

Title: **GOOD OFFICES: GRASPING THE PLACE OF LAW IN CONFLICT**

Author: Aoife O'Donoghue

Durham Law School,  
50 North Bailey,  
Durham,  
DH1 3ET,  
UK

Email: [aoife.o'donoghue@durham.ac.uk](mailto:aoife.o'donoghue@durham.ac.uk)

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# GOOD OFFICES: GRASPING THE PLACE OF LAW IN CONFLICT

Aoife O'Donoghue\*

## ABSTRACT

Good offices is now a significant facet in the pantheon of methods open to participants in the pacific settlement of disputes. This has come about due to a number of significant operational changes over the past century. This includes, among other changes, a move away from state-led good offices and an increased role in the practice for the heads of international organisations. This has led to a re-definition of good offices which stresses the actor carrying out the role rather than the form which it takes. Yet, this has not been accompanied by a change in the legal analysis or accompanying definitions of good offices. Bell's *lex pacificatoria* may offer a template by which to understand the operation of good offices in the settlement of violent conflicts in the 21st Century. If good offices is to continue to have a significant role in conflict settlement a fully developed legal analysis is required. Bell's *lex* proffers one potential mode of analysis for understanding good offices and the place of law in conflict.

Keywords: good offices, *lex pacificatoria*, UN Secretary General, conflict resolution

## I. INTRODUCTION

An insufficiently studied practice, good offices remains a central feature of international dispute settlement. Attempts at defining good offices in treaty or other form has been limited and when undertaken usually result in describing what it is not rather than what it, in practice, entails.<sup>1</sup> Similarly, doctrinal analysis has been sparse and where it has occurred it is often in the context of analysing a particular conflict or office holder.<sup>2</sup> This obscures the potential

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\* Lecturer in Law, Durham Law School. I would like to thank Dr. Matt Saul and Colin Murray for their insightful and useful comments on earlier drafts of this paper. All errors are my own. Email, aoife.o'donoghue@durham.ac.uk

<sup>1</sup> See variously Convention for the Pacific Settlement of International Disputes (adopted 1899), Convention for the Pacific Settlement of International Disputes (adopted 1907), Basic Documents, Permanent Court of Arbitration, The Hague & The American Treaty on Pacific Settlement (adopted April 30 1948) 30 UNTS 55, 601

<sup>2</sup> Leon Gordenker, *The UN Secretary General and the Maintenance of Peace* (Columbia University Press, 1967) 144, Thomas M Franck 'The Secretary General's Role in Conflict Resolution: Past Present and Pure Conjecture' (1995) 6 EJIL 360, Alys Brehio, Good Offices of the Secretary General as Preventative Measures, (1998) 30 NYUJ In & Pol 589, Benjamin G. Ramcharan, 'The Good Offices of the United Nations Secretary-General in the Field of Human Rights' (1982) 76 AJIL 130, K R Simmonds, 'Good Offices and the Secretary General' (1959) 29 Nordisk Tidsskrift International Relations 330, Thomas Fischer, 'Switzerland's Good Offices: A Changing Concept 1945-2002' (Nr 37, Centre for International Studies, 2002) Report of the Secretary General, In Larger Freedom: towards development, security and human rights for all' 2005, UN Doc. A/59/2005, William J Dixon, 'Third-party Techniques for Preventing conflict escalation and promoting pacific settlement' (1996) 50 International Organization 653, Francisco O. Vicuna, 'New Dispute Settlement Procedures' (1999) 31 Studies in Transnational Legal Policy 59, Robert Probst, "Good Offices" in the light of Swiss international practice and experience (Martinus/Nijhoff, 1989), Benjamin G. Ramcharan, *Humanitarian Good Offices in*

strengths that lie behind good offices, most particularly its ability to develop and evolve alongside a particular dispute that ensures the sensitivity required to resolve conflicts is the guide to its operation. Yet, the dearth in legal analysis leaves little guidance for those who wish to understand its character and the parameters of its operation. It is contended in this article that this is no longer satisfactory and further that in Bell's proposed *lex pacificatoria* a potential basis for analysis and understanding of some of the core questions relating to good offices' unstructured nature may be discussed.<sup>3</sup> These questions include, among other queries, whether the move from state-based to institutional good offices has changed a fundamental quality of its operation, how the actors who carry out good offices obtain their legitimacy and whether these actors become part of the settlement itself or remain purely international interlopers and most significantly how to satisfactorily define good offices.

