Good Offices and Mediation as Mechanisms for International Dispute Settlement

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Abstract

The international system prior and after Westphalia (1648) has been characterized by conflicting interests, that if not managed timeously could result in full blown crisis fought at the expense of human lives and infrastructure. Some of these crises when resolved at arbitration have not produced lasting peace because of the awarding nature of result that may not accommodate the parties in the process of arriving at final decisions. Thus, Good offices and mediation stand out as diplomatic methods of traditional dispute settlement endorsed in the Charter of the United Nations (1945). The study is saddled with the quest of unraveling the reasons for the irregular adoption and prioritization of good offices and mediation by conflict parties in international relations. The study combined the realist theory of Jurisprudence and the Constructivist theory of international relations to arrive at some findings which border on the similarities and differences between Good offices and mediation and its relevance as mechanisms for international dispute settlement. The study adopts the doctrinal legal research methodology and recommends that Good offices and mediation should be prioritized. It concludes that a good offices provider should know when negotiation is ripe for transition from good offices to mediation in other not to dampen the enthusiasm of the parties to reach final decision themselves.

I BACKGROUND

Pacific settlement of disputes between States has formed an important aspect of international law and order. As a subject, it has occupied the thoughts of many a statesman and has found expression in the writings of both past and contemporary jurists. The United Nations Charter also contains an important Chapter on Pacific Settlement of Disputes. Article 33 of the United Nations Charter provides that "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" (Article 33 United Nations Charter, 1945).

Much has been written about the various methods of pacific settlement of dispute mentioned above including mediation however an important component of the research topic was not expressly mentioned in the UN Charter, i.e. 'good offices'. This research presumes that there is no lacuna as the clause "other peaceful means of their own" includes "good offices" even though the literature found on "other peaceful means of their own" is sparse and insignificant. Secondly, "good offices" is often confused with "mediation". This study makes distinction between both means of peaceful settlement of dispute. The study also discusses instances of successful and failed mediated dispute settlements with classic examples to show the overlapping nature of both dispute settlement mechanisms.

II THEORETICAL FRAMEWORK

The theoretical framework of this study is eclectic. This is because legal research allows for a minimum of two theories and which we think is adequate given the subject-matter of the research. The following theories will be adopted;

A. REALIST THEORY OF JURISPRUDENCE

This is a legal theory which downplays the role of established legal principles or legislation in order to discover the other factors that contribute towards a judicial decision in a court of law (Wigwe 2011, p.240). These factors are usually legal but the realist has made more contributions by suggesting that other non-legal factors may contribute or influence a judge to make a judicial decision. Essentially, realist school of thought is able to predict future decision of a court of law based on previous decisions.

The realists would not agree that a judge makes his decision based on law but on fact. They differentiate between the court-centred and the rule-centred nature of the judiciary where a judge holds sway. Realists believe that whatever was the prevailing state of mind of the judge at the time of making his decision in court will be the ultimate determining factor of that case hence, they were referred to as 'Rule Skeptics' and 'Court-Central' since they doubted the value of simply relying on the paper rules and more so doubted the adequacy of the courts as a fact finding institution.

The realist theory emerged from the realist movement linked to important personalities like Veblen in economics, Beard and Robinson in historical studies, Oliver Wendell Holmes in Jurisprudence and William James in philosophy.

APPLICATION OF REALIST THEORY OF LAW TO THE STUDY

Good offices and mediation can be studied through the prism of the realist conception of law. From onset, realists scholars of jurisprudence developed this theory to solve the practical problems of man; problems that were however not limited to them as the theory relates to many non-tangible issues that facilitate or influence the reasoning of man and his practical relationship

with nature. The realist theory of jurisprudence bothers on conflict resolution, and more importantly non-legal factors that influence the decision or judgment of an arbiter.

