

# **The Role of Mediation in the Pacific Settlement of International Disputes**

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**Dr. Mohammad Naqib Ishan Jan**

*Associate Professor, Ahmad Ibrahim Kulliah (Faculty) of Laws, International Islamic  
University Malaysia*

*LLB (IIUM), MCL (IIUM) & PH.D (IIUM)*

[naqib@iiu.edu.my](mailto:naqib@iiu.edu.my)

## **ABSTRACT**

International political climate is currently tainted with unresolved inter-State disputes that emanate often from mere suspicion, mistrust, political and economic rivalry as well as claim and counterclaim over a certain territory. Disputes, such as these, if not carefully monitored and resolved peacefully, they may, as they did in the past, lead to arm conflicts – conflicts that would bring, as history has shown they have done so, devastating effects not only to the disputants but also to the international community. What can be achieved through peaceful means can never be achieved through wars or armed conflicts. The means for the pacific settlement of international disputes, which include ‘diplomatic’ and ‘legal’ means, are laid down in international law - a law that basically regulates the relations among States. ‘Mediation’ is one of the diplomatic means which this paper attempts to examine its nature, usage, and effectiveness in solving international disputes. The paper studies mediation purely from the international law perspective and in doing so it refers to international treaties, customs, judicial decisions and scholarly opinions. The conclusion drawn in this paper is that if mediation is taken seriously and utilized in good faith it may help to achieve the desired result, that is, pacific settlement of international disputes – a settlement that would help to ensure world’s peace and security.

## **1. Introduction**

The international political climate is currently fraught with unresolved interstate disputes that emanate often from mere suspicion, mistrust, political and economic rivalry as well as competition over territory. Disputes, such as these, if not carefully monitored and resolved peacefully, they may, as they have, lead to armed conflicts – conflicts that would bring, as they have done so, devastating effects not only to the disputants but also to the international community. What can be achieved through peaceful means may not be achieved through wars. The means for the pacific settlement of international disputes, including ‘diplomatic’ and ‘legal’ means, are laid down in international law - a law that basically regulates the relations among States and other entities having international legal personality<sup>1</sup>. ‘Mediation’ is one of the diplomatic means which this paper attempts to examine its nature, usage, and effectiveness in solving international disputes. The paper studies mediation purely from the international law perspective and in doing so it refers to international treaties, customs, judicial decisions and scholarly opinions. The conclusion drawn in this paper is that if mediation is taken seriously and utilized in good faith it may help to achieve the desired result, that is, pacific settlement of international disputes – a settlement that would help to ensure world peace and security.

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<sup>1</sup> See Schwarzenberger, *The Inductive Approach to International Law* 115-64 (1965).

## 2. The nature and scope of international dispute

The term ‘international dispute’, known also as ‘interstate dispute’, is more than a mere grievance or disagreement. It refers to a specific disagreement, between two or more States, that reaches a point of sufficient definition and clarity where the use of certain established means of dispute resolution under international law, such as negotiation, mediation, conciliation, arbitration and adjudication, might be utilized in resolving the dispute. The scope of international disagreement is wide but this paper confines the discussion to the disagreements that are governed by public international law<sup>2</sup>. Certain disputes, like those involving issues of private international law, are excluded from the ambit of the present study. Excluded from the ambit of the present study are commercial disputes involving individuals *vis-à-vis* States.

The other type of disagreement which falls outside the scope of this paper is ‘internal’ or ‘intrastate’ dispute. The term ‘intrastate dispute’ means a specific disagreement, for instance, between a ruling party or government in a State and its political dissident or separatist movement. Such a dispute may even lead to civil war but its resolution is not basically the concern of international law. The solution of the intrastate dispute normally falls within the domain of domestic law. A State may use force against armed dissidents and or separatists in its own territory, subject only to limitations imposed by international humanitarian law (IHL)<sup>3</sup> or other obligations created by the Security Council under the United Nations (UN) Charter<sup>4</sup>. This, however, does not mean that internal disputes cannot be solved through peaceful means such as mediation. For instance, in the 2008 internal dispute of Kenya, Mr. Kofi Annan, the former UN Secretary General, successfully mediated and settled the dispute between Kenya’s President and the opposition leader. Similarly, on May 2008 the Arab League mediated and settled the internal dispute between Lebanese Government and its armed opposition. These examples show that all the diplomatic methods for the peaceful settlement of international disputes can be utilized to solve internal disputes. Nevertheless, internal dispute falls outside the scope of this paper, as its title limit the scope of the discussion to the pacific settlement of international dispute.