One recent example of good offices' evolution is the Elders. This innovation acts as an exemplifier of the fractured understanding of good offices. Established in 2007, the Elders are a collection of senior figures from world politics brought together to undertake good offices.<sup>4</sup> A private initiative, it aims to bring together global figures of recognised integrity who can act independent of any governmental or other influences.<sup>5</sup> They 'offer their collective influence and experience to support peace building, help address major causes of human suffering and promote the shared interests of humanity.'<sup>6</sup> Elders are to use their good offices to attempt to bring about the pacific settlement of some of the world's longest running conflicts.<sup>7</sup> Several elements are intriguing here. For instance, as the result of private activism and not born of the more traditional governmental route, it raises interesting questions regarding the role of civil society. The group seeks to go beyond policy creation, research or influence which, as an NGO, would be its more likely avenue of activism. Other issues include the alignment of potentially quite influential and powerful voices that, by and large, were once governmental figures and the place of civil society with international law. However, for the purposes of this piece it serves as an example of the splintered understanding of good offices. Another current example is the activities of Tony Blair in the Middle East. As the Special Envoy of the Quartet, the UN, the US, the EU and Russia, Blair represents, alongside the Elders, the new generation of non-state, non institutional, actors in the settlement of international conflict. While the focus of this article is not on these Elders or Blair specifically, they do serve to underpin the questions that are raised regarding the parameters of good offices and its evolution over the past 100 years.

Both the practice and doctrinal underpinnings of good offices need to be more clearly determined. The specific actions that practitioners of good offices may or may not take, if it is entirely an internal dispute are practitioners domestic actors or does their presence

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*International Law*' (Martinus Nijhoff, 1983), Ian Johnstone, 'Role of the UN Secretary-General: The Power of Persuasion Based on Law' (2003) *Global Governance* 441

<sup>3</sup> Christine Bell, '*On the Law of Peace: Peace Agreements and the Lex Pacificatoria*' (OUP 2008)

<sup>4</sup> See < [www.theelders.org](http://www.theelders.org) > accessed 23 May 2011

<sup>5</sup> The founders of the organisation were Richard Branson and Peter Gabriel together with other private individuals. This is a remarkable movement of civil society into a realm traditionally not accessed by non-governmental organisations. Details available at <[www.theelders.org/organisation/supporters](http://www.theelders.org/organisation/supporters)> accessed 23 May 2011

<sup>6</sup> Persons eligible to be members, 'should have earned international trust, demonstrated integrity and built a reputation for inclusive, progressive leadership' The current Elders are Martti Ahtisaari, Kofi Annan, Ela Bhatt, Lakhdar Brahimi, Gro Brundtland, Fernando H Cardoso, Jimmy Carter, Graça Machel, Mary Robinson, Desmond Tutu, as well as two honorary Elders Nelson Mandela and Aung San Suu Kyi see <<http://www.theelders.org/elders/>> accessed 23 May 2011

<sup>7</sup> The Elders are active in The Sudan, Burma, Zimbabwe, North Korea and Cyprus see <<http://www.theelders.org>> accessed 23 May 2011

internationalise a conflict, if those using their good offices become signatories or monitors of peace agreements do they take on a domestic constitutional role are questions which largely remain unanswered. A resolution of the meaning of good offices will not provide a solution to all of these questions but the placement of good offices within Bell's *lex pacificatoria* framework may well assist in at least contextualising good offices within the broader arena of modern conflict resolution.

Good offices are used widely outside the context of the settlement of violent conflicts and as such this piece will not be a discussion of the broader questions regarding its character.<sup>8</sup> However, in this discrete area, where *lex pacificatoria* has a discernable impact, it may serve as a source of analysis of the broad array of activities undertaken under the title of good offices.

In her book, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* Bell argues that *lex pacificatoria*, or the law of the peacemaker, is a superior method of categorising and analysing the law surrounding the resolution of conflicts. This *lex* is an alternative to grappling with the dichotomy that is created when international and domestic law compete for dominance. She proposes that *lex pacificatoria* has emerged to encompass the various forms of conflict as well as the methods utilised to bring conflict to an end. The proposed doctrine establishes the place of law is in the midst of these conflicts and how law is best understood as a tool of pacific settlement. Bell's contention is that the hybrid nature of this *lex*, which encompasses both international and domestic law, creates this new categorisation of law. This new *lex* centres on the resolution of violent conflict, but is neither defined by temporality nor by the actors involved. It is this obscurity of character that Bell is seeking to understand with this *lex*. If *lex pacificatoria* is to succeed it must encompass the disparate elements of conflict settlement and provide a sound framework to succinctly analyse the actors and their legal progeny. It could establish a unified vision of the place of international, domestic and *lex pacificatoria* itself in the resolution of violent conflict.