It suffices that there are legal frameworks for the conduct of good offices and mediation in conflict resolutions, these principles are however inadequate to guarantee successful outcomes. Thus, there are non-legal factors often spontaneous which account for successful mediation of any crises. These may include international pressure, dwindling support base (local and international), mutual concession, and wearied posture of the parties due to the endemic nature of the crisis.

It is equally apt to say each crisis has a peculiar nature and though may benefit from the experiences of other successfully mediated crises, facts and parties differ from one crisis to the other. However, it is pertinent to note that one who provides good offices or mediates in a crisis lacks the power conferred on a judge according to the realist school of jurisprudence. To provide good offices and to mediate in a crisis only requires the provider or mediator to facilitate meetings and guide conflict parties to achieve the goal of bringing the crisis to a partial or complete end; i.e. a provider of good offices or a mediator does not award or impose outcomes on the parties. To this extent, realist theory of international law is inadequate to explain good offices and mediation as mechanism for international dispute settlement. Herein, lays the relevance and relational balance of the second theory.

B. CONSTRUCTIVIST THEORY OF INTERNATIONAL RELATIONS

The relational balance of constructivist theory of international relations to realist theory of jurisprudence is to explain cooperation under anarchy (Reus-Smith 2005, p. 190). The starting point for constructivists is the claim that what realists and liberals take for granted –interests and identities of actors- are actually malleable, constructed and subject to change by the actors themselves (Viotti & Kauppi 2013, pp.39-40). While realists in international relations continued to see states compete for power, influence, and prestige, constructivists argue that states do not simply react to their environment but dynamically engage it…just as the environment influences the behaviour of the actors, so too do the actors or agents who over time affect the environment that surrounds them (Viotti & Kauppi 2013, P.40).

According to Viotti and Kauppi (2013, P.40), as essentially subjective persons, human beings develop ideas among themselves, thus constructing their knowledge of (giving meaning to) the external world around them. States- the agents or persons acting for them- can and do redefine their interests, objectives, and individual courses of action. Collectively, these agents and persons effectively construct the norms that influence international relations or world politics. It is imperative to note what constructivists make of the relevance of their ideas in accelerating or halting state practice as opposed to realist thoughts.

From a constructivist perspective, actors or "agents" constitute or shape over time their own social context, and this context in turn shapes the behaviours, interests and identities…concepts such as "interests", "sovereignty", and "anarchy" are exactly that –concepts given meaning by actors, not eternal, unchanging aspects of the reality beyond the control of these agents (Viotti & Kauppi 2013, PP. 39-40).

APPLICATION OF CONSTRUCTIVIST THEORY OF INTERNATIONAL RELATIONS TO THE STUDY

This theory applies due to its flexibility without neglecting the norms and principles in providing good offices and mediation under international law. The context-driven nature of good offices and mediation further makes the constructivist theory apt. As demonstrated in study's examples, the parties and their willingness are crucial factors in the partial or complete resolution of any crisis.

From the experience of Liberia, peace comes via construction evolved by the people. It is trite that humanitarian intervention leaves a number of scares on an intervened state. Post-conflict peace building pushed by foreign powers is not purely an altruistic enterprise; it is usually connected to the national security/interest of another state. The experience of Liberia where local construction of institutions and norms to overcome uncertainties and instability associated with foreign intervention appeared to qualify ECOMOG intervention in Liberia from interventions experienced elsewhere.

Whereas, Libya in the aftermath of NATO intervention degenerated to a failed state, ECOMOG intervention in Liberia progressively through institutional metamorphosis (ECOMOG, ECOMIL and UNMIL) prepared and guided the country towards conflict resolution. What was different was the limited influence of outsiders in the domestic affairs of Liberia as lessons from the short-lived IGNU may have cautioned some external handlers of the crisis to reframe from imposing an interim administration that depended on outsider's aid to run the country.

