Promoting Peace in International Law: Bringing States to the Mediation Table

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Modern international law enshrines the value of peace. Nevertheless, the body of law regulating peacemaking is rather poor and ineffective. Chapter VI of the United Nations Charter aims to offer states an accessible roadmap to pacific conflict resolution. Disappointingly, Chapter VI has not lived up to expectations: it has produced an unimpressive record and is often referred to as the “neglected stepchild” of the Charter.

While traditional criticism of Chapter VI deals with Security Council paralysis attributable to the Permanent Five’s veto power, this paper offers an alternative point of view, focusing on states’ capacity to resolve their disputes without Security Council intervention. It suggests that article 33(1) of the United Nations Charter, which sets out the first step of pacific conflict resolution under Chapter VI, is deeply problematic because it requires states that are unable to cooperate to make the first move, approach the other party, and agree upon a method of dispute resolution in order to initiate the peacemaking process. However, states with a history of conflict and animosity often struggle to take the first step toward conflict resolution, often because of barriers such as suspicion of the other state’s intention, unwillingness to be the initiating party, and concerns

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regarding domestic public image and opinion.

Overcoming such obstacles requires a careful mechanism that will preserve states’ freedom of choice in dispute resolution while avoiding the initial barriers of conflict resolution. Choosing a default method of dispute resolution from the options listed in article 33(1) is just such a mechanism. Defaults satisfy both requirements: they have been shown to influence states’ behavior but do not violate states’ freedom of choice.

Specifically, this paper suggests that mediation should be set as the default method of dispute resolution, with the Secretary-General as a default mediator. Mediation may help states overcome the barriers to taking the first step and dispel stagnation in order to start a peace process. Setting mediation as the default approach is a solid option for improving the existing mechanism rather than undermining it altogether. It may offer states just the right nudge to start discussion and bring global peace one step closer.
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INTRODUCTION

“...[A]nd they shall beat their swords into plowshares, and their spears into pruninghooks: nation shall not lift up sword against nation, neither shall they learn war any more.”

Peace has been desired by humankind since biblical times, but it was only the two world wars that motivated the international community to design international law to maintain peace and security rather than to achieve justice and retribution. Peace in international law is usually described in negation, as the absence of armed conflict. While the negative definition of peace is the predominant one, it has been criticized for undermining “efforts for a broader peace by freezing the status quo, and [potentially leaving] the door open for human rights abuses to continue unabated.” Therefore, it has been suggested that peace should be defined by a positive rhetoric incorporating values such as justice, democracy, sympathy, cooperation, effectiveness, freedom, engagement, order, harmony, and

1. Isaiah 2:4.
3. See Paul F. Diehl, Exploring Peace: Looking Beyond War and Negative Peace, 60 INT’L STUD. Q. 1, 1–10 (2016) (explaining that the absence of war is the most common form of conceptualizing peace).
There are two spectrums commonly used to describe positive peace: the first is a spectrum of “warmth” and the second is a spectrum of “stability.” Using the “warmth” spectrum, scholars customarily differentiate “cold” peace (for example, between Israel and Jordan) from “normal” peace (for example, among South American states) and “warm” peace (for example, among European states), all of which sit on a spectrum—starting with absence of armed conflict, moving to ordinary coexistence that includes mutual acknowledgment of states’ territory and the right of self-determination within such territory, and ending with full cooperation and harmonic relations between states. The stability spectrum is also used to describe different types of peace. For example, “stable peace” is defined as “a situation in which the probability of war is so small that it does not really enter into the calculations of any of the people [states] involved;” “conditional peace” is used to describe a situation where a non-heated conflict exists, in which deterrence plays a predominant role in maintaining peace between the parties; and “precarious peace” is a “temporary cessation of hostilities when one side remains dissatisfied with the status quo and continues to see force as a legitimate means of changing it.”

These two spectrums are not mutually exclusive, for states’ cooperation to diminish animosity and reinforce common interests will strengthen stability. The idea that interstate collaboration contributes to stable peace can be found in Montesquieu’s writing comparing states to men, which argues that trading partners think twice before fighting. Cold peace, in its most basic form, can be imagined as a continuous state of ceasefire. In some circumstances of hostilities,
cold peace is the only type of peace that may be realistically achieve-
able; however, if conditions ripen through increased interstate collabor-
arion, it can develop later into normal peace. Thus, the “warmer” the peace is, the more stable it will likely be.

Peace does not have to be formally announced and declared, and it may simply exist because of an absence of armed conflict. However, there are clear benefits to reaching peace between states in conflict by the formulation of a peace agreement, because peace agreements which deal with the political issues that initiated the hostilities create stable peace:

Not surprisingly, de jure settlement of the issue leads to very durable peace. . . . In the last 50 years at least, war has not resumed between any states that reached an explicit peace agreement settling the political issues over which they fought. Political agreement on the fundamental issues leads to stable peace.

Peace agreements that settle the fundamental issues between states may render even cold peace stable. A good example is Israeli–Egyptian relations: in 1979, Israel and the Arab Republic of Egypt signed a peace treaty that included mutual recognition of statehood by each side, cessation of hostilities, Israeli withdrawal from the Sinai Peninsula, and uninhibited passage of Israeli vessels through the Suez Canal. While the peace between these states is often described as cold peace because of their limited political, economic, and cultural cooperation, “[the] agreement still stands and there has been no
major violent conflicts [sic] between these two countries since the peace agreement was signed.”

Since peace agreements are difficult to negotiate and conclude, most disputes in the world are not settled through peace agreements, and especially not through peace agreements resolving the main issues of the conflict. Most major conflicts in the world are temporarily solved in a cold peace form of hostilities cessation, which renders them inherently unstable. Notable examples include the conflict between Israel and Syria, which remains unsettled after five rounds of fighting; the conflict between India and Pakistan, who have not come to an agreement over Kashmir after four wars; the conflict between China and Vietnam, whose border dispute continues after two armed conflicts; and finally, the Korean conflict, which remains unsettled more than sixty years after the Korean War.

Despite the fact that peace is the main purpose of modern international law, and that peace talks which aim to conclude a peace agreement by settling the grounds of the dispute are the best way of achieving stable peace, international law, as will be further described, does not have sufficient tools for encouraging states to talk.

This is not to imply that there are no international instruments to promote peace, since the United Nations does provide assistance in peacebuilding and peacekeeping. While international law imposes concrete obligations to refrain from armed conflict and use of force, it does not have a similarly effective and comprehensive body of law oriented toward convincing states to engage in peace talks. Thus, international law is, arguably, practically oriented toward the

19. Id.
20. GEORGE & BENNETT, supra note 8, at 47.
23. The term “peace talks” will be used throughout the Article to describe any type of dispute resolution mechanism aiming to achieve a peace agreement.
24. The United Nations Peacebuilding Commission (“PBC”) is an advisory body that aims to support peace efforts in conflict-affected countries. See G.A. Res. 60/180 (Dec. 30, 2005) (creating the PBC); S.C. Res. 1645 (Dec. 20, 2005) (same).
26. Chapter VI of the U.N. Charter, which deals with pacific dispute settlement, has not proven effective over the years. See infra Part II.B.
prohibition of use of force rather than toward the positive promotion
of peace.

This paper examines the existing mechanisms of pacific dispute
resolution between states and evaluates the reasons for their fail-
ure to convince states to initiate peace-talking processes. Given
the importance that international law attributes to achieving peace and se-
curity, the international community needs to make better efforts in the
field of peacemaking. Existing mechanisms may need to be rethought
and reconstructed to provide states with the best terms for reaching a
peace agreement.

The Article proceeds as follows: Part I describes the develop-
ment of international law, which during the 20th century has shifted
from a justice-centric orientation to a peace-centric orientation. Part
II describes existing mechanisms of pacific dispute settlement. It pro-
vides a detailed analysis of Chapter VI of the United Nations (“U.N.”)
Charter, as well as explanations of its failure. The paper offers an al-
ternative explanation to account for the poor record produced by Chap-
ter VI, concentrating on article 33(1) and states’ independent efforts of
dispute resolution rather than the traditional criticism focusing on the
Security Council’s (“SC”) paralysis in operating under Chapter VI.
Part III offers a means of reviving Chapter VI. It presents the notion
that using a default method of dispute resolution may help states over-
come pre-negotiation obstacles in order to initiate peace talks, and it
offers Secretary-General (“SG”) led mediation as the best option for a
default. Such a solution does not presume to be a magic fix bringing
unwilling states to the negotiation table; however, it could aid states
that wish to resolve their issues but are faced with various constraints
by providing them with better terms to initiate discussion.

I. THE DEVELOPMENT OF PEACE AS THE MAIN PURPOSE OF
INTERNATIONAL LAW

This section outlines the development of the concept of peace
in international law. The historical context is important for under-
standing the centrality of peace in modern international law, but it may
also be used to show that this notion of ‘peace’ as the main purpose of
international law is relatively new. Thus, it may be argued that the
international community is still in a trial-and-error period of finding
successful peacebuilding mechanisms. States would be wise to con-
tinue modifying the international law peacebuilding efforts, which
have remained largely unchanged since the U.N. Charter’s ratification.
A. The Value of Peace in Just War Theory

While ancient records such as the Hebrew Bible include evidence of an effort to limit the use of force, in those remote ages “it was the struggle of one warlike people to dominate all the rest, and consequently rights of nations were little respected.”27 In other words, war was regarded as an efficient tool to gain land, collect taxes, strengthen the state, and consolidate the ruler’s authority.28

The revolution in the perception of peace as something that needs to be practically achieved started as early as the fifth century with just war theory. This new perspective on the morality of war hypothesized that war is to be resorted to in order to achieve certain goals, including peace.29 Classical or pre-modern jus ad bellum philosophers considered the notions of legitimate authority, just cause, and right intention to provide the basic framework for assessing the morality of war.30 Peace was intertwined in such expressions as “[r]estoring peace and stability was the duty of legitimate authority, just cause was constituted by threats to peace and order or to the lives of a significant number of the populace, and right intention aimed at the defeat of those who had unjustly started war or insurrection and the restoration of peaceful order.”31

However, while peace did have a place in just war theory, it was limited and by no means the driving force behind the doctrine. Since just war theory provided that war could be justified and even morally required, then the emergence of just cause meant that existing peace is of reduced moral value.32 According to Augustine, once a just cause could be established, existing peace was no longer a genuine peace:

He, then, who knows enough to prefer right to wrong and the orderly to the perverse, sees that the peace of the unjust, compared with that of the just, does not deserve the name of peace at all.33

30. Id. at 109.
31. Id. at 110.
32. Id. at 111.
33. AUGUSTINE, 6 CITY OF GOD 171 (William Chase Greene trans., 1960).
Saint Augustine distinguished “true peace,” which he defined as a “just order,” from “false peace,” which is inherently unjust. Thus, Augustine’s peace is, arguably, derivative of the way one defines justice, and does not stand independently as a separate value.

Clausewitz similarly observed that the idea of peace may be meaningless if it is not just peace that is the purpose of the war, since even aggressors, who make war without just cause, intend to create some form of peace eventually. For example, Clausewitz famously stated, “[t]he aggressor is always peace-loving; he would prefer to take over our country unopposed.”

The concept of just peace did not only affect jus ad bellum requirements but also the way jus in bello was perceived. In the jus in bello sense, just peace was not a theoretical aspiration. Rather, it imposed practical limitations on the way wars were fought because it demanded that the means employed would not undermine the possibility of future peace. Rawls articulated this idea, saying, “[t]he aim of war is a just peace, and therefore the means employed must not destroy the possibility of peace or encourage a contempt for human life that puts the safety of ourselves and of mankind in jeopardy.” Moreover, Kant stated, “a state must not use such treacherous methods as would destroy that confidence which is required for the future establishment of a lasting peace.”