The interstate dispute is normally the precursor to international armed conflict. No dispute should ever be allowed to lead to armed conflict as the later is unimaginably disastrous bringing with it suffering, pain, horror, destruction, death, homelessness and environmental damage. To avoid the catastrophic results that war usually bring with it, all the methods of dispute resolution under international law should be

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<sup>2</sup>Interstates disputes are governed by international law. See the Statute of International Court of Justice, Art. 38(1). However, the States may agree that their relations shall be governed by some other set of rules: *Tunisia-Libya Continental Shelf* case, (1982) ICJ Rep. 23, 38 (*lex specialis*). For example, they may agree that their relations shall be governed a system of municipal law: Denmark-Malawi Loans Agreement, 1966, 586 UNTS 3.

<sup>3</sup> The main purpose of IHL is to save human lives and alleviate human suffering, during interstate or intrastate armed conflicts, whether they are ‘combatants’(members of the armed forces) or ‘noncombatants’ (i.e., civilians); to protect the wounded, shipwrecked, prisoners of war and civilians, and to prevent unnecessary human suffering; and to safeguard human civilization, including hospitals, schools, religious sites, cultural and historical monuments

<sup>4</sup>For instance the UN Security Council may take a coercive enforcement action under Chapter VII of the Charter asking the parties to an internal dispute to put an end to the hostilities which the parties have to abide by it as such a decision is binding upon the disputant by virtue of Art. 25 of the Charter.

exhaustively utilized to solve the dispute. Prevention is always better than cure. But this does not mean that once armed conflict is legally or illegally started the international community should stay idly or encourage, as some powerful nations did for example encouraged Israel to continue its 2006 destructive war in Lebanon, without making any serious attempt by using the available international law mechanisms of dispute resolutions including mediation to swiftly bring the armed conflict to an end.

Armed conflict or the use of military force in international relation is generally prohibited by the UN Charter<sup>5</sup> unless such a force is used in self-defence<sup>6</sup> or authorized by the UN Security Council<sup>7</sup>. The nations that adopted the UN Charter expressed their determination ‘to save succeeding generations from the scourge of war’, ‘to practise tolerance and live together in peace with one another as good neighbours’, ‘to unite their strength to maintain international peace and security’, and to ensure ‘that armed force shall not be used....’ They agreed, as it is reflected in the Charter, to make it the prime purposes of the UN<sup>8</sup> to “settle their international disputes by peaceful means...”<sup>9</sup>. This agreement is mirrored further in the Declaration on the Principles of Friendly Relations and Co-operation among States in accordance with the Charter of the UN<sup>10</sup> and the Manila Declaration on the Peaceful Settlement of International Disputes<sup>11</sup>. The relevant provisions of the Charter read together with these General Assembly resolutions make it clear that peaceful settlement of international dispute is an obligation. However, the scope of the obligation is limited. There is no general rule requiring States to settle their disputes. The rule is that if States choose to settle their disagreements then they are under an obligation to settle it peacefully<sup>12</sup>. Had there been a rule that required States to settle their disputes then the International Court of Justice (ICJ) should have been given compulsory jurisdiction. The ICJ has no compulsory jurisdiction and as such States cannot be compelled to submit their dispute before the Court. However, if a dispute is likely to endanger international peace and security then it is obligatory upon the disputing parties to utilize diplomatic means, including mediation, to settle the dispute peacefully.

### 3. Mediation

Medication is an effective mechanism for the settlement of international dispute and is recognized as such by international law. The 1856 Declaration of Paris<sup>13</sup> was one of the early international agreements that encouraged member States to settle their maritime disputes by mediation. The Second Hague Conference of 1907 recognized the right of neutral states to acts as mediators in international disputes<sup>14</sup>. This was

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<sup>5</sup>Charter of the United Nations, June 26, 1945, 59 Stat. 1031, UNTS No.993 (hereinafter: ‘UN Charter’), Art. 2 (4).

<sup>6</sup> *Ibid*, Art. 51.

<sup>7</sup> *Ibid*, Art. 42.

<sup>8</sup> *Ibid*, Art. 1 (1).

<sup>9</sup>*Ibid.*, Art. 2 (3).

<sup>10</sup>UN GA Res. 2625 (XXV) of 24 Oct. 1970.

<sup>11</sup>UN GA Res. 37/10, 1982.

<sup>12</sup>Martin Dixon, *Textbook on International Law*, 4<sup>th</sup> ed., Blackstone Press Limited, 2000, at 262.