This article has two main motivations, firstly to consider good offices and secondly to examine whether Bell's theory gives a basis for understanding good offices' operation. The article first examines the historical development of good offices, it will look at the development of good offices in the last century and its contemporary utility in the resolution of violent conflicts in the 21<sup>st</sup> Century and following this ask whether Bell's *lex* exists and, if it does, where good offices would be situated in its structure. This examination centres on the activities of the UN Secretary General as this office, in many ways, exemplifies the questions raised by good offices. The role of the UN Secretary General also serves to narrate the move away from state-centred good offices, into an entirely unique role for the heads of international organisations which has rarely been successfully scrutinised.<sup>9</sup> This article will examine the relationship between *lex pacificatoria* and good offices and ultimately seeks to answer the question of whether this new *lex* can finally lead to a coherent understanding of good offices.

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<sup>8</sup> See for example its operation within the WTO, article 5 & 22 Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2, Agreement Establishing the WTO (1994) 33 ILM 1125 and Vienna Convention on the Protection of the Ozone Layer (adopted 22 March 1985) 1513 UNTS 293, article 11

<sup>9</sup> Recognising that it is often not the Secretary General, but a representative of the office who is often the actual UN official involved in good offices, this article will nonetheless focus on the actions taken by the Secretary General. See Simmonds, 'Good Offices and the Secretary General', Franck, 'The Secretary General's Role in Conflict Resolution', Brehio, 'Preventative Measures'

## II. GOOD OFFICES

Boutros Ghali stated that good offices ‘is a very flexible term as it may mean very little or very much.’<sup>10</sup> While this depiction may underpin good office’s mercurial nature it also emphasises the lack of clarity as to its content. Good offices can be depicted from two standpoints; as a secondary aspect of third-party settlement that is a catch all for various forms of peacemaking or alternatively as a distinctive method which unlike other kinds of dispute settlement is defined by the peacemaker and not the divergent structures it may take. While the latter is the more difficult perspective to prove it is perhaps the more accurate. Yet in the rather sparse analysis thus far undertaken in the literature, establishing this is not aided by either the development of treaty law or analysis of practice.<sup>11</sup> As UN Secretary General De Cuéllar stated good offices is ‘quiet diplomacy’<sup>12</sup> and whilst this has allowed good offices to become a vital aspect of the pacific settlement of disputes it has also made scrutiny difficult. Legal definitions of good offices are alternatively circular or vague and for the most part are a reflexive description of what the concept may potentially entail or on the other hand what it is not.

Dixon argues that third-party settlement involves “conflict management agents” who come in the form of international organisations, nation states, coalitions of nation states, transnational or sub-national organisations, ad hoc commissions, individuals or any other actor of international standing.<sup>13</sup> This is a broad state-based list which encapsulates the core issues encountered when attempting to establish a clear set of principles linked to a particular form of dispute settlement.<sup>14</sup> Yet, omissions from the list include important non-statist actors such as civil society (in the form of the “Elders” discussed above) and transnational communities (which may include borderless religious organisations or diasporas), which are also involved in pacific settlement and should not therefore be presented as less significant agents. As Vicuna notes in modern dispute settlement ‘[t]he role of non State actors has challenged the traditional exclusivity of States.’<sup>15</sup> While in this piece the good offices of heads of international organisations are the focus, this broader context is central to understanding conflict resolution as it presently stands.

In particularly acrimonious disputes it may be harder to move factions to agree to a dispute settlement format which is not clearly delineated; in these incidences good offices may be configured to suit the needs of the actors involved. In other incidences it may be better to remain vague as to good offices’ content. There is also an element of ownership attached to

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<sup>10</sup> Statement of the Secretary General, UN Doc. SG/SM/3525, as reported in *The United Nations Handbook on the Peaceful Settlement of Disputes Between States*, UN Doc. OLA/COD/2394, 35.

<sup>11</sup> For an excellent overview of international dispute settlement see John G. Merrills, *International Dispute Settlement* (5th edn CUP 2011) particularly with regard to good offices, 222-225, some pieces which specifically discuss good offices include; Gordenker, *Maintenance of Peace* 144, Franck, *The Secretary General’s Role in Conflict Resolution* 360, Brehio, ‘Preventative Measures’, Ramcharan, ‘The Good Offices of the United Nations Secretary-General in the Field of Human Rights’, Simmonds, ‘Good Offices and the Secretary General’, Fischer, *Switzerland’s Good Offices*, In *Larger Freedom*, Dixon ‘Third-party Techniques’, Vicuna, ‘New Dispute Settlement Procedures’, Probst, “*Good Offices*”, Ramcharan, *Humanitarian Good Offices*, I. Johnston, ‘Role of the UN Secretary-General: The Power of Persuasion Based on Law’ (2003) 9 *Global Governance* 441

<sup>12</sup> Robert Adams & Benedict Kingsbury (eds) ‘United Nations, Divided World’ (2nd edn Revised Clarendon Press 1996) 133

<sup>13</sup> Dixon, ‘Third-party Techniques’

<sup>14</sup> Dixon, ‘Third-party Techniques’ 653-654

<sup>15</sup> Vicuna, ‘New Dispute Settlement Procedures’, 60

good offices. An individual uses “her” good offices, a subjectivity which is not as present in other forms of conflict resolution and in many ways is central to understanding the differences between it and these other types of conflict resolution.