Indeed, just war theory did not consider peace to be its leading value; but, as the name implies, it was rather justice-oriented. War had a retributive aspect and was considered a means of just punishment for wrongdoing. In the sixteenth century, Cajetan asserted that war was justified not only in actions of self-defense, “but also to exact revenge

34. See id. at 175 (“[T]he peace of all things is a tranquillity of order. Order is the classification of things equal and unequal that assigns to each its proper position.”).


39. Blum, supra note 2, at 63.
for injuries to itself [the state] or its members.”

Modern interpretation of just war theory provides that “a just peace must also aim to be a lasting peace. It is of little practical value and disproportionate to the cost of lives and resources expended to permit a nation to justly engage in war and successfully terminate a conflict, yet allow conditions to remain that permit violence and aggression to again erupt.”

According to Brian Orend, “justness” depends on the following criteria: vindication of those rights whose violation triggered the just war to begin with; proportionality and publicity of the agreement reached; distinction between the leaders, soldiers, and civilians in the defeated country to avoid punitive post-war measures against civilians; fair and public international trials of leaders of regimes for the war crimes committed in cases where the defeated country has been a blunt aggressor; moderate and proportional compensation so that the defeated country would have sufficient resources to recover; and, finally, rehabilitation of the defeated country.

B. Europe’s “Peaceful” Nineteenth Century

The 1648 Peace of Westphalia, which followed the Thirty Years’ War, established the proclamation of peace in its first article, providing for “Christian and universal peace” as well as good and friendly relations among signatory states. The Peace of Westphalia

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43. The Thirty Years’ War was is known to be one of the most destructive wars in European history, involving more than a dozen nations and resulting in over 8 million fatalities. See generally Peter H. Wilson, Europe’s Tragedy: A New History of the Thirty Years War (2010).

marked a changing point as the international community began shifting from justifying war to regulating it.45 This attitude, which was notably developed during the nineteenth century, was described both as being “dominated by an unrestricted right of war and the recognition of conquests”46 and as showing a new desire to regulate hostilities.47 The Geneva Convention of 1864 (amelioration of treatment of wounded soldiers), the Declaration of St. Petersburg of 1868 (renunciation of the use of explosive bullets), and the First Hague Conference in 1899 (prohibition of methods of warfare that caused unnecessary suffering) all illustrate this trend.

It is often argued that the nineteenth century was the most peaceful century in modern European history because between 1815 and 1914 only five wars were fought between great powers.48 However, the “long peace” between European powers was not a non-violent order but rather “a precarious armistice between the great powers, based on their diplomatic cooperation and military intervention in weaker states as well as expansion and (informal) imperialism in non-European territories.”49 Thus, this period included vast use of military force as well as violent suppression of non-Europeans and control over peoples and territories.50

During the nineteenth century, philosophers, scholars, and legal authorities were divided on the status of peace in international law. Just before the break of the century, Kant sparked much debate regarding the legalization of peace and prohibition of war when he argued in favor of complete legalization and institutionalization of national and Christian and universal peace, and a perpetual, true, and sincere amity, between his Holy Imperial Majesty, and his most Christian Majesty [the King of France]; as also, between all and each of the allies . . . And this peace and amity shall be observed and cultivated with such a sincerity and zeal, that each party shall endeavor to procure the benefit, honor and advantage of the other; that thus on all sides they may see this peace and friendship in the roman empire, and the kingdom of France flourish, by entertaining a good and faithful neighbourhood.”)

47. Dugard, *supra* note 45, at 22.
international relations by means of positive law to supersede war with eternal legal peace.\footnote{Immanuel Kant, Project for a Perpetual Peace: A Philosophical Essay 11–33 (1795). In his essay “Conjectural Beginning of Human History,” Kant has offered a different perspective on war, arguing that war was a necessity for the progress of humanity, culture, liberty, and social coherence. See Kant, Political Writings, supra note 38, at 221–22; Hippler & Vec, supra note 35, at 3.} Kant’s idea of perpetual peace was received skeptically: commentators were “either critical, or harshly rejected the idea.”\footnote{Hippler & Vec, supra note 35, at 31.} Georg Friedrich von Martens referred to the idea as utopian and undesired.\footnote{Georg Friedrich von Martens, Einleitung in das Positive Europäische Völkerrecht: Auf Verträge und Herkomen Gegründet [Introduction to Positive European International Law: Based on Contracts and Origins], at VII, 27 (1796).}

Legal authorities such as Johann Caspar Bluntschli\footnote{Prominent Swiss lawyer and co-founder of the Nobel Peace Prize-winning Institut de Droit International.} and Henry Bonfils\footnote{Professor of Law at Université de Toulouse.} regarded war—any war, even one that would have been considered just under just war theory—as an evil, stating that peace is the normal and desired condition of international relations.\footnote{Simon, supra note 48, at 120; Henry Bonfils, Lehrbuch des Völkerrechts: Für Studium und Praxis [Textbook of International Law: For Studies and Practice] 538 (3d ed. 1904); Johann Caspar Bluntschli, Das Moderne Völkerrecht der Civilisierten Staaten als Rechtsbuch Dargestellt [Modern International Law ofCivilized States as a Legal Code] 9 (1868); Theodore D. Woolsey, Introduction to the Study of International Law: Designed as an Aid in Teaching, and in Historical Studies 187 (3d ed. 1871).} Such liberal thinking viewed international law as a tool designated to achieve international peace.\footnote{Simon, supra note 48, at 120.} In contrast, German jurists, and most notably German lawyer Karl Lueder, considered war the natural condition of international affairs; war was understood as “an exponent of progress, a necessary instrument for the further development of civilization.”\footnote{Id. at 119–20; Karl Lueder, Krieg und Kriegsrecht im Allgemeinen, in Handbuch des Völkerrechts [Manual of International Law] 169, 180 (F. von Holtzendorff ed., 1889); Emanuel Ullmann, Völkerrecht, in Handbuch des Öffentlichen Rechts [Manual of Public Law] 313 (2d ed. 1898).} War was further considered in harmony with the divine order and as “a political instrument to gain national honour, power and the independence of the sovereign state in its own right . . . .”\footnote{Simon, supra note 48, at 120; Lueder, supra note 58, at 203.}
status of the legal concept of peace was the Concert of Europe. Historians have described the Concert as somewhat of a “nineteenth century Security Council”, comprising the great powers of Europe, which cooperated to maintain a steady balance of power on the continent. Peace was not the main value shaping the discourse of international relations at that time; discussions involved European values and norms, positive law, unilateral rights and interests, Christian faith, and natural law, in addition to peace and security. Thus, the Concert of Europe did not impose a legal prohibition on making war. Nevertheless, the Concert “established some form of a diplomatic ‘culture of peace’ . . . between the great powers . . . built on international moderation, multipartite diplomacy and behavioural norms derived from the former. . . . [Consequently] ‘the preservation of the peace of Europe’ became a desired norm between right and might, which was applied in practice.”

Thus, while the nineteenth century was mostly peaceful within Europe, and some nineteenth century commentators did advocate for peace, peace was not a key concept on which international legal systems were founded. Further, the use of force was accepted in the mainstream as naturally stemming from states’ sovereignty. The form of peace promoted in this era, as the Concert of Europe shows, was peace between major European forces rather than world peace among all nations and peoples.


It has been cynically suggested that “if Tolstoy were to publish his novel War and Peace today he would probably have chosen Peace-Restoring and Peace-Keeping Missions as a title.” Nowadays, “war” is a rather irrelevant term in international law, replaced by the notion of “armed conflict” discussed below. Further, political vocabulary employs expressions such as “restoring peace” when talking about the use of armed force in conflict: “[t]o put it even more clearly: we are using

61. Id., supra note 48, at 133.
62. Id. at 132.
63. Id.
64. HIPPLER & VEC, supra note 35, at 29.
65. Id. at 3.
the word ‘peace’ when meaning ‘war.’”66 The value of peace, which historically was not a central purpose of international relations, has become, after the devastating experience of the First World War (“WWI”) and the Second World War (“WWII”), the paramount objective of international law.

The relative peace of the nineteenth century was interrupted by the break-out of WWI. Following the devastating outcomes of WWI, the international community “turned away from this notion of war as justice, choosing instead to adopt a paradigm that allows defensive wars only, emphasizing peace and stability.”67

The Paris Peace Conference of 1919 gave birth to the Treaty of Versailles and the League of Nations Covenant; the legal regulation of war in such instruments was clearly aimed at preventing war.68 The Kellogg–Briand Pact of 1928 was similarly intentioned, with a strong emphasis on the prevention of war rather than on the positive promotion of peace.69 From that point on, the international community began shaping international law, and specifically the law of resort to force, to prefer the preservation of peace rather than the realization of justice.70

The preamble of the League of Nations Covenant (“LNC”), in its very first sentence, provides that the purpose of the LNC is to “promote international co-operation and to achieve international peace and security.”71 That is, its most important objective is as follows:

Now the primary object of any League of Nations is the maintenance of peace in the world; for although it may well aim at other benefits, such as the suppression of abuses, the relief of suffering, the improvement of social conditions and of agencies for international co-operation, yet the experience of the struggle just closed has shown the predominant importance of preventing

66. Id.
67. Blum, supra note 2, at 63.
69. General Treaty for Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact] (“The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.”).
70. Id.; Blum, supra note 2, at 67.
wars which, if unrestrained, threaten our civilization with destruction.\(^72\)

According to the Taft et al. quotation above, the purpose of promoting peace was considered identical with that of preventing war. The LNC also introduced a more inclusive view of right holders than the view held in the nineteenth century, since at this time the obligation not to wage war was not limited only to European powers:

The general spirit of the Covenant surely is to prevent men and women – whether Japanese, Chinese, Bolivian, Paraguayan, French or British – being killed deliberately by international action . . . And which of the methods, whereby according to the preamble security is to be achieved, will prevent these deaths by violence if it be not the ‘obligation not to resort to war?’ . . . such security, on the true construction of the preamble, must be looked for in the obligation not to resort to war.\(^73\)

However, such efforts were not sufficient, since the world peace and stability aspired to after WWI were soon to be interrupted by the horrors of WWII. There is some debate regarding whether the legal construction of the LNC enabled WWII, mainly given its failure to destroy imperialism and its lack of means to combat aggression other than sanctions.\(^74\) Others point to the Treaty of Versailles as a

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74. Eugene A. Korovin, *The Second World War and International Law*, 40 *AM. J. INT’L L.* 742, 746–47, 749 (1946) (“The sad history of the League of Nations and the grim lessons of the Second World War eloquently show that as long as there are rapacious imperialistic countries the very existence of small states, let alone the question of equality, depends first and foremost upon the preparedness of the great peace-loving state to come to their defense . . . United Nations Organization, which, as distinct from the Versailles League of Nations, has all the rights and the requisite means for combating aggression.”); CARTER G. WOODSON & CHARLES H. WESLEY, *THE NEGRO IN OUR HISTORY* 624 (1962) (“The worst, however, was yet to come. The large powers, as of old, began to swallow the small nations[]. . . .while the moribund League of Nations could do no more than to threaten to invoke sanctions against the aggressors.”).
causal factor, arguing that the “guilt clause”\footnote{75. Treaty of Versailles, supra note 68, art. 231 (“The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.”).} hurt German pride,\footnote{76. Richard V. Pierard, Protestant Support for the Political Right in Weimar Germany and Post-Watergate America: Some Comparative Observations, 24 J. CHURCH & ST. 245, 251 (1982) (“The Treaty of Versailles with its humiliating ‘war guilt’ provision inflicted a wound on the nation’s pride that far exceeded the normal feelings of bitterness that accompany the territorial and economic losses of a defeat.”).} and that the vast reparations paid by Germany did not allow it to recover and rebuild after WWI ended, thus setting the conditions for the rise of Hitler.\footnote{77. Amos N. Guiora & Kristine J. Ingle, Militant or Bystander: How to Protect Democracy, 33 BYU J. PUB. L. 31, 61 (2018) (“The dark days of National Socialism did not happen in a vacuum; the Nazi’s did not fall upon Germany out of nowhere. Quite the opposite. Defeat in World War I, reparations imposed by the Treaty of Versailles, collapse of the Weimar Republic, and economic distress were in retrospect, harbingers of Hitler’s rise to power through democratic means and the unimaginable consequences it wrought.”).} To use just war rhetoric, the peace achieved was not just and thus not stable.\footnote{78. See Orend, supra note 42.}