<sup>13</sup> See Declaration Respecting Maritime Law. Paris, 16 April 1856, available at <http://www.yale.edu/lawweb/avalon/lawofwar/decparis.htm>

<sup>14</sup> W. F. Dodd, ‘The Work of the Second Hague Conference’ , *Michigan Law Review*, Vol. 6, No. 4 (Feb., 1908), at 294-303.

reaffirmed by the Covenant of the League of Nations<sup>15</sup> (LoN). Currently, the UN Charter requires all members to submit their disputes to mediation on recommendation of the Security Council. Article 33 (1) of the UN Charter has named mediation as one of the preferred mechanism for the settlement of international disputes.

Mediation, like negotiation, inquiry and conciliation, is a diplomatic means of dispute resolution. It is different from arbitration which is a judicial procedure in the sense that the parties to the dispute are not bound to accept the mediator's recommendation. Mediation, as well be defined later, is basically a diplomatic process to find a peaceful and just solution to a dispute by the help of a neutral third party who may be a third State, the UN or a well known, yet competent, individual. The United States (US) for example served as mediator between Bolivia and Chile in 1882<sup>16</sup> and between Russia and Japan in 1905<sup>17</sup>. The UN served, though unsuccessfully, as a mediator in the dispute between Israel and Palestine in 1948<sup>18</sup>. In 1966, the Soviet Union mediated the border clashes between India and China. The UN Secretary-General has resolved some other international disputes, like for example the dispute between Netherlands and Indonesia over West Irain, through mediation.

### 3.1 Definition

The term 'mediation' is defined as a confidential facilitated negotiation, substantially controlled by parties, procedurally controlled by neutral third parties but with no authority to impose an out come<sup>19</sup>. It is an alternative dispute resolution (ADR). ADR is a broad concept encompassing not only mediation but also any other means of settling a dispute outside the courtroom. In the sense of international dispute, ADR is alternative to the use of force. As a form of ADR, mediation is a peaceful mean of dispute resolution. It is a process in which the parties to a dispute, with the assistance of a neutral third party, identify the disputed issues, consider alternatives and try to reach an agreement.

### 3.2 Elements of mediation

Mediation, as an affordable and accessible means of alternative dispute resolution, has the following five elements:

- (1) The presence of the parties;
- (2) Willingness of the parties to act in good faith;
- (3) An impartial third party facilitator;

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<sup>15</sup>The League of Nations was established in 1919 under the Treaty of Versailles "to promote international cooperation and to achieve peace and security". It is now replace by the United Nations.

<sup>16</sup>See <http://www.boliviaweb.com/mar/sea/chapter10.htm>

<sup>17</sup> See Treaty of Portsmouth, (Sept. 5 [Aug. 23, Old Style], 1905), peace settlement signed at Kittery, Maine, U.S., ending the Russo-Japanese War of 1904-05. According to the terms of the treaty, which was mediated by U.S. President Theodore Roosevelt, the defeated Russians recognized Japan as the dominant power in Korea and turned over their leases of Port Arthur and the Liaotung Peninsula, as well as the southern half of Sakhalin Island, to Japan. Both powers agreed to restore Manchuria to China: available at <http://www.onwar.com/aced/data/romeo/russojapanese1904.htm>

<sup>18</sup> See A Mediator's Mission. Neil Caplan. *Journal of Palestine Studies*, Vol. 20, No. 3, 119-121, Spring, 1991.

<sup>19</sup>Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 2<sup>nd</sup> ed., London, 1991, at 30-31.

- (4) An appropriate site and
- (5) Confidentiality.

**The presence of the parties** to the dispute is a basic element of mediation. In international or interstate disputes the parties are generally States. Thus, two or more States must have identifiable and conflicting points of dispute that requires a solution through mediation. For instance, the dispute between Iraq and US-UK over the allegation that Iraq was possessing the so-called ‘illegal weapons of mass destruction’ was a dispute, though not legal but political, involving two or more states that could have been solved legally, cost-effectively, time-savingly and peacefully through ADR, like mediation, not through illegal war. Likewise, the 2006 border incursion by Hezbollah into Israel created a dispute between Lebanon and Israel that could have been resolved peacefully not through a destructive and illegal war – a war that resulted to nothing except human suffering.

**The willingness of the parties to act in good faith** is another element of mediation. Mediation, which is a voluntary process, would be successful if the parties are willing to resolve their dispute in good faith. Good faith means entering into the process with the intent to work towards a resolution, taking reasonable efforts towards it and not using the process for ulterior purposes, such as stalling for time or preparing for a major armed conflict. Had the US and UK shown their willingness to solve their dispute with Iraq through ADR then the 2003 illegal and yet costly occupation of the later State could have been avoided. Similarly, had Israel chose to settle its dispute with Lebanon through ADR then the 2006 illegal and destructively war could have not taken place. Of course public international law does not impose an obligation upon States to settle their disputes but if the disputants decide to settle their dispute, the obligation is that they must do it peacefully. Currently, US is disputing Iran’s nuclear activities; Pakistan and India have a long standing border dispute and there is also border dispute between Japan and Russia. If these States choose not to settle their dispute let them to do so. But when they decide to settle their dispute, they must do it, in good faith, through ADR including mediation and not through the use of armed force.