The following definition of good offices is a good example of the historical understanding of its operation:

The involvement of one or more States, or an international organisation in a dispute between other States with the aim of settling it or contributing to its settlement. A further aim of such involvement is the solution of specific problems, which the States in question are unable or unwilling to solve themselves. Finally the intention may simply be to establish or ease relations between certain States<sup>16</sup>

Whilst this is a somewhat vague and narrow definition which would probably not be put forward today it does illustrate that it is the process involved in good offices which is paramount and not its form. Arguably this process differentiates good offices from other forms of dispute settlement. The definition also manages to eschew the use of conciliation or mediation as definitional attributes of good offices, a common characteristic of good offices classifications which will be discussed in the next section. As Merrills points out, alongside other forms of dispute settlement, good offices ‘cannot always be sharply distinguished from each other in practice, it is perhaps more accurate to suggest that good offices may include other forms of settlement in practice.’<sup>17</sup>

The definition above also shies away from a description of the measures undertaken to promote pacific settlement through good offices. Those omitted measures arguably have developed into the most important facets of good offices. If good offices is understood as a multifaceted form of dispute settlement with numerous techniques for resolution that is capable of evolving alongside the dispute understanding it as simply inter-state action is inappropriate. This understanding of good offices incorporates the undulation of conflict as it transforms from one classification to another, for example, from an intra-state to an internationalised conflict. As Bell points out, the participants in dispute settlement have moved beyond the state, and so too have the methods used by the practitioners of good offices. Indeed, the Commonwealth Secretary General is only involved in intra-state disputes and therefore his good offices would fall well outside the traditional definition above.<sup>18</sup>

The following section will discuss the legal definitions of good offices and the possible limited utility of these explanations in understanding modern conflict management. It will also show the evolution of good offices, from a narrow state-led international practice to a role which can be domestic, international or a hybrid activity which may follow the trajectory of a conflict and utilise a plethora of conflict management strategies well into any post-conflict scenario. This section will then focus upon the centrality of individuals as the purveyors of good offices, particularly the role of the UN Secretary General. This will

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<sup>16</sup> *Bernhardt Encyclopaedia of Public International Law II* (Max Planck Institute for Comparative Public Law and International law, 1999) 601, Though as Probst has pointed out, you could separate good offices into two categories, as he describes it the strict legal one and the more generic one. This misses one vital element however, both kinds are involved in legal settlement, supervision or resolution and therefore classifying them as legal good offices and non legal good offices does not result in any true understanding of their nature, nor does it take non-state actors in dispute settlement into account. Probst, “*Good Offices*” 1-2

<sup>17</sup> John G. Merrills, ‘*International Dispute Settlement*’ (4th edn CUP, 2005) 217

<sup>18</sup> For details of the Commonwealth’s involvement in good offices see <<http://www.thecommonwealth.org/subhomepage/190691/>>accessed 12 October 2010

underpin the relevance of good offices to conflict resolution and why its neglect as a point of analysis could potentially be remedied by *lex pacificatoria*.

### III. The evolution of good offices

The progress of good offices, particularly since the passage of the 1899 Convention for the Pacific Settlement of International Disputes has been rapid. The most significant changes have occurred since the end of World War II, where good offices has shifted in emphasis from the role of states such as Switzerland or Norway to the heads of international organisations. More specifically, the UN Secretary General and others such as the Commonwealth Secretary General<sup>19</sup> have played a part in significantly changing the understanding their role as exponents of good offices.

Over the past sixty years good offices has evolved quickly from a narrow state-led form of diplomacy to presently incorporating a wide spectrum of settlement activities. These activities encompass not only, at its narrowest interpretation facilitating talks or other more procedural obligations but also comprises active participation in negotiating, implementing and supervising both peace agreements and a broader array of complicated and substantive long-running settlements that often involve questions of humanitarian and human rights law.<sup>20</sup> Temporally good offices is employed as conflicts escalate into violence, during the conflict and also as a tool of resolution which can come in the form of negotiating ceasefires or most significantly the substantive settlement itself and after the conflict has ended into monitoring peace. This has moved good offices well beyond some of the traditional and particularly the pre-First World War treaty definitions.