The aftermath of WWII brought the international community to the realization that a preventive regime for the use of force was crucial, since “peace and security from war became the paramount interest of the new international order.”\footnote{79. Id. at 69.} Under the guidance of Churchill, Roosevelt, and Stalin, states gathered to adopt the U.N. Charter at the San Francisco Conference on June 26, 1945.\footnote{80. CHRISTIAN HENDERSON, THE USE OF FORCE AND INTERNATIONAL LAW 15 (2018).} The establishment of the United Nations and the adoption of the U.N. Charter marked the beginning of the contemporary era of legal regulation of the use of force and the preference of peace over other values.\footnote{81. Id. at 15–16.}

The U.N. Charter sets out that the United Nations’ primary goal is to maintain peace and security.\footnote{82. U.N. Charter art. 1.} The word “war,” which has been used in the past to describe force between states, is no longer in use; it is replaced with the notion of “use of force.” Article 2(4) of the Charter imposes a prohibition on the use of force between states, providing that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the
Purposes of the United Nations.” 83 Article 2(4) is widely recognized as reflecting customary international law, 84 and similar provisions can be found in many international treaties signed after the Charter. 85 The exceptions to article 2(4) are use of force under the auspices of the SC 86 and use of force in self-defense. 87 The U.N. Charter provides that member states “shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” 88

The United Nations’ new order, and modern international law in general, shows “a strong overarching preference for peace and stability over justice in interstate relations.” 89 What has driven such a shift in the very core purpose of international law is the belief “that a seemingly value-neutral prevention paradigm is more conducive to peaceful coexistence than the moral-laden concepts of punishment and retribution.” 90 Indeed, use of force, as set out in the U.N. Charter, is permitted as a means of self-defense rather than as punishment or retribution, as was allowed in the pre-Charter era. 91

Such preference of peace over justice in modern international law, in contrast to an earlier clear preference for justice over peace, is based not only on the desire to reduce violence but also on the modern understanding that peace is a condition for justice: “[t]he objective of saving lives must take clear priority over attempts to make the world more just. Although we may find that peace can exist without justice,

84. HENDERSON, supra note 80, at 17–18; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 34 (June 27) (“There can be no doubt that the issues of the use of force and collective self-defence raised in the present proceedings are issues which are regulated both by customary international law and by treaties, in particular the United Nations Charter.”).
86. U.N. Charter art. 42.
87. U.N. Charter art. 51.
89. Blum, supra note 2, at 57, 60.
90. Id.
91. ANDREW CLAPHAM & PAOLA GAETA, THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 345–46 (2014); CAJETAN, supra note 40.
there will never be justice without peace.”

In the just war era, states used war as the means of enforcing justice, and in the recent pre-Charter era, they used war as the means of forcing peace under the terms of the victor. In the Charter era, however, it has become quite clear that this was a very poor tool for settling these political issues, since most armed conflicts in the last half century have ended without a settlement. While use of force may be an effective means of reaching justice, negotiation is the best means of achieving lasting peace.

Thus, one could assume that modern international law offers a well-developed system aimed at coercing states to talk and resolve their disputes without armed conflict. As will be argued in this paper, this is not the case.

II. PACIFIC SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CHARTER

States’ obligation to settle their disputes peacefully is the logical corollary of the prohibition on the use of force—in other words, these are two sides of the same coin. Thus, the obligation to seek peaceful resolution of disputes developed in parallel with the prohibition on the use of force.

Article 1 of the Hague Conventions for the Pacific Settlement of Disputes of 1899 and 1907 established that: “With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to insure the pacific settlement of international differences.” Article 2 provides that prior to appeal to arms, parties will, as far as circumstances allow, have recourse to the good offices or mediation of friendly states.

The LNC also included a pacific settlement of disputes clause,


93. FORTNA, supra note 15, at 207–08 (“Its other problems aside, war is a surprisingly ineffective means of settling disputes. In only nine wars have the issues over which the war was fought been settled unilaterally by a clear victor. . . .”).

94. Regarding the stability of negotiated peace, see the discussion in the introduction to this Article.


96. Id.
obliging states to choose between three methods: arbitration, judicial settlement, or an enquiry to the Council. Further, the Kellogg-Briand Pact included a general obligation to resolve disputes among states by pacific means. Since in the early twentieth century wars often ended with peace agreements dictated by the victors, it seems that, under these agreements, conflict settlement was used as a means of preventing war by deescalating tensions between states, rather than as a means of reinstalling peace after a war has ended.

A. Chapter VI of the United Nations Charter

The U.N. Charter provided for a new framework of dispute settlement, offering states great flexibility in resolving their conflicts. There are international and regional tribunals that deal with pacific resolution of international disputes, and the Charter refers to such tribunals in its proposed methods of dispute resolution. Thus, Chapter VI of the U.N. Charter can be viewed as a road map which includes various trails and routes that can be taken for different scenarios. The SC has been compared to a “traffic director,” channeling disputes into appropriate procedures.

Article 2(3) of the U.N. Charter’s Chapter I demands that “[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” However, the pacific dispute-settlement mechanism is detailed within Chapter VI. The rather complex structure of the
pacific dispute-settlement system under Chapter VI can mostly be described by its flexibility: It allows states much leeway in shaping conflict resolution to suit their specific needs. Chapter VI consists of articles 33–38, which detail states’ obligations to settle their disputes peacefully, as well as U.N. organs’ powers and obligations of assistance in the process.

Article 33(1) of the U.N. Charter sets out that 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 either negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Article 33(2) further provides that the SC may call upon the parties to settle their dispute by such means.

The relationship between articles 2(3) and 33(1) is somewhat unclear; however, it is generally accepted that article 33(1) constitutes a detailed elaboration of article 2(3). The generally accepted understanding of the relationship between the articles may be described as follows. Parties to a dispute are required under article 2(3) to resolve all their disputes by peaceful means. Article 33(1) offers methods of dispute resolution for specific types of disputes endangering peace and security. Then, in the case that the parties have failed in their efforts, the institutional responsibility of the United Nations comes into effect, allowing SC intervention.

While the SC is most famously involved in the framework of the system of collective security under Chapter VII, it also has a central role in the second phase of the pacific settlement regime of the Charter under Chapter VI. In the instance of Chapter VI, the SC’s powers are limited to conducting enquiries and making recommendations. The SC may act on its own initiative, ex officio, or at the request of

102. Neuhold, supra note 95, at 206.
103. U.N. Charter art. 33, ¶ 1.
106. Tomuschat, supra note 105, ch. B.I.
108. U.N. Charter art. 36; Neuhold, supra note 95, at 207.
either one of the parties (even if not a U.N. member, under some conditions)\textsuperscript{109} or a U.N. member (even if not directly involved in the conflict).\textsuperscript{110}

Indeed, the procedure set out in article 35(1)—allowing any U.N. member to bring disputes between other members to the attention of the SC or the U.N. General Assembly (“UNGA”)—illustrates that the drafters of the U.N. Charter believed that resolving peace-threatening disputes between states is in the interests of the entire international community. Despite the choice given between submission to the SC or the UNGA, state practice shows an overwhelming preference for the SC over the UNGA under article 35 because of the SC’s endless availability (in contrast to the UNGA’s annual meeting), its primary responsibility as a peacekeeping body, and its capacity to act in the general context of the U.N. Charter.\textsuperscript{111} If the SC cannot accept such submission owing to a veto of a permanent member of the SC, submission to the UNGA is still available.\textsuperscript{112}

Articles 36 and 37 of the U.N. Charter describe the measures that the SC may take to promote the settlement of a dispute. Article 36(1) provides that “[t]he Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.”\textsuperscript{113} The powers of the SC under article 36 are best categorized as those of “good offices”\textsuperscript{114} with an additional element of (procedural) mediation.\textsuperscript{115} Article 36 sets out that the SC can, of its own initiative, give non-binding procedural advice to the conflicting parties in order to

\textsuperscript{109} While article 35(2) allows for a non-member state to bring forth a conflict to which it is a party to the attention of the SC or GA, such a clause has little practical importance nowadays due to nearly universal U.N. membership. However, article 35(2) has been invoked in the past in the cases of Siam (1946), Hyderabad (1948), Tunisia (1952), Kuwait (1961), and South Korea (1983, 1988). Theodor Schweisfurth, \textit{Article 35, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, supra} note 105, at 1108, 1110–11.

\textsuperscript{110} U.N. Charter art. 35; Neuhold, \textit{supra} note 95, at 207.

\textsuperscript{111} Schweisfurth, \textit{supra} note 109, at 1110–11.

\textsuperscript{112} \textit{Id.}; see, e.g., S.C. Res. 462 (Jan. 9, 1980) (regarding Soviet intervention in Afghanistan).

\textsuperscript{113} U.N. Charter art. 36, ¶ 1.

\textsuperscript{114} Cindy Daase, \textit{The Law of the Peacemaker: The Role of Mediators in Peace Negotiations and Lawmaking, 1 CAMBRIDGE J. INT’L & COMP. L.} 107, 123 (2012) (“Good offices is a modest form of third-party involvement, in which the third party supports the disputing parties but does not actively take part in their dispute resolution.”).

\textsuperscript{115} Thomas Giegerich, \textit{Article 36, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, supra} note 105, at 119, ch. A.
reconcile the positions of the parties with respect to the proper peaceful means of settlement. The powers of the SC in this context are rather limited, and were designed as such by the drafters of the U.N. Charter:

[Under art. 36(1), the] SC’s discretion is limited to making procedural or methodological recommendations. . . . Both the wording and the history of Art. 36 (1) clearly indicate that this was the intention of the parties, which strove to avoid any impression that the SC should be a world directorate of the great powers with authority to impose settlements.117

Article 36(3) establishes that in making such recommendations the SC should also consider the general rule that legal disputes should be referred by the parties to the International Court of Justice (“ICJ”).118 However, the SC seldom refers disputes to the ICJ, thus proving article 36(3) has very little impact in practice.119

Article 37(1), on the other hand, provides the SC with greater power. It states that if the parties to the dispute fail to reach a settlement under the terms of article 33, they are obligated to submit their dispute to the SC.120 A party may refer the dispute to the SC under article 37(1) even if the failure in reaching a settlement is contested by the other party.121 Under article 37(2) of the Charter, the SC is obliged either to recommend an adjustment to procedures or methods detailed in article 36, as described above, or to recommend terms of settlement as it may consider appropriate.122 Recommending terms of settlement means determining the substance of the solution of a major dispute as defined in article 33, provided that the SC concludes that the continuance of the dispute is likely to endanger the maintenance of international peace and security.123 While in article 36 the recommendations of the SC are procedural, article 37 allows for substantive recommendations aiming to provide actual solutions.

Finally, under article 38 of the U.N. Charter, the SC may, at the request of all parties to any dispute, make recommendations (both

116. Id.
117. Id. at 1133.
118. U.N. Charter art. 36, ¶ 3.
119. See, e.g., S.C. Res. 22 (Apr. 9, 1947) (recommending the United Kingdom and Albanian governments to refer their Corfu Channel dispute to the ICJ).
120. U.N. Charter art. 37, ¶ 1.
121. NEUHOLD, supra note 95, at 211.
122. Id.
123. Id.
procedural and substantive) to achieve a pacific settlement of the dispute. In doing so, the SC thus acts, as under article 37(2), as a mediator. However, in practice, no conflicting party has ever resorted to such option.

