penn State Journal of Law & International Affairs*](#) summarize analytic research relevant to conflict situations and offer recommendations for how conflicts can more effectively be brought to an end. It is therefore worth considering how policymakers might employ these recommendations as they pursue the often elusive goal of peace.

THE “POLICYMAKER” DEFINED

One difficulty with that task is that “policymaker” is a title that can be applied to many different people playing many different roles in a conflict situation. The policymakers within a national government will be comprised of politicians elected to office, officials appointed by those politicians, and career bureaucrats. Each of them will approach the problem with different perspectives and priorities though they are nominally on the same team.

* [Dennis C. Jett](#), Professor of International Affairs, School of International Affairs, Pennsylvania State University.

Policymakers can come from the governments that are party to the conflict, neighboring states, regional and global powers, and any other nation that believes it has a dog in a particular fight.

In a civil war, in addition to the policymakers of the regime in power, there are those who have some degree of control over the group or groups trying to overthrow that regime in order to take power themselves. In any country in conflict, there are also the noncombatants who make up the elements of civil society that are trying to bring it to an end. They may not make policy, but the decisions they do make can place pressure on the combatants and help the cause of peace.

And then there are international organizations, where the representatives of member states provide instructions to international civil servants on how those organizations are to be involved. Even with clear guidance, there is much policy to be made in implementing a mandate including how to interpret it in the field and how forcefully to pursue it. Whether any of that can be done competently with the resources made available to these organizations by their members is another question.

That does not exhaust the list of players of course. Nongovernmental organizations are often instrumental in peace accords, once they are reached, as they can have the capacity to implement programs that bring into being many of the elements of such accords.

When the official representatives of the governments and rebel groups that are parties to the conflict fail to end it, a potential role for a mediator is created. Representatives of many of the organizations can attempt to serve in that capacity along with virtually anyone else who wants to engage in what is known as Track II diplomacy.¹ The only real requirement is that the parties to the conflict accept them as mediators. There is usually no shortage of elder statesmen and retired politicians willing to serve as mediators,

¹ A discussion of Track II diplomacy and its use in the case of U.S.-Iranian relations can be found at: <http://iranprimer.usip.org/resource/track-ii-diplomacy>.

especially if visions of a Nobel Peace Prize nomination are dancing in their heads.

Even though all will agree that peace is the goal, each policymaker will approach it from his or her perspective and be encumbered by some limitations, which affect just how much policy they are willing and able to make. With so many potential players, and so many violent conflicts, it is therefore important to consider to whom the policy recommendations are being made and what constraints they may be operating under. It is with that preliminary consideration in mind that I offer an evaluation as to whether the recommendations contained in this journal issue are realistic and useful.

MEDIATION RESEARCH IN PRACTICE

A. Scott Sigmund Gartner, [*Deceptive Results: Why Mediation Appears to Fail but Actually Succeeds*](#)²

Improving mediation is important, but even the best mediation is not a silver bullet solution. Wars can end in one of four ways—through a military victory, when a halt to the fighting is imposed by outside powers, when the parties to the conflict negotiate a cessation of hostilities in good faith, and when they negotiate one in bad faith.

When one side wins outright, there is no need for mediation. A clear military victory is difficult in a civil war, however, as it usually pits a government with a weak army against rebel forces that are even weaker. Both sides will have the power to terrorize civilians, but rarely enough to defeat each other.

When the international community steps in and forces an end to the conflict, it does not remove the underlying reasons for why the war started in the first place. That can imply a long-term commitment to creating a solution and that, plus a general reluctance to use force

² Scott Sigmund Gartner, [*Deceptive Results: Why Mediation Appears to Fail but Actually Succeeds*](#), 2 PENN ST. J.L. & INT'L AFF. 27 (2013).

to end the use of force, means there is rarely any enthusiasm for that outcome among other countries.