The involvement of **an impartial third party facilitator**, known as mediator, is the third element of mediation. The mediator, who makes the entire mediation process work, has to be acceptable to the disputants, enjoy their confidence, to be neutral and not to be involved with any of the parties<sup>20</sup>. A biased mediator can never be an honest peace broker. The US, for example, has attempted to mediate the dispute between Israel and Palestine but so far it has failed – failed because it is biased and is not neutral. For over sixty years the US has openly sided with Israel, overtly supported its expansionist policies and either watched indifferently or covertly approved the implementation of its evil agenda of ethnic cleansing. On 15<sup>th</sup> May 2008, during Israel’s 60<sup>th</sup> anniversary of existence, President Bush once again ignored the plight of the Palestinian and reiterated America’s support to Israel. How can the US, whose president considers the Palestinian freedom fighters as terrorists and honor Israel by calling it a ‘peace-maker’, be neutral? Unless changes its biased policies, the US cannot be a neutral peace broker in any dispute in the Meddle East. So far it has

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<sup>20</sup> For instance, in the disputes between Argentina and Chile over the implementation of the Beagle Channel award, both sides accepted Cardinal Antionio Samore as a mediator, upon the proposal by the Pope.

proved to be the cause of problems in the Middle East rather than solution. The 2003 invasion of Iraq, which was carried out at the behest of Israel and for the benefit of Israel, is a good testimony to this contention. Worse of all, it together with Israel conspires to create a dangerous rift between *Shiah* and *Sunni* sects in the Muslim World. The conspiracy is to make Muslims fight Muslims, weaken the Muslim Ummah and ensure the supremacy of Israel in the region. Both Israel and the US deceitfully and with malevolence motive portrait Iran as the enemy of the Arabs while Israel as a friend. I hope the Muslim world is aware of this conspiracy and never give it a chance to succeed. On 15<sup>th</sup> May 2008, President Bush made it clear that in any conflict with Iran "America stands with Israel". This also shows that the US is not a peace broker in the Middle East but is rather the problem maker.

The former Prime Minister of Britain, Toney Blair, is currently mediating the dispute between Israel and Palestine but again his neutrality is questionable. The British government has always been on the side of Israel. The early testimony to this is the Balfour Declaration of 1917<sup>21</sup> which was a classified formal statement of policy by the British government. This declaration stated that the British government "views with favour" the establishment in Palestine of "a national home for the Jewish people" on the conditions that "nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine" or "the rights and political status enjoyed by Jews in any other country."<sup>22</sup> Britain and the US were the only nations that did not support an early ceasefire to the 2006 Israel's aggressive war against Lebanon enabling Israel to inflict more harm to its enemy. On 15<sup>th</sup> May 2008 , while celebrating Israel's sixtieth birthday, Mr. Bush said, it was the British Military officer who while leaving Palestine, gave the key to Jerusalem to a Jewish priest telling him that the city belong to the Jews.

Thus, in the dispute between Israel and Palestine neither the US nor the UK can be a neutral mediator. The UN Security Council, which has the primary responsibility to maintain international peace and security, may utilize its authority under Chapter XI of the UN Charter to act as mediator in international dispute including the dispute between Palestine and Israel. However, the US, a veto wielded member of the UN Security Council, has so far prevented the Council to carry out its main responsibility in reaching a peaceful settlement of the dispute between Israel and Palestine through mediation or other forms of ADR mechanism. The US has always influenced the Council to have a determinative role regarding the content of the dispute between Israel and Palestine and has made it to lesson to the former point of view rather than the view of the later as if it has a stake in the outcome. A neutral mediator never has any stake in the outcome, and is committed to assisting the parties to reach resolution of their dispute. The mediator facilitates, not decides, by aiding the parties in a neutral fashion to help them find solution to their dispute.

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<sup>21</sup> The declaration, dated November 2, 1917, was made in a letter from British Foreign Secretary, Arthur James Balfour to Lord Rothschild, a leader of the British Jewish community, for transmission to the Zionist Federation, a private Zionist organization.

<sup>22</sup> The declaration, approved by the British Cabinet, reads: "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country".