No authoritative description of good offices has emerged to reflect this change and thus it is the early definitions, dating from the turn of the last century, which set out the treaty-based definitions of good offices.<sup>21</sup> This lack of certainty in the law of peace can be, as Bell describes, an advantage.<sup>22</sup> Indeed, the parameters of action are often delineated in the terms of agreement, be it treaty, declaration or otherwise. For example Higgins, writing about the UN Secretaries General good offices, argues that resolutions seeking her to act are always framed to 'leave the maximum flexibility.'<sup>23</sup> In examining the historical development of good offices the difficulties with classifying them either in the traditional state-centred

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<sup>19</sup>The Commonwealth has become increasingly active in good offices, The Millbrook Commonwealth Action Programme on the Harare Declaration, 1995, Issued by Heads of Government, New Zealand, 12<sup>th</sup> November 1995, The Harare Commonwealth Declaration, 1991, Issued by Heads of Government in Harare, Zimbabwe, both available from the Commonwealth website at [www.thecommonwealth.org](http://www.thecommonwealth.org). The Director General of the WTO is also active in good offices, The good offices role is contained in the Dispute Settlement Understanding under article 5; 'Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree'. article 5.6 sets out the particular role of the Director General, 'The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.' The Director General may also offer his Good Offices to Least Developed Countries under article 24.2 to prevent a dispute going before a Panel. These efforts largely occur before the actual proceedings of the dispute settlement procedure are underway. Under article 22.6 as the procedure which may include both a Panel and an Appeal Review, is underway the Director General can appoint an arbitrator if the parties to the dispute cannot agree on various deadlines.

<sup>20</sup>See for example the description in Ramcharan, *Humanitarian Good Offices* 35-51, Ramcharan, 'The Good Offices of the United Nations Secretary-General in the Field of Human Rights'

<sup>21</sup> This is besides the activities, for example, of the WTO Director General

<sup>22</sup> Bell, *On the Law of Peace* 166

<sup>23</sup> Roslyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 172

international or domestic constitutional law becomes evident. Nonetheless, state-based actors can no longer be asserted to be the centre of conflict resolution. In this section a very brief overview will be given of how good offices have emerged in the 21<sup>st</sup> Century as a possible exemplar of Bell's *lex* and more broadly the movement of international law away from Westphalian assumptions of state supremacy in conflict resolution.

#### A. *Treaty Based Good Offices*

Several treaties, both international and regional, include good offices as a form of conflict settlement. One of the earliest of these treaties is the 1899/1907 Convention for the Pacific Settlement of International Disputes.<sup>24</sup> It classifies good offices as sitting alongside mediation. Under Article 2, '[i]n case of disagreement or dispute, before an appeal to arms, the Contracting Parties agree to have recourse as far as circumstances allow to the good offices or mediation of one or more friendly powers.'<sup>25</sup> This appears to suggest that there is a clear division between good offices and mediation though not necessarily as mutually exclusive remedies. Good offices is often linked to both mediation and conciliation, even though arguably it encompasses both as well as other forms of dispute settlement and even beyond settlement into supervision during the period of post-conflict settlement. As such, mediation is distinct from good offices but good offices may include mediation.

Article 3 of the 1899/1907 Convention also states that, even during hostilities, powers that are 'strangers to the dispute'<sup>26</sup> should offer their good offices on their own initiative. This right of initiative has been a significant feature of good offices, particularly as multilateralism has evolved in the post Charter era. This right of initiative has been utilised mainly by the UN Secretary General, with both the Commonwealth Secretary General and the WTO Director General legally curtailed in the actions they may take. Article 6 the 1899/1907 Convention goes on to state that good offices have 'exclusively the character of advice and never has...binding force.'<sup>27</sup> This aspect of the Convention has lost much of its significance as good offices have expanded into the realm of negotiation and binding settlements.<sup>28</sup> This almost courteous version of good offices limits it to a very narrow base which would have little or no impact beyond cajoling parties into perhaps exchanging notes.

The American Treaty on Pacific Settlement 1948 sets good offices as distinct from mediation.<sup>29</sup> It is interesting as a regional and complete system of dispute resolution. More particularly in the evolution of good offices the characterisation of the move away from state-led good offices into the realm of eminent citizens, later echoed by the establishment of the Elders, is important. Article IX states that;

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<sup>24</sup> 1899 Convention for the Pacific Settlement of International Disputes, 1907 Convention for the Pacific Settlement of International Disputes

<sup>25</sup> article 2 is identical in both conventions.

<sup>26</sup> article 3, 1907 Convention for the Pacific Settlement of International Disputes

<sup>27</sup> Ibid. article 6

<sup>28</sup> An obvious recent example being the Annan Plan in Cyprus which in allowing the then UN Secretary General draft the ultimately unsuccessful peace agreement went far beyond what could be considered to be advice, though it did not have any binding force. The details of which can be seen at <[www.unficyp.org](http://www.unficyp.org)> accessed 24 March 2010. An example of binding good offices was the settlement in the Rainbow Warrior dispute where Du Cuéller at the request of France and New Zealand negotiated a binding settlement between the two States. Rainbow Warrior Dispute (1987) 26 ILM 1346

