

Building an Effective World Security System Panel
Enhancing the Capacity of the United Nations to Prevent and Resolve Armed Conflict

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Transforming Violent Conflict Strand

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Introduction

Innovative approaches to diplomacy are needed to strengthen the UN's response to violent conflict that could be integrated into the United Nations System. These approaches come from both inside and outside the United Nations System.

The first innovative approach to diplomacy comes from examining a provision for a mediation and conciliation service under the guidance of the Security Council, approved by the General Assembly in Article 22 and never implemented. It was called the U.N. Panel for Inquiry and Conciliation established in 1949, Hague Appeal for Peace.

Definitions

Mediation and conciliation are peaceful means for the resolution of international disputes, as provided in the U.N. Charter, Article 33. Mediation is the assistance of a third party (usually the U.N. Secretary-General or a neutral state) to help the parties to a dispute to communicate. Conciliation is the assistance of a third party to suggest, but not impose, terms of settlement.

Mediation and conciliation belong among what are called the diplomatic means for the resolution of disputes, since the parties retain control of the dispute and may accept or reject proposals for settlement as they see fit. Such diplomatic means may be distinguished from what are called legal means of settlement, since a third party can reach a binding decision in accordance, usually, with international law.

Typical legal means include arbitration and adjudication. Arbitration is the appointment of a panel of arbitrators (usually three or five persons) whom the parties entrust to find a binding settlement in accordance with rules of decision that the parties provide or with international law. Adjudication is the submission of the dispute to a permanently constituted international court representative of the main forms of civilization (like the International Court of Justice, the World Court), which will apply accumulated international law, or create new law out of precedents and interpretations, in order to make a binding judgment.

The whole array of peaceful means of settlement of international disputes, then, is, in the order of Article 33: negotiation, inquiry, mediation, conciliation, arbitration, adjudication, and resort to regional agencies (which offer the same range of means). "Good offices," though not

formally listed here, is often understood as another means of peaceful settlement. Good offices cover virtually all diplomatic means and usually are exercised by the U.N. Secretary-General or by a friendly state's foreign minister.

Conciliation, a diplomatic means, and arbitration, a legal means, are rather close in nature to one another. A conciliator does propose a settlement, though it is not binding on the parties to the dispute; arbitration is set up voluntarily by the parties, who choose the arbitrators, specify the rules for decision, and enforce the "binding" award at will. In recent years, as states have moved away from binding international arbitration-though they agreed to the widest range of arbitral provisions in the new Law of the Sea- the scope of mediation and conciliation has expanded, and agreements between the parties tend to hold though they are technically nonbinding. These distinctions, in present times of very rapid changes in international relations- such as the end of the Cold War or the decline of hegemonic powers- seem to be blending into one another. The idea of a conciliation service borders on the legal.

Conciliation and mediation are also rather close to inquiry or fact-finding. The service contemplated here could have a role in fact-finding or early warning of impending disputes. One such activity could be "preventive action," an adjunct NGO contribution to the U.N.'s preventive diplomacy, as proposed by Gordon Thompson .It could, lastly, take part, as some non-governmental organizations and those contributing to the development of "second track diplomacy "already do, in negotiation, which yet remains the primary means for states to resolve their conflicts.

An international mediation and conciliation service is understood to be a permanent institution of independent experts or professionals, probably in the U.N. Secretariat, that would supplant, if not replace, the present ad hoc and pragmatic practices that states, international organizations (the U.N. Secretary-General), and certain prominent individuals (former U.S. President Jimmy Carter) now occasionally employ to resolve disputes between sovereign states. The assumption is that such professionals would be more impartial and fairer than those who now exercise the offices.

A U.N. commission of mediation and conciliation, on the other hand, would be composed probably of member states under the authority of the General Assembly or Security Council. It could hardly maintain confidentiality and would almost certainly become politicized, though member states might well prefer that, since such a commission would preserve their sovereign control. At the present stage of history, since there is so little trust in the effectiveness and impartiality of the United Nations, states and even the U.N. Secretary-General tend to prefer the ad hoc and flexible character of mediation and conciliation. The proposal of an international service is designed to build trust in the United Nations, pending the day when it can be transformed into a reliable legal institution.

History:

A U.N. Panel for Inquiry and Conciliation was established in 1949, but it has never been used.

A Commission of Mediation, Conciliation, and Arbitration was established in the Organization of African Unity (O.A.U.) in 1961, but it also has never been used.

In the International Chamber of Commerce (Paris), an Administrative Commission for Conciliation has been set up (1973). It is all but an arbitral tribunal of three, except that the parties are free to reject its proposed settlement, after which they may seek more formal arbitration or litigation in national courts. There were five requests for conciliation in 1981, and expansion of the service is expected in construction and technical disputes.

In the General Agreement on Tariffs and Trade (GATT), "panels" of individuals, acting in their own capacity without instructions from their governments, investigate disputes, mediate, and present findings. The parties are not bound to accept the findings, but they usually do. There has been only one usage of sanctions, which were quite ineffective.

Since the early 1970s, there has been a public effort, led by the Commission to Study the Organization of Peace and more recently by the Campaign for U.N. Reform, to establish a permanent U.N. mediation and conciliation commission or service within the U.N. system. The reasoning behind this proposal is that the present practice is too unreliable, ad hoc, and often tardy; it should be put on a knowledgeable, professional basis for greater effectiveness.

Louis B. Sohn has pointed out that hundreds of bilateral and multilateral treaties provide for conciliation, but conciliation is not even as well-organized as arbitration. A permanent commission, composed of eminently qualified persons such as former presidents of the General Assembly or former state representatives to the U.N. with long experience, could be attractive to states and to the Secretary-General in his traditional conduct of good offices.