A negotiated end to conflict can often involve and be facilitated by mediation. But as Scott Sigmund Gartner points out in his article, success is not as elusive as it seems because the conflicts in which mediators are involved are also the ones least likely to succeed. If a peace accord were easy, the parties could reach it themselves. This point is worth remembering, and the international community and potential mediators should not avoid making the effort simply because the chances for success are not good. While mediation can be costly in many ways, they pale in comparison to the likely costs of continued war. The parties to the conflict will measure the cost of mediation as the potential it has for diminishing their chances to obtain more power, often without much regard for the toll on noncombatants should the war continue. Human suffering aside, the costs of relief efforts for refugees and people displaced by the fighting can easily and quickly amount to hundreds of millions of dollars.

The need for local expertise is one of the reasons that regional governmental organizations, with close ties, in-depth knowledge, and shared regional identities, are becoming increasingly utilized as mediators.³ On the other hand, while the countries in the region are the ones most directly affected by the spillover when a conflict's impact starts to cross borders, they may not be the best choice.

Regional organizations are often given the task of dealing with a conflict because the wider international community wants to avoid getting further involved rather than because they make ideal mediators. There is a strong correlation between conflict and poverty; civil wars occur more frequently in the least developed countries. The neighbors of countries in conflict are also likely to be poor and therefore the least able to support the cost of mediation and intervention. The neighboring states may also profit from the chaos by exploiting the resources of the country at war. And they will likely have an opinion as to which side they would like to see win. This may

³ *Id.*

be due to ethnic linkages, which can serve to make the conflict more difficult to resolve. So the decision to rely on a regional organization should be considered carefully and not assumed to be the best outcome.

B. Kyle Beardsley, [Using the Right Tool for the Job: Mediator Leverage and Conflict Resolution](#)⁴

Kyle Beardsley's discussion of the use of leverage by mediators in attempting to end conflicts is a useful reminder that mediators can try to use too much leverage as well as too little leverage. Using too little will not resolve the conflict and using too much might only result in a short-term cessation of hostilities and not address the root causes of the conflict.

By using just the right amount of leverage, the mediator can in theory achieve an end to the bloodshed and the humanitarian disaster it has caused and, at the same time, set the stage for a lasting peace. That is easier said than done, however, and it seems to assume mediators have a range of tools to use and the ability and willingness to use them. That is rarely the case.

Mediators are almost always in an inherently weak position.⁵ Their role has to be accepted by the parties to the conflict and those parties do not see such efforts as an opportunity to negotiate their own demise. They will limit what the mediator can accomplish and choose a mediator precisely because that person is weak. They are generally unwilling to concede much power to the mediator and will resist any efforts to force them to do things that they calculate are not in their interests. Thus, it is hard to identify too much or too little leverage *ex ante facto*, before its use, although the appropriate degree of leverage might be more clear *ex post facto*, after the mediation.

A mediator can have significant leverage if there is a willingness on the part of the international community to use military force or economic pressure to end a particular conflict. In his choice

⁴ Kyle Beardsley, [Using the Right Tool for the Job: Mediator Leverage and Conflict Resolution](#), 2 PENN ST. J.L. & INT'L AFF. 57 (2013).

⁵ See generally *id.*

of examples, Beardsley mentions the recent case of Syria where, as he notes, Russia and China have blocked any U.N. Security Council resolutions that might have teeth. Given the absence of any real leverage, Kofi Annan's efforts at mediation were doomed from the start. Since the Assad regime was not about to negotiate its own removal from power and is indifferent to the number of civilians killed, the only tool in Annan's toolbox was his ability to persuade both sides to stop fighting, and that obviously proved insufficient.

Beardsley uses the case of Rwanda as one where mediators used too much leverage. He believes this only resulted in a short-term cessation of hostilities, which was then followed by genocide after they resumed. A lower level of leverage implies less international involvement. It seems unlikely that would have made the outcome better and resulted in fewer deaths. In retrospect, most have concluded that a much more forceful intervention by the international community was required instead of an attempt at mediation that was too weak to prevent mass murder.

The problem for any mediator, and the international community as a whole, is that it is never clear whether hostilities are going to get worse or better. Even when there is some indication which direction the conflict is headed, unforeseen events—like the shooting down of the plane carrying Rwandan President Habyarimana and his Burundian counterpart—can be a catalyst for catastrophe. Habyarimana, had he lived, might have successfully implemented the Arusha accords.