<sup>29</sup> The American Treaty on Pacific Settlement (adopted April 30th 1948) 30 *UNTS* 55, (Pact of Bogotá, A-42) for a examination of the revision of the system see A H. Robertson, 'Revision of the Charter of the Organisation of American States' (1968) 17 *ICLQ* 346



the procedure of Good Offices, consists in an attempt by one or more American Governments, not party to the controversy, or by one or more eminent citizens or any American State, which is not a party to the controversy to bring the parties together, so as to make it possible for them to reach an adequate solution between themselves.<sup>30</sup>

Though this dates from the post Charter-era is it still quite a limited reading of good offices. In stressing the disparity between it and mediation as opposed to adopting mediation into the definition it limits good offices to mere advice. This definition was also contemporaneous with the nascent efforts of the UN Secretary General and the rise of international organisations in good offices. The essential difficulty in these treaty-based definitions is that they do not recognise the development of good offices alongside the conflict. Mediation, conciliation, negotiation all may form part of good offices as the needs of the conflict dictate; this is what has come to be elemental in understanding good offices, not as a single form of settlement, but as a plethora of formats.<sup>31</sup>

### *B. State-based Good Offices*

To understand the origin of good offices it is necessary to understand its state-based foundation. Located in the heart of Europe, Switzerland, as a historically permanently neutral country,<sup>32</sup> is well placed to provide good offices to warring parties.<sup>33</sup> It first undertook the role of “protecting power” during the Franco-Prussian War (1870-1871). Though this role falls under the purview of humanitarian law, the vital negotiations between warring parties for the exchange of prisoners or information involves delicate negotiation and ultimately can and has lead to the resolution of disputes. Under the 1929 Geneva Convention Relative to the Treatment of Prisoners of War Switzerland continued this protecting power role for most of the major powers of the time except the USSR.<sup>34</sup> During World War II Switzerland was successful in negotiating better conditions for some prisoners of war though little other negotiation between the two sides took place, one exception was the Swiss negotiated separate surrender of German forces in Italy. This lack of negotiation was due mainly to the Allies agreeing to accept nothing less than complete surrender from the Axis forces.<sup>35</sup> In this period, with 36 mandates, Switzerland’s position as a protecting power reached its peak. Post World War II it has continued in this capacity, for example during the Suez Crises in 1956 and the Falklands War in 1982.<sup>36</sup> The most successful recent example of the use of Switzerland’s good offices was the French-Algerian settlement of 1962 which was the ‘last

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<sup>30</sup> Ibid. article IX

<sup>31</sup> These early interventions by the UN Secretary General include: UNSC Res 2, The Iranian Question (30<sup>th</sup> January 1946) UNSC Res 31, The Indonesian Question (25<sup>th</sup> August 1947). A more recent example, in the non-conflict good offices is the 1985 Vienna Convention for the Protection of the Ozone Layer, it provides in its dispute settlement procedure negotiation as the primary form of settlement, this is followed by good offices or mediation by a third party. This has since been supplemented by subsequent Conventions.

<sup>32</sup> Swiss neutrality was recognised after the Thirty Years War in the Treaty of Westphalia 1648

<sup>33</sup> As a more recent example in Europe Ireland has recently opened a good offices centre in its Department of Foreign Affairs, though neutral only on a policy basis See Aoife O’Donoghue ‘Neutrality and Multilateralism after the First World War’ (2010) 15 JCSL 202, it is an indicator that state based good offices is still alive and well. See <<http://foreignaffairs.gov.ie/home/index.aspx?id=82471>> accessed 23 May 2011

<sup>34</sup> 1929 Geneva Convention Relative to the Treatment of Prisoners of War (This has subsequently been replaced by the 1949 Geneva Convention Relative to the Treatment of Prisoners of War)

<sup>35</sup> F. Vagts Detlev, ‘Switzerland, International Law and World War II’, (1997) 91 AJIL, 466, 470

<sup>36</sup> For a full account of Switzerland Protecting Power mandates see Fischer, Switzerland’s Good Offices

occasion during the Cold War where Switzerland successfully mediated on its own in an international conflict.<sup>37</sup>

Prior to World War I one of the most important examples and successes of state-guided good offices was the resolution, by the United States, of the Russo-Japanese War (1904-1905). The negotiations, which were led by President Theodore Roosevelt and resulted in the Treaty of Portsmouth, formed the basis of Russian and Japanese relations until the outbreak of World War I.<sup>38</sup> The United States was not conventionally one of the main exercisers of good offices,<sup>39</sup> however this instance was effectively the last farewell of grandiose state-based great power diplomacy. While this is not an attempt to give a full overview of state-led good offices it nonetheless illustrates its decline as an alternative to subjective trust in the holders of international offices.