To understand the logic behind the non-binding, rather weak powers of the SC in the context of Chapter VI, that chapter must be read together with Chapter VII of the U.N. Charter. Chapter VII engages with the SC’s capacity to make recommendations or decide what measures shall be taken to confront a threat to the peace, breach of the peace, or act of aggression, thereby granting the SC powerful means to take action, such as the imposition of sanctions and the use of force to enforce its recommendations. Thus, Chapter VII was designed to provide the SC with measures to compensate for the weak nature of its powers under Chapter VI:

Chapters VI and VII of the [U.N.] Charter are closely related in the sense that whatever restrictions the former imposes on the SC can easily be overcome by proceeding to the latter if the situation is serious enough (and if the requisite majority can be obtained); that was also the intention of the drafters.

Indeed, allowing the SC to adopt binding measures under Chapter VI would undermine the structural integrity of Chapters VI and VII as a whole, since “[t]he whole aim of separating these chapters is to distinguish between voluntary and binding measures. Whereas the pacific settlement of disputes provided by the former is underpinned by the consent of the parties, binding measures in terms of Chapter VII are characterized by the absence of such consent.”

Further support for the non-binding nature of SC powers under Chapter VI can be found in article 27(3) of the U.N. Charter, which obliges SC members to abstain from voting when they are a party to the dispute in decisions under Chapter VI. During the Dumbarton Oaks Conference, while formulating the U.N. Charter, a disagreement

124. Id. at 211–12.
126. Giegerich, supra note 115, ch. B.
128. U.N. Charter art. 27, ¶ 3 (“Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”).
arose regarding the obligations of SC members involved as a party to a given dispute. While the United Kingdom promoted a general obligation to abstain from voting, the Soviet Union insisted that the principle of unanimity should be strictly observed.\textsuperscript{129} The result was article 27(3), which represented a compromise between these opposing positions, limiting the duty to abstain from voting to non-binding measures, mainly under Chapter VI.\textsuperscript{130} Indeed, this chain of events indicates that SC powers under Chapter VI are non-binding.

Such a view of the division of powers between Chapter VI and VII was contested by Stephen Zunes, who argued that SC resolutions under Chapter VI are binding, and that the difference between the chapters lies in the enforcement mechanisms available to the SC under Chapter VII, namely sanctions and use of force.\textsuperscript{131} In practice, however, the SC does not indicate whether it is operating under Chapter VI or VII, and “[s]ince the end of the Cold War the Security Council has in any event increasingly used its Chapter VII powers with regard to ‘disputes’ and ‘situations.’ This has rendered the intricacies of Chapter VI less important.”\textsuperscript{132}

\textbf{B. Failure of Chapter VI}

Chapter VI of the U.N. Charter has been described as one of the most poorly drafted chapters of the Charter.\textsuperscript{133} It is often called “the neglected stepchild of the Charter” because parties rarely, if ever,
rely on its provisions in practice.\textsuperscript{134} The performance of the United Nations in the area of peaceful dispute settlement under Chapter VI has been criticized as unsatisfactory, since international conflicts remained unresolved for a considerable period of time, and parties to existing conflicts have often not been prevented from resorting to armed force.\textsuperscript{135} So far, over seventy years after entering into force, not a single SC resolution has explicitly referred to article 36, article 37, or article 38 of the U.N. Charter.\textsuperscript{136} In the earlier days of the Charter, the SC gave at least an indication of the legal basis for some of its decisions by quoting from the text of article 36,\textsuperscript{137} but this practice was soon abandoned, blurring the boundaries between Chapter VI and Chapter VII.\textsuperscript{138}

It has been suggested that the fact that the SC does not explicitly refer to Chapter VI in a given resolution does not mean that the resolution has no basis in that chapter, but rather that it fails to indicate so, although even such instances are rare:

In practice, the Security Council seldom refers explicitly to a specific provision in Chapter VI. Hence it remains unclear on the basis of which Article it takes action. Moreover, the various terms are used rather loosely. Furthermore, several elements of the rather elaborate peaceful settlement system of the [U.N.] Charter have been employed in only a few cases, if at all.\textsuperscript{139}

Thomas Giegerich suggested that reliance on Chapter VI can be inferred by the absence of reference to Chapter VII in resolutions concerning international disputes, and that the SC has actually, though not explicitly, relied on Chapter VI in its resolution:


\textsuperscript{135} Neuhold, supra note 95, at 214.


\textsuperscript{137} See, e.g., S.C. Res. 47 (Apr. 21, 1948) (concerning the India–Pakistan Dispute).

\textsuperscript{138} Giegerich, supra note 115, ch. B, ¶ 16.

\textsuperscript{139} Neuhold, supra note 95, at 212.
But since the SC often, although not always, explicitly identifies decisions taken under Chapter VII in the Preamble, one can, by way of a rule of thumb, assume that whenever the SC does not explicitly base a resolution concerning an international dispute on Chapter VII, it has acted under Chapter VI or used its implied powers under Art. 24(1), unless that presumption is rebutted by the content, context, and/or drafting history of the resolution.\textsuperscript{140}

Giegerich provides examples for the identification of the use of Chapter VI by the absence of reference to Chapter VII. These include SC Res 338, calling for a ceasefire in the Yom Kippur War of 1973, in which the SC set out that “negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East,”\textsuperscript{141} SC resolution concerning the conflict between Ethiopia and Eritrea, which “uses language reminiscent of Art. 36 (1),”\textsuperscript{142} a resolution concerning Georgia, which underlines the importance of the peaceful resolution of disputes and then requests for “the intensification of efforts to address the issue of regional security and stability, and the issue of refugees and internally displaced persons, through the discussions currently under way in Geneva”,\textsuperscript{143} and finally, a resolution concerning Western Sahara.\textsuperscript{144}

It is clear that, even assuming Giegerich’s argument to be true, the use of Chapter VI still has not lived up to its potential. Indeed, the rather unimpressive body of practice under Chapter VI is a great loss for the international community because the effort of concluding peace agreements remains an important piece of the puzzle. While the international community dedicates a great deal of effort to preventing the use of force,\textsuperscript{145} limiting it during armed conflict,\textsuperscript{146} and maintaining peace once an agreement is achieved,\textsuperscript{147} the missing link of working toward a peace agreement remains neglected. As scholarship shows, in the absence of a settlement addressing the underlying reasons for

\begin{itemize}
\item \textsuperscript{140} Giegerich, \textit{supra} note 115, ch. B, ¶ 16.
\item \textsuperscript{141} \textit{Id.} ch. B.17; S.C. Res. 338 (Oct. 22, 1973).
\item \textsuperscript{142} Giegerich, \textit{supra} note 115, ch. B, ¶ 17; S.C. Res. 1177 (June 26, 1998).
\item \textsuperscript{143} Giegerich, \textit{supra} note 115, ch. B, ¶ 17; S.C. Res. 1866 (Feb. 13, 2009).
\item \textsuperscript{144} Giegerich, \textit{supra} note 115, ch. B, ¶ 17; S.C. Res. 1920 (Apr. 30, 2010).
\item \textsuperscript{145} \textit{Jus ad bellum} body of law.
\item \textsuperscript{146} \textit{Jus in bello} body of law.
\item \textsuperscript{147} U.N. peacekeeping missions.
\end{itemize}
the violence, the odds are that hostilities will eventually resume.148

C. Explaining the Failure

In explaining the reasons for Chapter VI’s infrequent use, existing scholarship focuses on the political motivations of the SC, arguing that diplomacy issues have kept it from exercising its Chapter VI powers as expected:

The absence of any impressive body of practice under Chapter VI lies precisely in the one unalterable fact that realists have used to impugn international organizations in general – that the political organs comprise merely a group of States and cannot act independently of their wishes. As such, political concerns necessarily guide the Council and the Assembly . . . .149

While states often do not act on their duty to resolve conflicts under article 33(1), the rest of Chapter VI has constructed “the field of action of the Security Council . . . broad and largely exclusive, its actual authority . . . stringently limited, and the freedom of action of sovereign states . . . carefully protected.”150 Thus, the combination of states’ unwillingness to resolve their conflicts along with limited powers of the SC under Chapter VI leads to the low impact of the chapter.

The argument may be further developed if one considers limited SC powers together with the blurred lines between Chapter VI and Chapter VII. It is possible that states would prefer to submit a dispute to the SC directly under Chapter VII, which offers the SC binding powers, and thereby “skip” the use of Chapter VI, which is perceived as rather weak. Supporting evidence can be found in the Report of Repertoire of the Practice of the Security Council of 2016–2017, which explains that “the nature of the matters brought to the attention of the Council in the communications submitted by Member States during the period under review was often framed beyond the scope of Chapter VI of the Charter relating to the pacific settlement of disputes.”151

The lack of use of Chapter VI by the SC has created a somewhat circular pattern, whereby confusion regarding SC powers under

148. FORTNA, supra note 15, at 209.
149. Ratner, supra note 134, at 431.
150. Eagleton, supra note 133, at 513.
Chapter VI leads to lack of use of the chapter by the SC, which thus misses the opportunity to clarify the scope of its powers, and so forth:

The polarization of views over Chapter VI is exacerbated by the small degree to which the Council’s members have employed its procedures since 1945, both in terms of the number of occasions and the depth of involvement. For nearly forty five years, the application by the political organs and the Secretary-General did little to embellish the artifice drafted at Dumbarton Oaks and San Francisco, and made confusing the Council’s precise role under Chapter VI.  

While there is much criticism regarding the construction of SC powers and responsibilities under Chapter VI, limited attention has been given to the formulation of article 33(1) setting states’ initial responsibility to resolve their disputes peacefully by different methods proposed. The great flexibility provided by article 33(1) aims to fulfill the principle of free choice of means, which is derived from the principle of sovereign equality. Thus, while:

> [s]tates are obliged to settle their disputes exclusively by peaceful means, they may not be tied to a specific procedure. The only procedure which they can initiate unilaterally is the dispute-settlement activity of the UNGA and the SC. This is the crux of the international system for the settlement of disputes.

However, such great flexibility might be part of the reason Chapter VI has not lived up to expectations. It has been suggested that “the genuine reason for this sobering record [of dispute resolution under Chapter VI] is the lack of political will to use the various means available for conflict resolution for which the consent of all parties involved is required.” Indeed, Chapter VI, and especially article 33, requires the cooperation of states that by definition fail to cooperate. Therefore, while criticism regarding SC authority is legitimate, it seems that Chapter VI is flawed from the start—even before the SC is required to intervene. Therefore, the very expectation that states in

152. Ratner, supra note 134, at 431.
153. Some criticism regarding the formulation of article 33(1) can be read into Eagleton’s quote, supra note 150. However, even Eagleton’s argument, while mentioning states’ vast freedom of action, focuses on SC’s responsibility.
155. Id.
156. NEUHOLD, supra note 95, at 215.
dispute, especially those that have just ceased hostilities, will cooperate and work together with such great leeway is problematic at best.