The Liberian specifics showed that an end to the crisis equally meant immediate commencement of the post-conflict peace building process. But as it were, the institutions to enforce resolutions reached to end the crisis were either non-existent or weak. One of such institutions was the judiciary. At a time when government should be up and running, the reality was one of state paralysis; the government has been dislodged with no legitimate executive and legislature. What was left in post-conflict Liberia was a judiciary drenched in fear so that the normal justice system could not function to address injustice and related issues emanating from the war for obvious reasons. For instance, the police was unable or incapable of providing safety for judges and the courts and so was its capacity to apprehend and bring perpetrators to court. This was a direct challenge to the implementation of post-conflict peace building in Liberia where amnesty was left to be addressed at a future date by the NTLG.

Such an obligation left for Liberians by foreign mediators was sensitive to the point that any poor handling of the fate of combatants (and other civilians involved in the crisis) could be implosive. This was the rationale behind the transitional justice model used which placed premium on reconciliation and national healing. As opposed to punitive justice system favoured by most foreign powers (but for some African states which supported the 2003 CPA), Liberians adopted a justice system that brought perpetrators and victims together on terms that fostered peace and unity. Access to justice for Liberians and national healings for the country have continued to guide policy decisions ever since.

III. GOOD OFFICES AND MEDIATION AS MECHANISMS FOR INTERNATIONAL DISPUTE SETTLEMENT

Good offices and mediation are among the traditional methods of dispute settlement in international law. Traditional methods of dispute settlement are grouped as diplomatic and adjudicative; while diplomatic method involves an attempt to resolve differences either by the contending parties themselves or the aid of other entities by the use of discussion and fact-finding means, adjudicative method involves the referral of disputes to an impartial third party/tribunal- either an arbitration tribunal or an international court for a binding decision based on international law. Good offices and mediation are within the precinct of diplomatic method. This chapter discusses the meanings, similarities and differences of good offices and mediation and their relevance to effective international dispute settlement.

A. SIMILARITIES AND DIFFERENCES BETWEEN GOOD OFFICES AND MEDIATION

Though it is quite common for a good offices mission to turn into mediation, the two activities remain distinct. In spite of being distinct activities, most mediation has unfortunately been described as missions of 'good offices'. The employment of the procedures of good offices and mediation involves the use of a third party, whether an individual or individuals, a State or group of States or an international organization, to encourage the contending parties to come to settlement. Unlike the techniques of arbitration and adjudication, the process aims at persuading the parties to a dispute to reach a satisfactory term for its termination by themselves.

It has been argued that the difference between good offices and mediation is shrinking so much so that classic works on the subject-matter including Satow's Guide to Diplomatic Practice is not spared; a separate chapter on 'good offices' and 'mediation' has disappeared from the latest edition of Satow's book (Orugbani, 20:01:2021). Prof. A. Orugbani observed how frequent good offices mission turned into full mediation. Shaw has argued that the dividing line between the two approaches is often difficult to maintain as they tend to merge into one another, depending on the circumstances (Shaw 2010, P. 1018).

The main distinction between good offices and mediation is that in case of good offices, the third party simply offers its services, and does not actively participate in the talks. Whereas, in the case of mediation, third party actively participates in the talks and makes suggestions so as to resolve the dispute between the States, in Shaw's view, technically, good offices are involved where a third party attempts to influence the opposing sides to enter into negotiations, whereas mediation implies the active participation in the negotiating process of the third party itself (Shaw 2010, P.1018).

A litany of examples of good offices and mediation, and their points of departure in different instances have been captured in Shaw's summation:

> One example of good offices method is the role played by the US president in 1906 in concluding the Russian-Japanese War, or the functioned by the USSR in assisting in the peaceful settlement of the India-Pakistan dispute in

> 1965. Another might be the part played by France in encouraging US-North Vietnamese negotiations to begin in Paris in the early 1970s. A mediator, such as the US Secretary of State in the Middle-East in 1973-74, has an active and vital function to perform in seeking to cajole the disputing parties into accepting what are often his own proposals. It is his responsibility to reconcile the different claims and improve the atmosphere pervading the discussions (Shaw 2010, P. 1018).