### C. *Post Charter Good Offices*

Article 2(4) as well as Chapters VI and VII of the Charter require methods of pacific settlement to be more expansive than had previously been asserted under international law. Though Chapter VI of the Charter does not mention good offices in subsequent resolutions of the General Assembly and Security Council note is taken of the Secretary General's good offices as a core method of dispute settlement and it is in this circumstance that good offices has developed its current incarnation.<sup>40</sup> What is apparent under the Charter, as well as in the use of the Secretary General's good offices, is that the character of any particular dispute will establish whether any binding measures can be forthcoming from good offices. The earlier Conventions, in omitting any binding quality, are now out of step with the practice discussed next. Specifically, good offices has developed most emphatically under the remit of Articles 99 and 98 of the Charter. While the language of Article 99 is open to interpretation, it arguably infers that threats to international peace and security are of interest to everyone.<sup>41</sup> As such, it contrasts with the American Treaty where no strangers to a dispute may become involved in a dispute.<sup>42</sup>

The UN Handbook on the Peaceful Settlement of Disputes contains one of the most expansive official, though clearly non-legal, definitions. 'When States party to a dispute are unable to settle it directly, a third party, may offer his [or her] good offices as a means of

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<sup>37</sup> Fischer, Switzerland's Good Offices 17

<sup>38</sup> Treaty of Portsmouth, The Conclusion of the Russo-Japanese War, signed at Portsmouth, New Hampshire. September 5th, 1905, See further Payson J. Treat, 'The Good Offices of the United States During the Sino-Japanese War' (1932) 47 Political Science Quarterly 547

<sup>39</sup> T. Denet, 'American Good Offices in Asia' (1922) 16 AJIL 1

<sup>40</sup> UNGA Res 43/51 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field (5<sup>th</sup> December 1988) and UNGA Res 37/10 The Manila Declaration on the Peaceful Settlement of Disputes between States (15<sup>th</sup> November 1982)

<sup>41</sup> Charter of the United Nations, UNCIO XV, 335, This has since been supplemented by the General Assembly Resolutions *inter alia* UNGA Res 37/10 The Manila Declaration on the Peaceful Settlement of Disputes between States (15<sup>th</sup> November 1982), UNGA Res. 43/51 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field (5<sup>th</sup> December 1988), UNGA Res. 50/50 United Nations Model Rules for the Conciliation of Disputes between States (11<sup>th</sup> December 1995) UNGA Res. 57/26, Prevention and Peaceful Settlement of Disputes, (3<sup>rd</sup> February 2003) Johnstone argues that UNSC Res. 1366 extends the power of Article 99 somewhat in that enables the Secretary General to bring to the attention of the Security Council cases of serious violations of international law. Johnstone, 'The Role of the UN Secretary General' 441-442

<sup>42</sup> The American Treaty on Pacific Settlement, Pact of Bagota

preventing further deterioration of the dispute and as a method of facilitating efforts towards a peaceful settlement of the dispute.’<sup>43</sup> It goes on to state that ‘[t]he third party exercising good offices normally seeks to encourage the parties to the dispute to resume negotiations, thus providing them with a channel of communication.’<sup>44</sup> This more accurately reflects what good offices have, in practice, become. While other areas such as mediation and adjudication have become increasingly significant in international dispute settlement, in situations of violent conflict, good offices fulfil the central role of providing a forum and enabling a flexible framework to become preeminent.

Thus there is no satisfactory legal definition of what good offices entails. The next section will specifically deal with the good offices of the heads of international organisations with an emphasis on the UN Secretary General and attempts to delineate how practice has established what good offices entails in the 21st Century.

#### IV. GOOD OFFICES AND THE HEADS OF INTERNATIONAL INSTITUTIONS

This section aims to discuss the evolution of good offices through the prism of the heads of international organisations. The Commonwealth Secretary General will be first briefly discussed, followed by a more in depth discussion of the UN Secretary General. The UN Secretary General has been at the forefront of the development of good offices over the past 60 years. In developing this role the Secretary General has had to navigate the restraints of both the UN structure itself as well as the complicated issues which have built up around conflict resolution. The section discusses how the UN Secretary General, as the driver behind good offices’ development in the post-Charter era, has changed the understanding of its operation.<sup>45</sup>

The good offices of the Commonwealth Secretary General are a distinct form of conflict management which is entirely circled by the membership of the Commonwealth.<sup>46</sup> In Fiji, Cameroon, Bangladesh, Guyana, Swaziland, Kenya, the Maldives and Tonga, among others, the Secretary General of the Commonwealth has successfully utilised good offices to bring about a pacific settlement.<sup>47</sup> Within the Commonwealth good offices are limited to its membership and to the upkeep of a certain standard of democracy that the organisation aspires to represent.<sup>48</sup> In contrast to the UN which regarded intra-state conflicts as outside its remit unless they posed a threat to international peace and security or there was a request from a government to intervene, the Commonwealth is, thus far, limited to these conflicts.<sup>49</sup>