Reaching a decision upon the means of dispute resolution according to article 33(1) fits the definition of “talks about talks,”157 or “negotiation around negotiation,”158 and concerns “how individuals agree to negotiation according to the accepted agenda.”159 The pre-negotiating phase oftentimes is too much of an obstacle to overcome:

The prenegotiation stage of a peace process, often termed “talks about talks,” typically revolves around how to get everyone to the negotiating table with an agreed-upon agenda. For parties to a long-term conflict, any move to the negotiating table is a trial-and-error process linked to whether they perceive themselves as getting more at the table than on the battlefield. For face-to-face or proximity negotiations to take place at all, parties need assurances that the talks will not be used by the other side to gain military and/or political advantages. The prenegotiation stage tends to focus on who is going to negotiate and with what status, raising issues such as the return of negotiators from exile or their release from prison; safeguards as to future physical integrity and freedom from imprisonment; and limits on how the war may be waged while negotiations take place.160

Adversary states that have ceased fighting are in a very delicate political state, which might make pre-negotiations even more complicated. The public, from both sides, often faces a long recovery process, is likely hostile toward the adversary, and will not easily support efforts to normalize relationships with its enemy state. States will tend to be suspicious of their adversaries’ intentions, and will not trust the other party’s suggestions and offers.161 In particular, neighbor states

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157. Bell, supra note 14, at 376.
159. Id.
160. Bell, supra note 14, at 376.
161. Such animosity and mutual suspicion can be clearly detected in the context of the Israeli-Arab conflict, as both sides share a “profound animosity, suspicion, and sense of vulnerability. Both sides [see] themselves as victims,” creating poor conditions for peacemaking. Robert H. Pelletreau, U.S. Policy Toward the Middle East: Steering a Steady Course, 7 U.S. DEP’T ST. DISPATCH 429 (1996). The same can be suggested regarding Indian-
“with a long history of rivalry have a hard time overcoming a legacy of mutual fear and suspicion by themselves.”\textsuperscript{162} Such suspicion and animosity is not restricted to the core grounds of the conflict, since states with a history of conflict tend to suspect their adversary’s motives and agendas on all issues:

A nation tends to see the hostility of its antagonist extending far beyond the particular points in dispute and embracing a generalized malevolence. Once suspicion and fear gain the upper hand, the worst possible interpretation is placed on the opponent’s every action.\textsuperscript{163}

Even more so, states might be hesitant to approach the other state and offer to act upon article 33 because they are reluctant to make the first move.\textsuperscript{164} The very decision to start a communication route might be perceived as controversial. Thus, gaining mutual consent to a method of dispute resolution might prove a great challenge, because states are both hesitant to make the initial offer but also resistant to every offer from their adversary. Such hesitation may be due not only to a genuine suspicion of the other state’s intention, but also to concerns about domestic public opinion and image because making peace is not always popular.\textsuperscript{165}

Therefore, one must consider that the unlimited flexibility provided by Chapter VI causes difficulties for states that have animosity between them in terms of cooperating to the extent that Chapter VI requires; such states might struggle at the “talks about talks” stage, or even during internal deliberations of whether to make the first move. Obviously, not all states in dispute are unable to cooperate, and if the parties are able to reach agreement on the means of dispute resolution,


\textsuperscript{164} Brad McRae, \textit{Breaking the Impasse: Negotiation and Mediation Strategies}, in \textit{Negotiation in International Conflict: Understanding Persuasion} 31, 38 (Deborah Goodwin ed., 2014) (explaining that states often worry about who will make the first move to start negotiations); Dennis Ross & David Makovsky, \textit{Myths, Illusions, and Peace: Finding a New Direction for America in the Middle East} ch. 5 (2009) (describing the feeling in the Arab world that due to being the weaker side “felt that the initiative and the first move must always come from the Israelis”).

the flexibility and diversity offered by article 33 may promote a successful process by allowing the parties to choose a method that best fits their needs.166

The flexibility of article 33(1) is both necessary and problematic at the same time. Thus, one should ask whether there is a way of ensuring that states in dispute cooperate more realistically, in a manner that would preserve flexibility and freedom of choice, but nevertheless aid states in making such choices. The method need not and should not undermine the flexibility that article 33 currently offers, because such flexibility is important and valuable, but rather need only aid states in taking the steps that article 33(1) requires. Such a solution is offered in the following part of this Article.

III. REVIVING CHAPTER VI

A. The Importance of Overcoming the Pre-Negotiation Obstacle

The poor record of Chapter VI is an issue that affects global security and peace, since the existence of a viable method of pacific dispute resolution would encourage states to resolve their conflicts without resorting to the use of force. The lack of use of Chapter VI is especially problematic in light of the fact that many of the major international armed conflicts are ones that reoccur.167 Thus, the international community cannot allow itself to miss the chance to bring states to the negotiating table once the actual hostilities have ended, and before hostilities likely resume once again.

Paralysis of the SC is not an issue unique to Chapter VI. Such criticism is often expressed in various other contexts, mainly the SC Permanent Five’s (“P5’s”) veto rights, which have proved difficult to overcome.168 Some have suggested that the scope of the SC paralysis

166. Anna Spain, International Dispute Resolution in an Era of Globalization, in INTERNATIONAL LAW IN THE NEW AGE OF GLOBALIZATION 42, 42 (Andrew Byrnes et al. eds., 2013) (“[I]t is important to recognize that the fluidity and flexibility of IDR [international dispute resolution] is a great asset to international law. The ability for IDR practices continually to adapt to changing circumstances enhances its effectiveness.”).

167. FORTNA, supra note 15, at 209.

effect is underestimated because oftentimes a draft resolution which is likely to be blocked is simply not submitted in the first place. 169 Such veto privileges directly affect the SC’s ability to effectively help resolve international disputes and function as expected under Chapter VI. 170 Therefore, a better tactic to enhance the usefulness of Chapter VI would be to improve the mechanism of article 33(1), which lays responsibility upon the states in dispute, rather than attempt to resolve the much broader problem of SC paralysis.

While it is difficult for states with a history of fighting to fulfill the requirements of article 33(1) and start working toward resolving a dispute, experience shows that when actual communication starts, interaction between the parties might increase the feasibility of reaching an agreement, as will be demonstrated in the following examples. Dispute resolution methods such as negotiations, mediations, and good offices all entail personal contact between officials from both parties. Experience and research demonstrate that working and sharing time together helps in building personal relations between parties; for example, negotiations entail personal contact which allows each party to gain a better understanding of the other’s culture, thereby humanizing their so-called enemy. Such personal relations became substantial during the negotiations of the Oslo Accords between Israeli and PLO representatives. One of the Israeli negotiators, Amos Guiora, described that the time shared together, becoming acquainted with each other’s cuisine and culture, contributed to their ability to talk:

The often used expression “breaking bread” may be the most accurate description of the soft aspect of negotiation. Perhaps under-appreciated, I would suggest it can significantly contribute on both a tactical and strategic level alike. Breaking bread with the other side does not, obviously, guarantee success, but it does represent the Council’s paralysis, caused by the Russian and Chinese veto of resolutions addressing the Syrian crisis, calls into question the international community’s commitment to act collectively ‘in a timely and decisive manner’ through the Security Council to protect the populations from mass atrocity crimes, including crimes against humanity.”).

169. Saleh Al Shraideh, The Security Council’s Veto in the Balance, 58 J.L. POL’Y & GLOBALIZATION 135, 139 (2017) (“The threat of veto prompts states to question the use of presenting a draft resolution for a Security Council decision, when they know in advance that such draft is going to be blocked as a result of a threat of the use of veto exercised by one or more of the Security Council’s permanent members.”).

170. YO SHIFUMI TANAKA, THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES 80 (2018) (“Even though the Security Council can perform multiple roles in international dispute settlement, its function is compromised by the right of veto of the permanent members of the Security Council.”).
negotiators’ fundamental mutual task of working together.171

Guiora further stated that time spent together with the PLO representatives helped to reduce gamesmanship on both sides, minimize posturing, and develop common grounds for discussion and shared core understandings.172

The Israel–Arab conflict serves as a good example on this point because there are some deeply entrenched prejudices between the parties which hinder constructive discussion. For example, Golda Meir was famous for saying “[p]eace will come when the Arabs will love their children more than they hate us.”173 This reflects “an Israeli perspective of how Israel’s neighbors perceive the sanctity of life,”174 and it is the very essence of dehumanization of an adversary. However, such perceptions can be rebutted when actually becoming acquainted with people, their stories, and their sentiments. The intensity of negotiations, including pre-negotiations, creates a close familiarity among negotiators.175

U.N. diplomat and peacemaker Sergio Vieira de Mello, who negotiated on behalf of the United Nations with the Serbians during the Kosovo war, experienced difficult negotiating conditions, since “[d]uring the Bosnian War (1992–1995), Serbs had been fed a steady diet of anti-U.N. propaganda, which continued during the war in Kosovo.”176 Vieira de Mello appreciated the importance of human connections and cultural sensitivity in negotiations and recognized that “[i]n highly conflictual situations in particular, it takes time to build trust – trust is easy to lose and much harder to earn.”177 He believed


172. Id. at 425.


175. See, e.g., Guiora, supra note 171, at 433 (describing the core-group’s close relations which went as far as considering the other party negotiators’ favourite sports matches in scheduling meetings). Such a close relationship between opposite camps can be seen in the 2018 documentary The Oslo Diaries, which deals with the negotiation process. See THE OSLO DIARIES (HBO Sept. 13, 2018).


177. Id. at 329–31.
that getting to know and respect the people negotiating for the other party, their culture and traditions, has a crucial function in humanizing the parties and creating a good setting for successful negotiations. 178 Personal relations matter; therefore, he submitted that special and personal attention must be given to the individual people involved in the negotiation. 179

Similar notions were stressed by Stan B. Levin, based on his experience negotiating with Soviet Union officials. Levin highlighted the importance of “friendly socializing following official negotiations, during which one can establish personal relations.” 180

This is not to suggest that negotiators need only befriend each other in order to guarantee a successful result; clearly, people do not neglect their state’s interests simply because they formed friendly relations with the other party’s representatives. However, it seems that, especially between states which experience a great deal of animosity and dehumanization, building personal relations between negotiators is a first step toward understanding the other party’s point of view.

In the context of Chapter VI, states may use lessons learned regarding the importance of personal relations between negotiators to overcome the obstacle of article 33(1). Disputing states with entrenched animosities may struggle to take the first step and set negotiations in motion, but once they are actually in the same room together, they are more likely to communicate, making peace talks a realistic possibility. Thus, international law actors should consider implementing a mechanism that efficiently brings states to the table to start a peace process.

Any mechanism aimed at improving the record of Chapter VI, and specifically article 33(1), would have to respect the idea of a state’s freedom of choice, rather than eliminate it:

The procedure of pacific settlement is based upon the theory that the states have a right, as well as a duty, to settle their differences by agreement among themselves. The Security Council cannot settle a dispute; it can only exhort or recommend. The fact that all of Chapter VI, with the exception of four words (“such terms of settlement”) is devoted to procedures through which the parties may choose their own means and their

178. Id.
179. Id. at 329.
own terms of settlement manifests the emphasis of the Charter upon the right of sovereign states to settle their disputes in their own fashion. This emphasis must dominate in any interpretation of the Charter provisions for pacific settlement.\(^{181}\)

Thus, while some have called for “liberal interpretation of the Charter” to strengthen its mechanism of dispute resolution,\(^{182}\) any such suggestion would have to preserve its governing principles and allow states flexibility to shape dispute resolution in the way they see fit.

B. Setting Defaults

Any attempt to fix the failure of article 33(1) of the U.N. Charter requires a careful approach, one that would preserve states’ freedom of choice in dispute resolution but at the same time help states overcome the initial barrier to engaging in dispute resolution with an enemy state. So, how do you convince non-cooperating states to cooperate without deciding for them? A possible solution may be to create default rules.

1. The Power of Defaults

Defaults have proven to be powerful tools for influencing behavior. In a study examining the saving behavior of individuals enrolled in a 401(k) savings plan, the use of a default proved to increase participation from 37% to 86%.\(^{183}\) A different study demonstrated that when organ donation was the default, there was a 16% increase in donation.\(^{184}\) Another example is an experiment in which the researchers asked participants in an online form whether they would like to be notified about future surveys. Participants were asked to choose between ticking boxes of “yes” or “no.” Changing the default from “no” to “yes” increased agreement by 29%.\(^{185}\)

\(^{181}\) Eagleton, supra note 133, at 514.

\(^{182}\) Id. at 528.