The international reaction to conflict situations is often based on hope and the desire to avoid being drawn into the conflict. The biggest problem in Rwanda, as Beardsley points out, was the international community followed up the signing of the peace accords with a tiny peacekeeping force and a weak mandate that only allowed them to become bystanders, and at times victims, when the violence resumed.

The role of Richard Holbrooke in ending the war in Bosnia is cited by Beardsley as a compelling case in which the use of leverage calmed a humanitarian disaster. Holbrooke had a very forceful personality, however, and the military might of NATO to draw upon

if he chose to use it. There is no greater source of leverage than the ability to use force to punish an uncooperative party.

Having that power at the ready is not going to typically be the case. The international community is rarely willing to use such force. The fighting in Libya ended because the international community was willing to use such force in that instance. The fighting in Syria continues, however, because the international community is not willing to use force, at least not as of the time this is being written.

Another problem is that some mediators are life-long U.N. bureaucrats. One of the unwritten rules for a successful career at the U.N. seems to be “never alienate anyone.” With 193 member states as their bosses, those that work at the U.N. do not like to stick their necks out. A U.N. mediator therefore may not be enthusiastic about using leverage since it is bound to displease someone. Even mediators who are not U.N. officials are unlikely to have as strong a personality type as Holbrooke.

Beardsley’s fundamental point, however, is important for any mediator to consider. It is always essential to look into the toolbox and see what instruments of leverage it contains. Unfortunately, in many real world instances, there may not be much in the toolbox and the mediator may not be able or willing to use the tools available. Given Beardsley’s argument, additional research might examine how to expand the options available to mediators.

C. Molly M. Melin, [*When States Mediate*](#)⁶

In her essay on when states mediate, Molly Melin concludes that states should offer to mediate “only in optimal circumstances” and policymakers should “first consider the characteristics of the third party, the conflict, and the disputants.” Both recommendations may seem obvious but are they easily achieved?

States seek to act as mediators when their interests are at stake or when they feel they have to become involved. A

⁶ Molly M. Melin, [*When States Mediate*](#), 2 PENN ST. J.L. & INT’L AFF. 78 (2013).

humanitarian crisis can create pressure for international action as it did for Bosnia and Darfur even when the national interests of the major powers are not directly threatened. If the suffering largely escapes the media's attention and the public's concern, as it has in the Democratic Republic of the Congo, the pressure and the resulting action will be much less however.

Another reason states want to mediate is prestige. When a conflict is somehow identified with a potential mediator, because of colonial ties or other linkages, there will again be pressure, often from the public and the media, to play such a role. Having an interest in a conflict implies the mediator is not indifferent to the outcome, however, and that can lessen the acceptability of the mediator to the parties to the dispute. As Melin points out, in cases where the decision to attempt to mediate stems from domestic politics, public pressure, national interests, or politicians' search for prestige, the decision to get involved may have little to do with whether the situation is optimal for mediation.

If the conditions are not optimal, but the pressure to do something to end the conflict is significant, states will often look for non-state actors like international organizations or prominent former statesmen willing to play the role. That way any blame for failure, when it comes, can be shifted to the mediator and the damage to national pride and political risk can be minimized.

As Melin points out, nation states are the most frequent mediators of international disputes. Thus it is critical to understand the factors affecting their involvement. As she suggests, it is the parties involved in a conflict that decide whether there is to be a mediator and they will do that only when they think it serves their interests. The problem is that the disputants may not reach the stage until what I. William Zartman has characterized as a "hurting stalemate"⁷ has been achieved. The combatants will then see further military efforts as impossible or unproductive. Arriving at that point may take years and is why there are more conflicts every year than

⁷ See I. William Zartman, *Conflict and Resolution: Contest, Cost, and Change*, 518 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 11, 16 (1991).

there are mediation efforts and not because states considering becoming mediators are pondering their strategic choices.