The Hague Conventions of 1899 and 1907 laid down many of the rules governing these two processes. It was stipulated that the signatories to the treaties had a right to offer good offices or mediation, even during hostilities, and that the exercise of the right was never to be regarded by either of the contending sides as an unfriendly act. It was also explained that such procedure were not binding. The Conventions laid a duty upon the parties to a serious dispute or conflict to resort to good offices or mediation as far as circumstances allow, before having recourse to arms. This, of course, has to be seen in the light of the relevant Charter provisions regarding the use of force, but it does point to the part that should be played by these diplomatic procedures.

B. GOOD OFFICES IN THE NIGERIAN CIVIL WAR (1967-1970)

The main diplomatic procedure engaged in the above conflict was 'good offices' when some African Statesmen notably the Ghanaian Head of State (at the time) General Ankrah attempted to resolve the brewing conflict between 4th and 5th January, 1967 in Aburi Ghana. Apt to classify because the indices of 'good offices' were present.

First, distrust existed between the two main actors in the conflict (Ojukwu and Gowon) so much so that colonel Ojukwu as head of the eastern regional government didn't feel safe to attend proposed conferences to chat the course for peace anywhere on the soil of Nigeria outside his region. Forsyth stated that at a time when popular pressure increased that the Regional Military Governors should meet to sort out the problem, a view strongly shared by colonel Ojukwu…there was nowhere within Nigeria (which in Ojukwu's view) he could go in personal safety (which was why) it was agreed to hold the meeting in Aburi, Ghana, under the auspices of General Ankrah. Frederick Forsyth, the Making of an African Legend: The Biafran Story (1977) Penguin Books. So the indices of the provider being chosen by the parties; providing an acceptable venue and its security as the meeting lasted; and working out a workable date for the parties qualified Ghanaian mediation in the conflict as good offices rather than a full mediation. Frederick Forsyth, the Making of an African Legend: The Biafran Story (1977) Penguin Books (Forsyth 1977, P.88).

Secondly, it appears General Ankrah did not do more than gathered the parties by making less inputs, of influence on the 'manner of discussion' at the meeting which is a strong index for facilitating effective 'Good offices'. The provider of Good offices in the instant case appeared to have left the venue never to return after the parties entered the venue as no role of his' in speech or action beyond stated exists in Nigerian-Biafran literature.

Third, the matrix of the Nigerian conflict required much more than providing 'Good offices' given the issues involved. A full mediation should have been leveraged upon by General Ankrah once the meeting in Aburi got on the way. This is because the context of 'mediation' unlike 'Good offices' used could have permitted the active involvement of the mediator and given the desperation of the parties to resolve the impasse allowed the mediator to influence the positions of the parties toward ending the conflict. All the grey areas in the 'Aburi Accord' which parties have interpreted to their own advantage could have been ironed out perhaps revisited at a future date. Forsyth and Wigwe saw this in the light of Ojukwu's diplomatic savvy as FGN delegations appeared to have come unprepared.

Mediation, by its standard, should produce a win-win outcome not one where a party scores diplomatic point against the adverse party. It is a diplomatic plunder to say that the Head of the FGN and his retinue of officials did not understand the concept of "confederation" discussed at Aburi and least to say only Ojukwu had recorded the proceedings of such an all-important conference as documented by Forsyth .

Thus, Nigeria was plunged into a 30 month Civil War because a situation which calls for full mediation improperly handled as one of Good offices.

C. FULL MEDIATION IN THE LIBERIAN CIVIL WAR (1980-2003)

The case of Liberia was endemic. With little less than 5 million populations and a relatively small landmass, Liberia had the grace of experience to grow her economy and prosper its peoples but certain historical and ethno-social differences plunged the country into years of fratricidal crisis which claimed over 250,000 lives (Baala 2021, P.4). Wigwe puts the percentage thus, that "Liberia's civil war claimed the lives of one out of every seventeen people in the country, uprooting most of the rest and destroying once viable economic infrastructure" (Wigwe 2010, P.343).