\(^{185}\) Steve Bellman et al., *To Opt-In or Opt-Out? It Depends on the Question*, 44 COMM. ACM. 25, 25–26 (2001). The researchers conducted an experiment asking participants in an
Explanations for the effectiveness of defaults in shaping individuals’ behavior include procrastination, or an effort tax, because individuals would rather stick to the status quo than invest time in making a decision; peoples’ tendency to believe that a default is a recommendation of the choice architects; and finally, the loss aversion default rule, which establishes the status quo, and therefore opting out of the default is translated to people as having lost something they currently possess.

While much of the research on the impact of defaults was performed on individuals rather than states or organizations, many argue that default rules also influence the behavior of states. As far as states are concerned, the “excessive commitment to consent” in international law, designated to maintain state sovereignty in its fullest form, leads states, according to Tomer Broude, “to pursue their (imperfectly rational) preference for status quo.” Indeed, the case of article 33(1) is an excellent example of how the status quo is maintained by the requirement of states to consent. However, treating consent as a problem is not especially useful, since consent is essential to maintain the legitimacy of the process, and it cannot be disregarded or dismissed without interrupting states’ sovereignty. Thus, a more practical approach would not be to undermine the demand of consent, but rather to shape pacific dispute resolution schemes to ease the way for states to consent to the requirements article 33(1).

Setting one of the methods offered in article 33(1) as a default is a useful way to ensure states participate in a process they would otherwise have disregarded, while not violating their autonomy and online form whether or not to be notified about future surveys. Participants were asked to choose between ticking boxes of “yes” and “no.” Changing the default from “no” to “yes” increased agreement by 29%.

187. Id. at 98.
188. Id.
189. See supra notes 184–86 and accompanying text.
190. Tomer Broude, Behavioral International Law, 163 U. Pa. L. Rev. 1099, 1140–41 (2015) (providing that the default rule of non-consent in treaty signage leads to lack of signage even when states do not have a concrete objection to the treaty itself: “The immediate implication is that states might regularly withhold consent from new treaty regimes and treaty reforms, not only because they believe these regimes and reforms run counter to their best interests, but because of an embedded behavioral aversion to change.”).
191. Id. (citing Andrew T. Guzman, Against Consent, 52 Vir. J. Int’l L. 747, 749 (2012)).
192. Broude, supra note 190, at 1141.
freedom of choice. Crucially, article 33(1) is already obligatory; in other words, the consent demanded is for the method of dispute resolution, but states have already consented to the requirement that they pacifically resolve the dispute in the first place. Setting one of the listed options as a default does not violate states’ freedom of choice because they can decide on a different method by their own will. However, starting the process by default would force states to evaluate their preferred method and start pre-negotiations instead of simply disregarding their duty entirely, since to change a default rule, an active choice must be taken to reject that rule.193

When assessing the possibility that a default would be effective for states, one can consider both Broude’s assertion that states aim to preserve the status quo,194 which relates to the loss aversion explanation discussed above,195 but also the second traditional explanation, which considers the default as a recommendation.196 It is possible that if a default method for dispute resolution were carefully chosen and well explained, states would look favorably at such method. However, the greatest advantage of setting a default method for dispute resolution would be to spare states from having to make the first move toward negotiations; a default may help to save face and start a process that states are interested in but do not want to initiate.

While defaults are effective, they might not have the expected impact for one of two reasons: either “strong antecedent preferences” or counter pressure “by those with an economic or other interest in convincing choosers to opt out.”197 Thus, this Article does not suggest that defaults are a magical solution that would bring overtly obstinate states together to suddenly start talking, but they can nudge states which are struggling to start the peace process in the right direction.

2. Available Default Options

If one considers that setting one dispute resolution method in article 33(1) as a default may benefit states in dispute, then the real challenge is to decide which method should be the default. Article 33(1) offers the dispute resolution methods of negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to

193. SUNSTEIN, supra note 186, at 97.
194. Broude, supra note 190, at 1141.
195. SUNSTEIN, supra note 186, at 98.
196. Id.
197. SUNSTEIN, supra note 186, at 111.
regional agencies or arrangements, or other peaceful means of the parties’ choice.198

It is clear that a default cannot be set on an option that limits parties’ control over the resolution. If the intention is to encourage the parties to stick with the default, it should be a reasonable option, since a default rule to which the parties strongly oppose would simply not have an effect.199 Therefore, the best candidates to serve as a default in the case of article 33(1) are negotiation, enquiry, mediation, and conciliation because such methods do not oblige states to accept a decision they do not agree with, as will be described at length in the following section. It is important to note that good offices might have been a suitable candidate to serve as a default, had it been mentioned in article 33(1). Good offices is generally understood as “the deployment of diplomatic means for the settlement of disputes through a modest form of third-party involvement in which the third party encourages or supports the disputing parties to resume negotiations but does not actively take part in them.”200 In practice the difference between good offices and mediation is blurred, and “it is often difficult to determine whether the third party has only brought the disputing parties together or whether it also actively assisted them in reaching a compromise – which would be the role of the mediator.”201 While article 33(1) is a basket clause and includes any method to which the parties agree,202 for the sake of legitimacy it is better to set the default as one of the methods explicitly specified in the Charter.

To properly determine which method is best suited to serve as a default among negotiation, enquiry, mediation, and conciliation, consider the following concise review of the different methods.

\[\text{a. Negotiation}\]

In international relations, negotiation is defined as “discussions

\begin{footnotes}
199. Sunstein, supra note 186, at 98–99 (demonstrating such principle on the default of retaining remarriage surname in the United States: the default is ineffective with regards to women, as 80% of college graduate women change their surname after marriage). Sunstein explains that defaults do not work as well as expected when people have a strong will against the default. Still, Sunstein points out, it is possible that without the default of retaining remarriage surnames, even more women would have changed their surnames.
200. Daase, supra note 114, at 123.
201. Id. at 112.
\end{footnotes}
at different levels of authority with a view to achieving common understanding or agreement. Negotiation is a method of dispute resolution that includes direct talks between the parties, without third-party involvement: “through negotiations the parties to a dispute establish direct contacts between themselves and discuss litigious points.” The ICJ has asserted that negotiating states are “under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.” The UNGA has determined that negotiations “should be conducted in good faith” and that “States should endeavour to maintain a constructive atmosphere during negotiations and to refrain from any conduct which might undermine the negotiations and their progress.” Thus, in properly conducted negotiations, both parties are required to make concessions and to deliberate in good faith to achieve an agreement that will lead to sustainable peace. Negotiation is considered the most common means of dispute resolution between states as well as the simplest and the cheapest:

Direct negotiations between the conflicting parties without the involvement of a non-party are simple, confidential, flexible and usually the least expensive, as well as the most frequently used method. Skillful negotiators may find a genuine solution through balanced mutual concessions leading to an agreement that both parties accept of their own free will and prefer to a continuation of their conflict. Basically, they can aim at the lowest common denominator or a package deal between the common and divergent positions of the parties.

Direct negotiation is considered a favorable method of dispute resolution by some authorities. For example, the Manilla Declaration sets out that “[s]tates should, without prejudice to the right of free

204. NEUHOLD, supra note 95, at 176.
208. Id. ¶ 2(e).
209. NEUHOLD, supra note 95, at 176.
choice of means, bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their disputes." The UNGA considers negotiation to have an important role "in attaining the purposes of the [U.N.] Charter by contributing to the management of international relations, the peaceful settlement of disputes and the creation of new international norms of conduct of States." 211

However, the absence of a third party to navigate the discussion might lead to "unmitigated negative impact of the power relationship between the parties on the outcome, especially if the stakes of the dispute are high." 212 Thus, a symmetrical power balance might lead to deadlock, and an asymmetrical power balance might lead to an inequitable solution favoring the stronger state’s interests. 213 Thus, the very advantages of negotiation—the fact that it is cheap and accessible because of the lack of third-party involvement—also lead to its drawbacks, since lack of guidance and management of the discussions by an impartial party might lead to stagnation of the process due to perpetuation of existing patterns in the parties’ relationship.

b. Enquiry

The purpose of an enquiry (also referred to as inquiry, fact-finding or an investigation) is "to clarify controversial facts without passing judgment on the legal aspects of the dispute." 214 Enquiries as dispute resolution methods were set out in the 1899 Hague Convention for the Pacific Settlement of International Disputes, and then in the revised version of the Convention of 1907. The 1899 Convention stated that in disputes “arising from a difference of opinion on points of fact, the Signatory Powers recommend that the parties . . . should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.” 215 Since uncertainty and disagreement regarding facts often create the

210. G.A. Res. 37/10, Annex 1, Manila Declaration on the Peaceful Settlement of International Disputes, art. 10 (Nov. 15, 1982).
212. NEUHOLD, supra note 95, at 179.
213. Id.
214. Id.
core difficulty of a dispute between states, “a report emerging from an
inquiry can provide the parties with the materials for a permanent and
just solution.”\textsuperscript{216} Such a report is not legally binding but rather meant
to be used as a tool for the parties to draw respective conclusions.\textsuperscript{217}

However, enquiry alone is often not enough to successfully re-
solve a dispute, since “most international conflicts are not caused just
by differences of opinion on verifiable facts but are more complex, so
that fact-finding tends to be just a step on the road to a pacific solu-
tion.”\textsuperscript{218} Thus, enquiries are an important tool in dispute resolution,
but more effective as a complementary method rather than as a
standalone solution.

c. Mediation

Mediation includes the “active participation of a third party in
the negotiation process between the parties to the dispute.”\textsuperscript{219} A me-
diator may comment on the positions of the parties as well offer her
own proposals for a solution.\textsuperscript{220} Various types of entities serve as me-
diators, including organs of states, international organizations, non-
governmental organizations (“NGOs”), and private individuals.\textsuperscript{221} While the SC can mediate peace negotiations upon the request of the
states in conflict,\textsuperscript{222} mediation is mostly conducted voluntarily by
third-party states that wish to mediate the process.\textsuperscript{223} The mediation
of a third party, especially between unequal forces, helps to create a
“perception of greater equality between the parties to the dispute, and
may produce a more equitable resolution than direct negotiations be-
tween two parties with greatly disparate influence or resources.”\textsuperscript{224}

Successful mediation has been performed in modern times,

\textsuperscript{216} Tomuschat, supra note 105, ch. VI, ¶ 27.
\textsuperscript{217} Id.
\textsuperscript{218} Neuhold, supra note 95, at 180.
\textsuperscript{219} Id.
\textsuperscript{220} Id. at 181.
\textsuperscript{221} Id.
\textsuperscript{222} U.N. Charter art. 24, ¶¶ 33–38.
\textsuperscript{223} Molly M. Melin, When States Mediate, 2 Penn St. J. L. & Int’l Aff. 78, 78 (2013)
(describing the dominance of state-led mediation in modern international relations, and
pointing out that over 1,334 mediation attempts by states in 333 interstate and civil conflicts
have been reported since World War II).
\textsuperscript{224} Catherine Tinker, Dispute Resolution and International Law: The United Nations
inter alia, by the United States between Egypt and Israel in 1978, by Algeria between Iran and the United States in 1980, by the United States regarding the conflict in Bosnia and Herzegovina in 1995, by Pope John Paul II between Argentina and Chile in the dispute over the Beagle Channel, and by the World Bank between India and Pakistan in the Indus basin dispute.\footnote{225}{Neuhold, supra note 95, at 183–84.}