D. Stephen E. Gent, [*The Politics of International Arbitration and Adjudication*](#)⁸

Wars come in two flavors—the international kind where the opposing sides are nation states (interstate conflicts), and internal ones, where the regime in power is pitted against those who seek to overthrow it (intrastate conflicts). Wars between countries are usually over territory, though there are usually other factors involved as well. Wars within countries are almost always about political power. In the former, if the parties are willing to accept the outcome, those imaginary lines on maps called borders can easily be drawn to divide territory. Resolving the latter type of conflict is harder, however, because political power is not as easily divided, especially in a poor country where elites are either in power or out of luck. When a faction does take control of the government, even through legitimate elections, the majority tends to rule with little regard for the rights of minorities. And there is no Heritage Foundation or American Enterprise Institute where ideologues can hang out until their side can return to power.

The difference between interstate wars over territory and intrastate wars over political power also has implications for alternatives to mediation. As Gent points out in his essay, international arbitration and adjudication is often the most effective means of producing long-lasting settlements and certainly should be considered as an alternative means of dispute resolution.

Such a binding mechanism, however, is unlikely to be used when the challenge is dividing political power in a country where that has never been achieved before. Dividing territory is something international arbitrators are good at because there is usually some legal basis on which to proceed, but it does not always end the problem. Having an international body mandate a solution provides cover to political elites who have to defend against charges that they

⁸ Stephen E. Gent, [*The Politics of International Arbitration and Adjudication*](#), 2 PENN ST. J.L. & INT'L AFF. 66 (2013).

have given up too much. Even that may not be enough to ease the pain of wounded national pride, as Gent demonstrates in his description of how Ethiopia rejected an international boundary commission's demarcation of its frontier with Eritrea.

Gent also points out that the losing side in the finding of an arbitration panel is more likely to reject the decision if it possesses a clear power advantage. That means either other, more flexible mechanisms should be considered as he suggests, or at a minimum, the international community needs to throw its weight behind supporting the outcome and provide incentives for both sides to respect it. One advantage of having elections as part of the process that brings a civil war to end is that it confers legitimacy on the winner. The loser will have an easy excuse for rejecting the result if the winner is chosen by an international arbitrator and not by the voters. To avoid that tendency, the international community must use the carrots and sticks at its disposal to ensure the outcome is accepted if the parties agree to arbitration.

Interestingly, international arbitration has increasingly become the rule in international commercial disputes. While its use is growing in non-commercial international disputes, it is still not common. So while policymakers should certainly look carefully at all aspects of the conflict—including who should mediate and when—decisions are often made not on the basis of an objective and detached assessment of what can be achieved. Rather decisions are made on the basis of what is necessary and what is possible given the political pressures they are operating under. In order for international arbitration to expand from economic to political disputes actors will have to address these types of political pressures.

E. Isak Svensson, [*Research on Bias in Mediation: Policy Implications*](#)⁹

Isak Svensson discusses the policy implications of bias in mediators and concludes that even biased ones can play a useful role. He notes that rebel-biased mediators tend to create peace settlements that include power-sharing arrangements while government-biased

⁹ Isak Svensson, [*Research on Bias in Mediation: Policy Implications*](#), 2 PENN ST. J.L. & INT'L AFF. 17 (2013).

mediators opt for amnesties. Both the mediators and the outcomes that are deemed acceptable are up to the parties in the conflict. The bias in play may therefore result from the selection process rather than a preference toward a particular solution on the part of the mediator. Mediators “create” only those solutions that the combatants will agree to and are able to consider solutions that might be accepted by both sides.

Svensson’s central premise—that bias is not an inherent disqualifying feature of mediation—is an important one. However, and as Svensson points out, a little bias may not be a bad thing. The real test is whether the mediator is capable of guiding the parties to an agreement and not whether he or she is absolutely neutral. This also represents a major distinction between domestic mediation—which seeks neutrality among mediators—and international mediation. For example, it not only took Begin and Sadat to create peace between Israel and Egypt but it also took Carter, the leader of a pro-Israel state, to convince Israel to give up territory in exchange for a U.S. assurance of security. Mediators will often be charged with bias, especially by the side playing the weaker hand, whether it exists or not. The parties to the conflict have to have some sense that the mediator will act fairly even if not necessarily impartially. The bias may even help get the stronger side to a deal as it probably did at Camp David.