It all started when Sgt. Samuel K. Doe seized power in April 1980 in which the President of Liberia, Williams Tolbert was killed. Sgt. Doe government's continued the killings of cabinet members of the displaced government incident upon which 12 cabinet ministers under President Tolbert were publicly executed at a beach in Monrovia. In the nick of time, two insurgent groups, the National Patriotic Front of Liberia (NPFL) led by Charles Taylor and the Independent National Patriotic Front of Liberia (INPFL) which broke away from the NPFL and led by Prince Yomie Johnson emerged. Their activities from 1989 climaxed in the public assassination of President Doe on September 9th, 1990.

From 1990-1996, Liberia was without a credible authority as war camps assumed jurisdiction over territories under their control. In 1996 and given the enforcement of the 'Abuja Accord 1995' which provides inter alia for the conduct of a 'Special Election' that year, the country appeared to be returning to the path of peace; an election Charles Taylor was said to have won by over 75% of the votes. However, the Taylor government would face worse crisis thereafter.

The second Liberian civil war began in 1999 when a rebel group backed by the Government of neighbouring Guinea, the Liberians United for Reconciliation and Democracy (LURD) emerged in northern Liberia. In 2003, a second rebel group, the Movement for Democracy in Liberia

(MODEL), emerged in Southern Liberia. This was accompanied by loss of territories and mounting casualties so that between June-July 2003, Charles Taylor's government controlled less than one-third of the country (TRC 2009, P.137).

It was an open secret that by June 2003, Liberia's experience was that of a society already wearied by long years of war. The parties, and given the degree of international pressures, have become receptive to diplomatic measures that could end the crisis and build peace. For over two month, negotiations went on between representatives of the Government of Liberia (GOL), LURD, MODEL, 18 political parties among others in Accra, Ghana as part of a full mediation effort launched Ghana, Nigeria and South Africa to resolve the Liberian crisis.

While Ghana provided 'venue' and other ancillary security measures, the Chief Mediator came from Nigeria, Nigeria's former military Head of State –General Abdulsalam Abubakar said to have been chosen by the parties from a proposed list of Chief mediators presented to them (TRC 2009, P. 137). Significantly, it has to be stressed that issue of security for the parties was something facilitators of mediation in Liberia adequately provided. For instance, the move by the Chief Prosecutor of the International Crime Court (ICC) to arrest President Charles Taylor on charges of war crimes and crimes against humanity in Ghana was rejected by the host State of Ghana.

The ICC Chief Prosecutor O'Campo had traveled down to Ghana expecting the Ghanaian authority to handover Taylor to face trial before the UN, the US and Great Britain backed Special Court of Sierra Leone (SCSL) for his alleged complicity in the mayhem that took place in Sierra Leone by Revolutionary United Front (RUF) led by Fodey Sankoh. Though, Taylor was allowed to return home (Liberia), the pressure by the ICC to effect his arrest in Ghana prompted his exit from the ongoing peace talks. The implication was that Taylor did not participate in the negotiations; thus, the non-participation of Taylor in the negotiation extinguished his future role in Liberian politics though his representative continued to stand in for the GOL.

The advantage of full mediation over Good offices played out in the process of achieving peace in Liberia. The singular advantage here, being the active participation of the mediator in the negotiations. The Chief Mediator General Abdulsalaam Abubakar called off negotiations many times to reach agreement within the process. There was two months of impasse spanning June 18th 2003 when ceasefire agreement was signed to August 18th 2003 when the parties signed the Comprehensive Peace Agreement (CPA); the interregnum was characterized by negotiation-between-negotiation and pressure on the warring parties to reach final agreement.