While mediation is closely related to negotiation,\footnote{226}{Tomuschat, supra note 105, ch. VI, ¶ 27.} a third party’s involvement may offer substantive advantages, especially in disputes between states with a history of conflict. Neuhold posits that mediation has four clear advantages over negotiation in international disputes:\footnote{227}{Neuhold’s complete list includes six advantages, as he further lists two additional advantages of mediation. These are the claims that the mediation process helps to “buy time” and defuse an escalation, and that the confidentiality of the process helps the parties save face. However, any dispute resolution method may “buy time,” and negotiations may be conducted confidentially as well. Therefore, such additional advantages seem to be unexclusive to mediation. See Neuhold, supra note 95, at 182.} (1) it helps the parties to a dispute to save face because “it is easier for each of them to accept a proposal submitted by a mediator than the same proposal made by its opponent;”\footnote{228}{Id. at 181.} (2) also from a substantive perspective, a proposal presented by a mediator has a better chance of being perceived as fair owing to its impartiality, while an offer from the adversary would be suspected of containing a hidden ploy;\footnote{229}{Id. at 181–82.} (3) since parties to a dispute often have fixed thinking patterns, the mediator may be able to offer fresh ideas and perspectives and “come up with other options which the parties have overlooked in the ‘heat’ of their controversy;”\footnote{230}{Id. at 182.} and (4) a mediator may offer “carrots” and “sticks” to change the interest map of the parties—she can offer incentives (e.g., financial assistance or military guarantees) if the parties accept her proposal, as well as disincentives (e.g., non-renewal of favorable mutual agreements) should one of the parties refuse to cooperate.\footnote{231}{Id. at 183–84.}

General Assembly Resolution 70/304 has reaffirmed the status
of mediation as a solid method for resolving international disputes.\textsuperscript{232} In this resolution, the UNGA acknowledged “the importance of mediation in the peaceful settlement of disputes, conflict prevention and resolution and in seeking long-term political solutions for sustaining peace.”\textsuperscript{233} Moreover, it recognized that “mediation needs to be further and more effectively used”\textsuperscript{234} while encouraging states and other international entities to “continue to develop, where appropriate, their mediation capacities in the peaceful settlement of disputes, conflict prevention and resolution, to enable a professional approach in their mediation activities and the effectiveness of mediation.”\textsuperscript{235}

As for the disadvantages of mediation, it is customary to argue that the weakness of international mediation is that “the conflicting parties are not legally bound by the proposal submitted by a mediator but are free to reject it; second, the suggested solution need not be based on existing international law by which the parties are bound.”\textsuperscript{236} However, such disadvantages are unexclusive to mediation, and may just as well be attributed to any other non-binding dispute resolution method listed in this chapter.

d. Conciliation

Conciliation is a dispute resolution method that combines elements of enquiry and mediation.\textsuperscript{237} It is generally understood to refer to the actions of a third party to the dispute to “investigate a dispute and present the parties with a set of formal proposals for its solution.”\textsuperscript{238} A conciliation commission investigates the facts and submits to the parties non-binding proposals for a solution.\textsuperscript{239} Such commissions are composed of experts without political affiliation, whose “recommendations will hopefully be accepted by the conflicting parties on the strength of convincing arguments and their readiness to end their dispute.”\textsuperscript{240} Conciliation was popular between the two world wars, but

\textsuperscript{232} G.A. Res. 70/304, Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution (Sept. 9, 2016).
\textsuperscript{233} Id. ¶ 2.
\textsuperscript{234} Id.
\textsuperscript{235} Id. ¶ 11.
\textsuperscript{236} NEUHOLD, supra note 95, at 181.
\textsuperscript{237} Tomuschat, supra note 105, ch. VI, ¶ 29.
\textsuperscript{238} J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 27 (1991).
\textsuperscript{239} Id.
\textsuperscript{240} NEUHOLD, supra note 95, at 185.
has been rather abandoned since.\textsuperscript{241} Conciliation procedures are included in various international treaties, such as the 1969 Vienna Convention on the Law of Treaties\textsuperscript{242} and the 1982 U.N. Convention on the Law of the Sea.\textsuperscript{243} Further, in 1995, the UNGA adopted a resolution providing model rules for the conciliation of disputes between states.\textsuperscript{244} However, the inclusion of conciliation in such international instruments remained theoretical and “has not been reflected in the actual resort to this method in practice.”\textsuperscript{245}

3. Narrowing the List

Of the four dispute resolution methods listed in the Charter (with the deduction of the more coercive methods), two candidates seem more suitable to serve as defaults than the others: negotiation and mediation. Both enquiry and conciliation involve a third party conducting her own investigation upon the facts of the conflict (as mentioned, conciliation consists of elements of enquiry).\textsuperscript{246} A third party that makes substantial factual determinations regarding narratives in the conflict might deter the parties from pursuing such a path, since each party may fear that its narrative would be determined to be false. Such determination might be feared for holding influence over the international community’s opinion and damaging a party’s reputation, or it might serve as a starting point in future deliberations should an agreement not be reached, despite the dissatisfaction of a party with the determinations reached. As explained, a default to which the parties are strongly opposed simply would not work.\textsuperscript{247}

Further, since enquiry is usually regarded as a complementary

\textsuperscript{241} Tomuschat, \textit{supra} note 105, ch. VI, ¶ 29.


\textsuperscript{244} G.A. Res. 50/50, United Nations Model Rules for the Conciliation of Disputes Between States (Jan. 29, 1996).

\textsuperscript{245} NEUHOLD, \textit{supra} note 95, at 185.

\textsuperscript{246} Tinker, \textit{supra} note 224, at 997 (“What distinguishes [mediation] from conciliation is that a mediator generally makes proposals informally and on the basis of information supplied by the parties, rather than conducting an investigation.”). An enquiry is the investigation of disputed facts between parties. \textit{Id.} at 996–97.

\textsuperscript{247} SUNSTEIN, \textit{supra} note 186, at 98–99.
method rather than an independent mechanism, it makes more sense to choose either mediation or negotiation and allow the parties to complement such chosen method with enquiry should they be so inclined. Finally, because conciliation has a “hardly impressive” record and has not been used in practice in modern times, it may be more beneficial to set the default on a method that is considered reliable and acceptable, with a more recent record of success. Once again, any of the other options of article 33(1) are still available to the parties; the goal is to choose a default that would ease the parties into setting the process in motion. Therefore, the ultimate decision can be narrowed down to negotiation or mediation.

A predominant advantage of negotiation which may make it preferable over mediation is its accessibility. Negotiation between parties demands very little because it “does not require complex procedures or costly settlement mechanisms but simply time and space for the parties to meet or otherwise discuss the pending issues.” In negotiation, much depends on the skills of the negotiators, since without a third party to guide the talks, the negotiators carry the burden of finding creative solutions and transmitting them to the other party in a well-minded and careful manner.

In the case of parties with entrenched hostility, such simplicity may not suffice to reach an agreement. As detailed in Part III.B.2.c above, mediation has some clear advantages, especially concerning international disputes with deep roots and longstanding animosity between the parties. External suggestions for solutions may help overcome the suspiciousness of the other party’s suggestions as well as the political obstacle of agreeing to such party’s offers. Moreover, they may break existing thought patterns and bring new ideas to the table, while also providing additional incentives to reach an agreement.

248. Neuhold, supra note 95, at 180.
249. Tanka, supra note 170, at 69.
250. Neuhold, supra note 95, at 185.
251. Hakapää, supra note 203, ¶ 21 (arguing that the simplicity of negotiation is the main reason it is often preferred over other means of dispute settlement: “It does not require complex procedures or costly settlement mechanisms but simply time and space for the parties to meet or otherwise discuss the pending issues. . . . As such, it is often to be preferred over other means of dispute settlement. This is also recognized by international courts.”).
252. Id.
253. Neuhold, supra note 95, at 176.
254. See supra Part III.B.2.c.
255. Neuhold, supra note 95, at 181–84.
However, successful mediation demands a suitable mediator agreed upon by the parties. This is a step that is far more complex than the simple meetings that negotiation demands. To make a successful mediator, a third party needs to possess a specific combination of “diplomatic and psychological skills and experience, patience and perseverance, creativity and flexibility,” as well as charisma, rhetorical skills, and a “personal ability to cajole, flatter or threaten.” Further:

A mediator has to be ready to make his/her contributions to a pacific solution appear less important than they actually are and give most of the credit for an agreement to the parties. He or she needs a thorough knowledge of the details of the dispute which he or she is trying to help settle.

While neutrality is supposedly a required quality of a mediator, experience shows that past support or alliance with a party does not exclude successful mediation. Examples include the mediation performed by the pro-India Soviet Union between India and Pakistan, which resulted in the 1966 Tashkent Declaration, and the mediation performed by the pro-Israel United States between Egypt and Israel, which culminated in the 1979 peace treaty between the parties. It has been suggested that “it may even be a good idea for a state to accept a mediation offer from a third party that up to now has sided with its adversary” since “a mediator who invests considerable efforts in his/her function is primarily motivated by the desire to succeed in brokering a solution to the conflict to which both parties agree and thereby to increase his/her own prestige and power” while exerting pressure on its ally to avoid being accused of bias.

In light of the qualities demanded of a mediator, it is not always possible to find a suitable mediator in any given conflict:

[T]here is no guarantee that a third party can offer good offices or mediation in a timely manner. In case of

256. Id. at 183.
257. Daase, supra note 114, at 112.
258. Id. at 111 (quoting W.I. Miller, The Messenger, in FRIEDEN STIFTEN, VERMITTLUNG UND KONFLIKTLÖSUNG VOM MITTELALTER BIS HEUTE 19, 19 (G. Althoff ed., 2010)).
259. NEUHOLD, supra note 95, at 184.
260. Id.
261. Id.
262. Id.
263. Id.
disputes between major powers, in particular, it seems difficult to find a qualified third party offering mediation since any third States might regard themselves as unqualified to act the mediator because of their limited influence or power.264

The need to choose a mediator is the main obstacle in setting mediation as a default in the context of article 33(1). The very reason a default has been determined in this study as an appropriate means of inducing states to talk is the fact that states in long-term disputes experience problems with starting the process of dispute resolution. The default is intended to spare them from having to reach an agreement regarding the terms of the discussions. Having to choose a mediator, once again, requires the states to reach an agreement at an early stage.

A possible solution to the mediator problem is to set a default mediator. Such an idea may seem problematic at the start, since finding an appropriate mediator is a complex task, and one cannot lay such responsibility on one permanent specific state. However, the U.N. SG has repeatedly performed good offices and mediated disputes.265 Indeed, “[m]ediation is one of the means at the disposal of the SG to initiate and accompany peace processes.”266 The role of the SG is characterized as highly diverse,267 as Article 98 of the Charter sets out that the SG, in addition to acting in his capacity under the Charter in all meetings of the GA, the SC, the Economic and Social Council, and the Trusteeship Council, “shall perform such other functions as are entrusted to him by these organs.”268 The SG’s capacity to mediate disputes is derived from article 99 of the U.N. Charter, providing that the SG “may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.”269 Article 99 has been interpreted to give the SG “a broad discretion to conduct inquiries and to engage in informal diplomatic activity.”270 The Preparatory Commission observed already in 1945 that the SG may have “an important role to play as a mediator . . .

264. TANAKA, supra note 170, at 49.
265. Id. at 48.
266. Daase, supra note 114, at 122–23.
267. TANAKA, supra note 170, at 88.
268. U.N. Charter art. 98.
and will undoubtedly be called upon from time to time, in the exercise of his administrative duties, to take decisions which may justly be called political.”  

Article 100 of the Charter aims to ensure that the SG remains impartial and “shall not seek or receive instructions from any government or from any other authority external to the Organization.”

The involvement of the SG in international mediation significantly increased during the late 1980s, since the SG mediated the ceasefire between Iran and Iraq, the withdrawal of Soviet forces from Afghanistan, and the decolonization of Namibia, as well as being involved in the dispute over Western Sahara. In 2005, SG Kofi Annan stressed that the SG plays an important role in mediating international disputes:

Although it is difficult to demonstrate, the United Nations has almost certainly prevented many wars by using the Secretary-General’s “good offices” to help resolve conflicts peacefully. And over the past 15 years, more civil wars have ended through mediation than in the previous two centuries, in large part because the United Nations provided leadership, opportunities for negotiation, strategic coordination and the resources to implement peace agreements.