F. Birger Heldt, [*The Lack of Coordination in Diplomatic Peacemaking*](#)¹⁰

Birger Heldt, of the Folke Bernadotte Academy, examines the growth in the number of efforts at peacemaking in emerging conflicts and in particular the lack of coordination that results from so many different actors becoming involved. To address this problem, he suggests policymakers adopt a long-term strategy focused on coordination. In addition, he urges policymakers not to be discouraged by the failures of initial peacemaking attempts. He cautions that the need for coordination should not crowd out attempts at further peacemaking. He also emphasizes that if violence

¹⁰ Birger Heldt, [*The Lack of Coordination in Diplomatic Peacemaking*](#), 2 PENN ST. J.L. & INT’L AFF. 9 (2013).

is going to escalate dramatically, it normally does so in the first two years of the conflict.

That two-year window when effective peacemaking has a chance to prevent a significant expansion of hostilities is critical for policymakers to acknowledge and incorporate into planning efforts. The problem, of course, is that senior officials in any busy capitol or international body are almost always consumed by the crisis of the moment and long-term planning rarely gets beyond next week. The paradox and the tragedy is that until the violence does escalate, the conflict is likely to fail to grab the attention of the media and the policymakers.

The International Crisis Group and other organizations have long tried to direct the attention of officials to crises in need of attention and alert policymakers before the conflicts escalate. The U.N. has discussed ways to improve crisis management and to take advantage of constantly evolving information and communications technology.¹¹ It would be useful if each government and international organization had an internal group that was designed to prioritize mediation needs. And those groups should try and stay ahead of the curve by engaging in a continuing dialogue with those who make the study of mediation efforts their academic specialty.

The coordination of peacemaking efforts is made difficult by the fact that there are no barriers to entry, especially to potential Track II mediators. That may account for the growth in such efforts as much as any other factor. It is still worthwhile to attempt to bring coordination, as well as long-term planning, to peacemaking. The biggest obstacle is perhaps a lack of time and attention to the problem by policymakers as much as anything else. Heldt's policy recommendations offer an important reminder of the value of preventative measures and of the critical timeframe for such action.

¹¹ See generally Daniel Stauffacher, *Strengthening Crisis Information Management*, 48 UN CHRONICLE (2011), <http://www.un.org/wcm/content/site/chronicle/home/archive/issues2011/thedigitaldividend/strengtheningcrisisinformationmanagement>.

G. Victor Asal & Jonathan Wilkenfeld, [*Ethnic Conflict: An Organizational Perspective*](#)¹²

Victor Asal and Jonathan Wilkenfeld provide a convincing argument that assumptions about a conflict always need to be checked and that generalizations expounded by scholars and journalists can lead to the wrong policy choices. True experts in a region need to convey the complexity of each situation to policymakers without making it seem so difficult that any involvement is unwise. Academics and other analysts need to keep in mind that no data set can substitute for in-depth knowledge when it comes to a particular conflict. Some humility is required in making assessments of conflicts and policy recommendations regarding them. If they are made simply on the basis of number crunching of past conflicts, ideology or a lack of knowledge about the motivations of the combatants, an illusion of understanding will be created and could lead to poor decisions.¹³

H. David E. Cunningham, [*Who Should Be at the Table?: Veto Players and Peace Processes in Civil War*](#)¹⁴

David Cunningham cautions that too many players can spoil the peace process and urges that those without a veto be excluded from it. It will not be only the mediator that decides who gets a seat at the table, but to the extent that this recommendation can be followed, it should be. While civil society may not participate in the actual negotiations, it would also be useful to think of ways to help them pressure the parties to come to an agreement. Leymah Gbowee, the Liberian activist who won the Nobel Peace Prize, is one example of how such pressure can be used to encourage politicians to negotiate seriously.