Such a commission, according to Sohn, could be authorized to intercede in a conflict on the request of one party, the General Assembly, or the Security Council (U.N. Charter, Articles 14 and 33). It could be granted the jurisdiction, by a clause like ICJ Statute Article 37, over the many bipartite conciliation commissions, whose members are currently appointed by the Court. If a new permanent commission appointed them, it could develop more regular and professional standards for conciliation.

F.S. North edge and M.D. Donelan, in discussion of a similar U.N. service, emphasize the need to develop a professional corps of mediators, trained in the technique and in the history and social structures of countries that may call for aid. A U.N. mediation service, they suggest, would also need to mobilize U.N. resources to guarantee states against armed attack if they should accept mediation in a dispute, just as the nuclear powers in the Non-Proliferation Treaty promise to assist non-nuclear powers in case of aggression. It probably would also need to be able to cut off U.N. technical assistance programs in case of refusal of mediation, or even to apply sanctions.

The intent here is to will the means (trained mediators, guarantees, warnings) as well as the end (peaceful settlement). If mediation is going to be more than a merely available technique, say these scholars, states must be discouraged from continuing to rely on threats or use of force for the settlement of their disputes.

A permanent U.N. mediation and conciliation service was discussed and recommended at the founding conference of the Center for U.N. Reform Education, a U.S.-based non-governmental organization, in 1978. Since the Special Committee on the Charter, designed to

consider U.N. Charter amendments in anticipation of the long-postponed review conference mandated in Article 109, had just been established, citizens in the Center proposed to the Special Committee in 1979 to create a "permanent commission of the General Assembly . . . to fulfill the functions of mediation, good offices, and conciliation." It was not accepted, but Walter Hoffman and Charles Guetell have continued to follow consideration of such measures in the Special Committee.

In 1983, Romania, the Philippines, and Nigeria introduced a working paper into the Special Committee providing for a mediation and conciliation commission of all the members of the United Nations. The commission's powers would not be binding, but they could be used to promote the peaceful settlement of a dispute. The commission was to establish its own professional bureau, which could establish a "chamber," at the request of a state party to a dispute, the General assembly, the Security Council, or the Secretary-General. The chamber would "seek to induce the parties to the dispute to immediately enter into direct negotiations" or "seek to clarify the differences between the parties and to accommodate them by offering appropriate suggestions and solutions." This proposal was also rejected.

Objections were made to any "mandatory" conciliation procedure or to any interference in the "free choice of means." It was also said that the "procedure of good offices" was "difficult to institutionalize." But the main objection was that such a commission "might upset the functions of the principal organs of the Charter of the United Nations, particularly because of its proposed universal composition similar to that of the General Assembly." The proposal, in other words, aimed at "amending the Charter."

Supporters replied that current U.N. processes for peaceful settlement were clearly not working very well, and nothing in the proposed permanent conciliation and mediation commission implied binding powers that might upset the existing organization of the United Nations. The lack of political will to use the U.N. was a problem, but "the creation of an effective mechanism of pacific settlement was in itself a way of promoting trust."

Despite this disagreement, the proposal did not soon die. The Philippines and after 1986 Romania continued to sponsor and revise it in the U.N. Special Committee on the Charter. The trend in subsequent proposals was away from a permanent commission toward a procedure for establishing a commission of good offices, mediation, and conciliation as needed for each dispute. But no arrangement for a permanent procedure for establishing ad hoc commissions ever achieved consensus. All this happened at a climactic period of the Cold War. Finally, the Special Committee, expressing appreciation for the "better understanding" contributed by the discussions over the years, "completed its consideration of the proposal" on 10 April 1989.

About the same time as the U.N. Special Committee on the Charter was failing to seriously take up the proposed mediation and conciliation commission, a novel approach outside the U.N. and rooted in the progress of domestic conflict resolution was being made by John W. Burton and his colleagues. Burton succeeded in getting a proposal before the U.S. State Department on "facilitated international conflict resolution" in 1985. Traditional settlement of disputes by peaceful or coercive means, Burton argued, were conceived as win-lose means, and hence judicial, legal, or ultimately military means were practiced. The alternative was win-win

nonviolent conflict resolution between states, guided by a facilitator or panel of facilitators, as in arbitration. In face-to-face situations, facilitators aim at sustainable understanding and accommodation of parties in deep conflict, rather than at compromise, as in traditional mediation. Although State Department officials regarded facilitated conflict resolution as closer to domestic than to international situations, Burton and others have developed it into a very sophisticated technique suitable for the emerging more integrated world.

Within well-organized national states, there exist extraordinarily successful mediation and conciliation services. The U.S. Federal Mediation and Conciliation Service, founded in 1947, has successfully mediated many thousands of labor-management disputes in the United States. In Britain, the U.K. Advisory, Conciliation, and Arbitration Service performs similar familiar functions. Why cannot something like these be established at the international level?

The basic answer is that any proposal of an independent, professional mediation and conciliation service or commission, which necessarily moves from diplomatic toward legal means of settlement, represents a delegation of sovereign powers from states to an untested international organization. Hence, any proposal of, say, an international facilitation service must be designed to meet the much greater challenges of international, rather than domestic, disputes; and it must be framed to convince cautious, responsible statesmen and stateswomen that a greater portion of their disputes might safely be entrusted to professional mediators and conciliators.

People who think that the time for such a service has come must bear in mind that down the road they are taking lies Grenville Clark and Louis B. Sohn's World Equity Tribunal, designed to settle the political disputes now beyond the legal capacity of the World Court. What is clearly implied are further delegations of sovereign powers from the states to a central world body. The plain implication is some form of constitutionally limited world government. But the conciliation service for the time being would only take us to what is now called world governance.