The mediator, as a facilitator, reconciliator, educator or resource expander, interpreter and reality tester, creates a positive tone and establishes behavioral guidelines to control the proceedings and the flow of communication between the parties. Understanding all parties' points of view concerning the issues underlying circumstances, facts, positions, appraisals, etc, is crucial as it would help the mediator to assist the parties to improve their attitudes towards one another. It also helps the mediator to improve communication between the disputants, clarify the issues, develop options, test the validity of proposed solutions advanced by parties, narrow the differences between the parties and facilitate decision making. The mediator not only transmits and interprets the proposals of the parties to the dispute in order to find consensus among them, but may also advance independent proposals or suggestions for the settlement of the dispute. However, the mediator's proposals are not binding upon the parties to the dispute. Mediation may fail if both parties regard themselves as relatively strong and their aims are truly incompatible. However, a strong mediator may influence the parties' behaviour.

The safety and security of the mediator is paramount for without it mediation process cannot achieve its desired objective. The parties to the dispute must ensure, at all time, the safety and the security of the mediator so that he may effectively carry out his functions. The failure of a disputing party to exercise due diligence in providing protection to the mediator entails the responsibility of that party<sup>23</sup>. The best example to illustrate this is the tragic death of Count Folke Bernadotte (1895 – 1948), a Swedish diplomat who is known for his successful negotiation to release about 15,000 prisoners from German concentration camps during World War II. Following the 1947 UN Partition Plan, on 29 May 1948, the UN unanimously appointed Bernadotte as its mediator in Palestine, the first official mediator in the UN's history. In this capacity, he succeeded in achieving a truce in the 1948 Arab-Israel War and, as an ardent supporter of the Arab refugees right to return<sup>24</sup>, laid the groundwork for the UN Relief Works Agency for Palestine Refugees in the Near East which until now is in operation. Sadly, however, he was assassinated in Jerusalem in 1948 by members of the underground Zionist terrorist group known as Lehi while pursuing his official duties.

The death of Bernadotte at the hand of Israeli terrorist group shows mediators require **a neutral site** to carry out their functions safely and effectively. Selection of a neutral site, i.e., a place where neutrality can be maintained and confidentiality preserved, is the fourth important element of mediation process. In the context of interstate dispute, the mediation process may be carried out in the good offices of the UN or in a neutral third State. Equally important is the **seating arrangement**. Although there is no established rule on this, yet it is generally agreed that the disputants are seated across a table from each other so that they may establish direct eye contact as their dialogue develops. The mediator seats at the end of the table. This seating arrangement, though generally agreed to be effective, cannot be imposed on the parties. Whatever seating arrangement the parties wished their wishes should be given serious consideration.

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<sup>23</sup> See *Reparation for Injuries Suffered in the Service of the UN* case, (1949) ICJ Rep. 174.

<sup>24</sup> In his report to the UN, Bernadotte strongly urged the provisional Israeli government to let the refugees return to their homes. He said: "It would be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right to return to their homes while Jewish immigrants flow into Palestine, and, indeed, at least offer the threat of permanent replacement of the Arab refugees who have been rooted in the land for centuries."

The **confidentiality of the mediation** is the final element of mediation proceeding. Keeping the proceeding confidential is crucial in the sense that it gives the parties some quiet and uninterrupted times to contemplate over the issues and try to find a common ground in order to resolve the dispute. It may also deny media speculation and prevent self-centred third parties who benefit from the dispute to cause obstacles in the mediation proceeding. The mediator should therefore carefully guard the confidentiality of the mediation proceeding. However, if the disputing parties wish to disclose the proceedings the mediator cannot do anything about it. But it would be better, for the reasons mentioned earlier, the parties too should ensure the protection of the confidentiality of the mediation proceeding.

### **3.3 Advantages of Mediation**

Mediation has several advantages. Mediation is a process that gives the parties an opportunity to express their views, to compromise and to find, provided they acted in good faith, a satisfactory solution – a peaceful solution that is acceptable to both parties. It is a process that helps to avert serious armed conflict. Even if the conflict had already occurred mediation may help to put an end to it. A mediated solution is cheaper, quicker and safer. As a peaceful, fast and cost-effective mode of dispute resolution, mediation may help in maintaining or restoring world peace and security.

### **4. Conclusion**

Maintaining international peace and security is essential requirement for the prosperity and success of humanity, for the protection of human rights and for the safety of environment. It is the prime purpose of the UN and the aspiration of civilized nations to work hard to maintain and, in some cases, restore world peace. If peace is achievable through nonviolent means, like mediation, it must be worked out through these means. Mediation, if taken seriously and utilized in good faith it may help to achieve the desired result, that is, pacific settlement of international disputes – a settlement that would help to ensure world peace and security.