¹² Victor Asal & Jonathan Wilkenfeld, [*Ethnic Conflict: An Organizational Perspective*](#), 2 PENN ST. J.L. & INT'L AFF. 91 (2013).

¹³ Richard Syngé's book "Mozambique" is a good example of bad analysis and the U.S. Institute of Peace should be embarrassed by its publication. See RICHARD SYNGE, MOZAMBIQUE: UN PEACEKEEPING IN ACTION, 1992-94 (1997).

¹⁴ David E. Cunningham, [*Who Should Be at the Table?: Veto Players and Peace Processes in Civil War*](#), 2 PENN ST. J.L. & INT'L AFF. 38 (2013).

Cunningham notes the problem with a strategy of threatening to exclude the main combatants from the negotiations is not effective. If they are not included there are no benefits from peace, because peace won't be possible. The parties must always reach a decision that their interests are better served by peace than by continued war for any talks to begin. And there must be some common ground that is reachable, which it is not when the aims of those doing the fighting are diametrically opposed and nonnegotiable.

I. J. Michael Greig, [*Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation*](#)¹⁵

J. Michael Greig is the co-author of one of the most comprehensive books on international mediation.¹⁶ Here, Greig applies his strong analytical understanding of mediation not to one issue, but to one case. In his assessment of Syria, he quotes one Middle Eastern analyst as saying that President Assad will go down fighting. If that is the case, there is little that can be done by the international community. If active military engagement is ruled out, the international community can do little more than encourage opposition forces to discuss and coordinate what will happen after the fighting stops. Efforts have been made and conferences held to try to avoid the post-conflict chaos that has been seen in Libya. It is unfortunate that more was not done to help Libya make the difficult transition from dictatorship to democracy, but it is hard to anticipate if and when regime change is going to succeed and therefore hard for the international community to know what to do and the best timing for doing it. And if, as in the case of Syria, those in power have strong allies like Russia and Iran encouraging them to fight on, a mediator will have little chance of success as Kofi Annan finally admitted. Whether his successor, Lakhdar Brahimi, will do any better will depend on circumstances beyond his control more than his ability to mediate.

¹⁵ J. Michael Greig, [*Intractable Syria? Insights from the Scholarly Literature on the Failure of Mediation*](#), 2 PENN ST. J.L. & INT'L AFF. 48 (2013).

¹⁶ J. MICHAEL GREIG & PAUL DIEHL, INTERNATIONAL MEDIATION (2012).

CONCLUSIONS - MEDIATORS AND THE REALITIES THEY FACE

Mediators almost always play a weak hand unless, like Richard Holbrooke in the case of Bosnia, they represent an entity that is willing to take an active part in the conflict. Whether dealt a weak hand or a strong one, mediators play a crucial role in reaching a peaceful resolution to a conflict and have a significant effect on the durability of the settlement that ends the fighting. Mediators do not simply add “grease” to the “squeaky wheel” but can redefine issues, reshape debates, and restructure negotiations in ways that lead to successful and peaceful outcomes. It is therefore important that mediators carry out their responsibilities with the utmost skill and access to the relevant research, as that will enhance the chances for success.

At the same time, mediation often occurs in a crises situation where it is virtually impossible to reach out and learn about past patterns, new theories and innovative approaches. In that regard it is useful for policymakers, to draw on the cumulative knowledge of mediation scholars, both represented here and throughout the research community before they get to the work of mediating. Even if such general learning is not possible, whatever their relationship to the situation and their power to affect it, mediators and policymakers should consider the research-based recommendations outlined in this collection of essays.

The journal’s goal in constructing this issue—to develop a more robust and interactive dialogue between researchers and practitioners—should be received as a call to the members of both communities. It is important for researchers, who have the time to study these matters in depth without being forced to rapidly turn their attention to the next crisis, to share their findings on what works and what does not with more than other academics. And those who have served as mediators need to share with researchers their views on the constraints they face in the field. There are a number of ways to accomplish this kind of direct dialogue on peacemaking, which will draw the communities together and produce mutually beneficial results—and this issue serves as an important launch point to begin that discussion.