In the quotation above, Annan refers to good offices under the headline of mediation. Since good offices can be described as a method situated between negotiation and mediation, and since the SG is extremely familiar with both methods, setting the SG as mediator may allow the SG leeway to step back and simply guide the parties rather than mediate, if he deems appropriate.

4. Negotiation or Mediation?

Deciding between mediation and negotiation as defaults is not an easy task. Most importantly, the states must be given an option that they would actually consider, and the default method must be the one


that has the greatest chance of promoting the resolution of conflict in the case of states that struggle to cooperate. Moreover, on a practical level, the option given must be one that would be easy to pass at the legislative or administrative level: the U.N. Charter is not likely to be amended in the near future, and thus an option that can be set by means of interpretation has a greater chance of being carried out. In the following paragraphs, I present an assessment of the compatibility of both methods with reference to the above considerations.

**Legitimacy** – Based upon the analysis presented in this Article, it is this author’s assessment that both negotiation and mediation would be considered legitimate default methods of conflict resolution by states in conflict. The reason for this is that both methods maintain control in the hands of the parties and do not grant a third party means of making decisions and determinations over the conflict.275 In negotiation there is no third-party involvement, and in mediation the mediator may offer the parties solutions; however, it is up to the parties to accept such solutions or decline them.276 Thus, from a legitimacy perspective, it seems that both methods are equal.

**Prospect of Achieving Conflict Resolution** – Both negotiation and mediation are reliable methods with solid records of achieving conflict resolution.277 However, setting a default aims to help states that do not cooperate by initiating deliberations. As an atmosphere of trust is important for international negotiations,278 states that find it difficult to cooperate and have a history of animosity might find it difficult to negotiate without third-party involvement. The greatest advantage of mediation in this context is that the mediator may transmit ideas between such parties, help the parties save face, suggest new solutions to overcome parties’ tunnel vision, and offer external incentives for conflict resolution.279 Thus, in the case of states with recurring conflicts, or severe differences, third-party involvement could be crucial for fruitful conflict resolution. Such position has been acknowledged by former SG Ban Ki-moon, who stated that “[o]f the various means that the Charter suggests for this purpose, mediation has

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275. See supra Part III.B.2.a, c.
276. Id.
277. Id.
278. G.A. Res. 53/101, supra note 207, ¶ 8 (“Noting that the identification of principles and guidelines of relevance to international negotiations could contribute to enhancing the predictability of negotiating parties, reducing uncertainty and promoting an atmosphere of trust at negotiations.”).
279. NEUHOLD, supra note 95, at 181–82.
proved to be the most promising.280 Choosing mediation as a default would not prevent states with moderate disagreements from negotiating without third-party involvement if they saw fit. Therefore, when considering the chances of achieving conflict resolution, mediation has a clear advantage over negotiation.

Prospect of Implementation – Implementation of the default venture would be more achievable if the notion of default could be reached by method of interpretation or administrative resolution rather than by an amendment of the U.N. Charter. Since article 33(1) lists methods of dispute resolution in a certain order, it could be interpreted that such methods are listed in an order that suggests negotiation, which is listed first, is the preferable method and should be set as a default. Clearly, that is not an acceptable interpretation of the Charter, since it is widely accepted that methods listed in article 33(1) do not reflect an order of priority.281 However, it has been argued that the weakness of the U.N. Charter with regards to conflict resolution demands a liberal and unorthodox interpretation thereof:

[I]t is beyond doubt that the Charter is weak and inadequate in its provision for the peaceful settlement of disputes among states. It is most desirable that it should be strengthened and much could be done in this direction through liberal interpretation of the Charter.282

It is not clear that a liberal interpretation would include the setting of negotiation or mediation as a default. However, because negotiation is listed first, it may have a better chance of being accepted in the case that such an interpretational move were to be considered legitimate. However, if a body with authority over interpretation of international instruments, such as the ICJ or the International Law Commission, would support the interpretation of either negotiation or mediation as a default in the context of Chapter VI, it could have better


281. NEUHOLD, supra note 95, at 175 (“The criterion that underlies the order in which these means are listed is the degree to which the conflicting parties keep or relinquish control over the outcome of their dispute in favour of a third party.”); Tomuschat, supra note 105, ch. V, ¶ 24 (“The listing in Art. 33 (1) is not to be understood as indicating any substantive priorities.”); CHRIS CARLETON & CLIVE H. SCHOFIELD, DEVELOPMENTS IN THE TECHNICAL DETERMINATION OF MARITIME SPACE: DELIMITATION, DISPUTE RESOLUTION, GEOGRAPHICAL INFORMATION SYSTEMS AND THE ROLE OF THE TECHNICAL EXPERT 42 (2002) (“[T]he methods of dispute resolution settlement [in Art. 33(1)] are not listed in any order of priority – states are not bound to pursue these methods in series.”).

282. Eagleton, supra note 133, at 528.
chances of implementation by means of interpretation.

When summing up the considerations, it appears that while mediation has a greater chance of actually aiding states in dispute to reach an agreement, negotiation may be more “marketable.” This Article’s purpose is primarily to offer a suggestion to revive Chapter VI. Even if the actual implementation of such suggestion would be difficult or even improbable, there is nevertheless a value in raising the idea and planting its seeds. Actual implementation may come later; that is the nature of ideas.

Therefore, it is my submission that mediation should be set as a default option of article 33(1) with the SG as a default mediator. When identifying a situation of dispute between states, the continuance of which is likely to endanger the maintenance of international peace and security, the SG would send the parties an invitation to SG-led mediation. If the parties wish to resolve their dispute by other means, they are free to do so; and if the parties wish to find a different mediator, they are free to so too, since this is a default and not an obligation to commit to such a specific method. However, states who wish to start the peacemaking process but are deterred by various barriers, such as lack of trust in the other party’s honesty and fear of making the first move to begin negotiations, may find the default helpful for overcoming such obstacles. The SG would initiate mediation and thus exempt the states from having to take the first step, and he may also help in building a safe mediation environment and transmitting ideas between the parties in a fair manner. States that do not accept the mediation invitation and refuse to deliberate by a different method would be labeled refusers. Such a label would not carry actual influence but could damage a state’s reputation.

The route to implementing such a venture might be difficult as it is not at all clear that mediation could be set as default by means of interpretation; however, an attempt to revive Chapter VI should give states the best chance of reaching an agreement. Otherwise, the same old problems that have prevented Chapter VI from influencing conflict resolution would remain. Thus, setting negation as a default is simply not a sufficient solution.

C. Explicit Use of Chapter VI by the Security Council

This article will not attempt to solve the much broader issue of

283. See supra Part III.B.3.
284. Bell, supra note 14, at 376; McRae, supra note 164, at 38.
SC paralysis and abuse of the P5’s veto right. However, it will suggest that within the current framework, and without limiting its powers, the SC may act to improve the record of Chapter VI.

It has been stressed that states often prefer to submit a dispute to the SC directly under Chapter VII rather than refer to Chapter VI, since states would rather request the stronger measures offered by Chapter VII.285 The SC itself, and perhaps because of the rhetoric of states’ submissions, also does not refer to Chapter VI in its resolutions, even in cases when it can be inferred that the SC actually operates under Chapter VI.286

Therefore, it may be useful to draw to the SC’s attention such lack of explicit use of Chapter VI, and to encourage the SC to mention the chapter explicitly in its decisions. Explicit rather than implicit use of the chapter would at least initiate some discussion about its value. Since Chapter VI is not even mentioned in SC resolutions, the discussion and debate regarding the chapter and its implications remains rather poor. The SC must cease considering Chapter VI as an unnecessary step to Chapter VII that is not worth mentioning, and instead begin referring to it by its own merits. Indeed, Chapter VI has enormous potential that so far has been left unfulfilled. If U.N. organs themselves do not acknowledge the importance of Chapter VI in the context of dispute settlement and peacemaking, it is clear that states will not either. The United Nations, and especially the SC, which holds the most authority and power under Chapter VI, must insist that the chapter be employed.

CONCLUSION

Modern international law sets the maintenance of peace as its immediate goal. Despite the centrality of the ideal of peace, international law has developed a rather poor body of law with regard to peacemaking. While there are various limitations and obligations on states in armed conflict, as well as various instruments of peacekeeping aimed at maintaining peace once an agreement is achieved, such efforts have neglected to consider the period between the end of hostilities but before an agreement has been reached.

When interstate conflicts are only temporarily solved in order to achieve hostilities cessation, peace achieved would be inherently

unstable. As history shows, such conflicts tend to eventually re-emerge. Lasting, stable peace is achieved by peace agreements which settle the underlying issues of the conflict. Thus, it is critical to set terms which allow states to start talking in order to reach such a peace agreement rather than a mere cessation of hostilities.

Chapter VI of the U.N. Charter should have been drafted to offer states an accessible roadmap to pacific conflict resolution. Disappointingly, Chapter VI has not lived up to expectations; it has produced a rather unimpressive record, and is often referred to as the neglected stepchild of the Charter. While traditional criticism of Chapter VI deals with SC paralysis that is due to P5’s veto power, this research has offered an alternative point of view, focusing on article 33(1) and states’ capacity to start resolving their disputes without SC intervention. Article 33(1), which manifests the very first step of pacific conflict resolution under Chapter VI, is deeply problematic. Article 33(1) offers a non-exhaustive list of dispute resolution methods to the available states in dispute. States, in the first instance, are expected to agree upon a method of dispute resolution pre-negotiation, and thus start the peacemaking process themselves. However, states with a history of conflict and animosity often struggle to take the first step toward conflict resolution because of different barriers, including a genuine suspicion of the other state’s intentions as well as concerns regarding public image. While it is difficult for such states to fulfill the requirements of article 33(1) and start working toward resolving a dispute, experience shows that once actual communication starts, the interactions between the parties lead to development of personal connections which render circumstances more favorable for reaching an agreement.

Overcoming such obstacles requires a careful mechanism that will preserve states’ freedom of choice in dispute resolution, as well as help states break down the initial barrier of reaching an agreement about the means of dispute resolution with an enemy state. Choosing a default method of dispute resolution from the options listed in article 33(1) satisfies both requirements because defaults have been shown to

287. George & Bennett, supra note 8, at 47.
289. Id. at 208.
290. Ratner, supra note 134, at 428; Neuhold, supra note 95, at 214; White & Henderson, supra note 134, at 12.
291. See supra note 161 and accompanying text.
influence states’ behavior while maintaining their freedom of choice.

Setting mediation as a default method of dispute resolution, with the SG as a default mediator, may help states overcome the barrier of taking the first step to start the process of peacebuilding. States with a history of animosity might find it difficult to negotiate without third-party involvement. The biggest advantage of mediation in this context is that the mediator may transmit ideas between such parties, help the parties save face, suggest new solutions to overcome parties’ tunnel vision, and offer external incentives for conflict resolution. Thus, in the case of states experiencing reoccurring conflicts or severe differences, third-party involvement could be crucial for fruitful conflict resolution.

While this Article has not claimed to solve SC paralysis, it has recommended that the SC should explicitly mention Chapter VI in its decisions, because explicit rather than implicit use of the chapter would at least initiate some discussion with regard to the chapter and its implications.

The path to implementation of the default idea is not an easy one. The U.N. Charter is not likely to be amended in the near future, and it is not clear that such development could be achieved by means of interpretation. However, since the maintenance of peace plays such a key role in modern international law, the seeds to such an idea should be planted and a public discussion on the matter should be raised. In time, the realization may come that achieving global peace requires a more sophisticated mechanism than the one currently offered by the Charter. Setting mediation as a default is a solid option for improving the existing mechanism rather than undermining it. Mediation may provide states with just the right nudge to start talking, and thereby bring us one step closer to global peace.

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293. Neuhold, supra note 95, at 181–82.