One non-legal factor which pushed the mediation process in the instant case was the delegations from Liberia and the Diaspora which converged at the venue of the hotels where the conference was been held just to press for a quick resolution of the crisis. A Mass protest from Liberian Women also stormed the Conference in mid-August 2003 uninvited threatening to go nude if something was not done urgently to reach an agreement. Last minute pressure came from the impatient host (Ghana) and the International Contact Group on Liberia (ICGL).

Eventually, a Comprehensive Peace Agreement was reached and signed on August 18th 2003 by representatives of the parties in Accra, Ghana. The parties were the GOL, LURD, MODEL and

18 political parties. Because the outcome of the peace talks and the consequential agreement were true positions of the parties, implementation was quick and predictable. Liberia has experience eighteen years of uninterrupted peace since the CPA was signed in August 2003.

IV. CONCLUSION

There are a number of conclusions to be drawn from this study. First, that 'good offices' and 'mediation' belong to the broad category of diplomatic method of traditional dispute settlement in international law as opposed to the broad category of adjudicative methods like arbitration and conciliation. The difference between diplomatic and adjudicative categories seen majorly in procedure/process of arriving at decisions, manner of discussion, powers of the arbiter and effect of its decision on the conflict parties. Thus, while good offices and mediation provide an arbiter with a restrictive role which allows parties to a conflict to reach decisions by themselves and only (in the case of full mediation) would the mediators cajole or threaten the parties to reach a decision, such decisions are usually from the parties themselves. The purpose of mediation is for a third to convince the disputing parties to change positions in a way they both find acceptable, so that they can resolve the dispute themselves.

Secondly, good offices and mediation in spite of their common category have both evolved into two distinct methods. A good offices provider withdraws once the parties enter the venue of negotiation and may occasionally resurface when the parties are unable to reach an agreement but a mediator plays an active role in the process of arrival at a decision. He or she must be present at the negotiation table to guide the manner of discussion and to show the parties why they have to modify or in extreme cases abandon their long held posture on issues ancillary to such conflict resolution.

Thirdly, the study concludes that with good offices and mediation, there are no set terms on which disputes are resolved. It requires the parties to cooperate with the mediator as Good offices and mediation does not succeed otherwise. In practice, successful mediations frequently depend on timings, and the particular personality involved because parties submit to an arbiter to mediate very likely because the dispute has reached a point whereby a change in the parties' position is required. Sometimes, socio-political factors such as local and international pressure can alter the long held position of the parties to submit to a mediated settlement. Liberian parties (the GOL, LURD and MODEL) bowed to both local and international pressure to reach both agreements (ceasefire agreement and comprehensive peace agreement) in Accra, Ghana between June-August 2003.

V. RECOMMENDATIONS

Significantly so, good offices and mediation should be prioritized among disputes resolution mechanisms because of its 'parties-central' nature and the effect that parties are most likely to stick to agreement reached by them. This is apt with Liberia whose endemic crisis was resolved by mediation in 2003; the country not only enjoys uninterrupted peace but those ethno-social factors which birthed Liberian crisis no longer count in national discourse.

Secondly, every provider of good offices should equally be equipped with mediation skills to enable such person(s) maintain the tempo of negotiations in transition from good offices to

mediation. The Nigerian Civil War could have been prevented if General Ankrah of Ghana who provided good offices within the framework of the Aburi Conference (1967) promoted the national discourse in Aburi beyond his good offices posture. General Ankrah was conspicuously missing at the table to know the moment of transition. Were the issues addressed within the framework of mediation, the mediator could have been saddled with the responsibility of assisting with the interpretation of messages as well as being able to show one or both parties how the style and content of a message from one party can be made more palatable to the other. This is so as the Aburi Conference and the Aburi Accord have been interpreted without clarity by the parties to promote their respective positions.

Finally, providers of good offices and facilitators of mediation must seize the spur of the moment in launching both good offices and mediation as timing is crucial successful mediations. Parties in their choice of a chief mediator must arrive at one based on consensus, a personality rooted in character, integrity and experience

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