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<sup>43</sup> The United Nations Handbook Para 101

<sup>44</sup> The United Nations Handbook Para 102

<sup>45</sup> Under article 6 of the Covenant of The League of Nations the Secretary General held a role limited to that of a purely administrative officer, though some commentators saw the role as ‘considerable’, it was suggested that any future organisations should have a figurehead, ‘chosen rather from statesmen than civil servants’. J. L. Kunz, ‘The Legal Position of the Secretary General of the United Nations’ (1946) 40 *AJIL* 786, 788

<sup>46</sup> The Commonwealth is itself a singular international organisation, William Dale, ‘Is the Commonwealth and International Organisation?’ (1982) 31 *ICLQ* 451

<sup>47</sup> <[www.thecommonwealth.org](http://www.thecommonwealth.org)> accessed 24 March 2010

<sup>48</sup> According to the Commonwealth website, with good offices the organisation aims to strengthen, ‘a country’s ability to govern democratically, respecting human rights and the rule of law.’ See <[www.thecommonwealth.org](http://www.thecommonwealth.org)> accessed 12 October 2010.

<sup>49</sup> Even though some conflicts such as the Congo or Cyprus, which the UN have been involved, would first appear to be intrastate, the involvement of outside forces have internationalised these conflicts

Therefore, it 'has not become involved in any conflict resolution between member states though it remains ready and willing to do so if asked by governments concerned.'<sup>50</sup>

The Commonwealth may act in concert with other organisations, be they regional, global, or with civil society. These good offices are never self-initiated, always arising out of the invitation of governments. The limitation to intra-state conflicts and the lack of self initiation together curtail the form which Commonwealth good offices takes, though this does not mean that it cannot positively contribute to pacific settlement. It is an example of how a very particular organisation can use its good offices to ease tensions in a discreet manner but also how international organisations can take the lead in conflict resolution.<sup>51</sup>

The Report of the Preparatory Commission of the United Nations stated that the Charter granted to the Secretary General a broad role in dispute settlement, 'The secretary general may have an important role to play as a mediator and as an informal advisor of many governments...to take decisions which may be justly called political.'<sup>52</sup> The establishment of dual roles in the office, both bureaucratic and political, is important. This duality is mirrored in the involvement of Secretaries General in good offices, both as political office holders and as bureaucratic or legal enforcers of peace agreements. The rather limited role of the first Secretary General Lie should be starkly contrasted to that which is now available to Ban Ki-moon. In many ways the evolution mirrors the progression of good offices from a very narrow doctrine to one central to conflict resolution. While the UN Charter is the legal basis on which the Secretaries General have based their activities it has been the active engagement in the process of conflict resolution which has led to much of the expansion over the past 60 years.

Under Article 99 of the Charter,<sup>53</sup> 'the Secretary General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of

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<sup>50</sup> Speech by the Commonwealth Secretary General Rt. Hon Don McKinnon, The Commonwealth and the Healing Touch, India International Centre, New Delhi, 17<sup>th</sup> February 2003, available from the Commonwealth website at <[www.thecommonwealth.org](http://www.thecommonwealth.org)> accessed 24 March 2010

<sup>51</sup> While the dispute settlement procedure of the WTO does not deal with violent conflict for two reasons, namely that it involves the head of an international organisation and secondly that trade has historically often been used as a tool of conflict, it will be very briefly discussed. Merrills states that the GATT system has always contained good offices, conciliation or mediation in some form Merrills International Dispute Settlement 217. The WTO dispute settlement system has shied away from making use of its good offices. The success of the Panel and Appellate Body procedures together with the non-expansive manner of the Director General's action has meant that the good offices role has rarely ever been utilised. Indeed the Director General in 2001 issued a Communication calling members attention to the possibility of making use of his good offices and encouraging members to do so. 'Article 5 of the Dispute Settlement Understanding' Communication from the Director-General WT/DSB/25, 17 July 2001. Good offices were invoked between Columbia and the EC: DS 361- EC-Regime for the importation, sale and distribution of bananas; between Panama and the EC: DS27- Banana import regime and ACP-EC Partnership Agreement and Ecuador and the EC: DS 27- EC- Regime for the importation, sale and distribution of bananas. The Handbook on WTO Dispute Settlement states that good offices normally consists of providing logistical support to help produce a 'productive atmosphere' whereas conciliation involves direct participation in negotiations discussion. Mediation consists of conciliation plus actual proposals for a solution. A Handbook on the WTO Dispute Settlement System: A WTO Secretariat Publication (CUP 2004) 94

<sup>52</sup> Report of the Preparatory Commission of the United Nations, Chapter VII The Secretariat, paragraph 16, available in Gordenker, Maintenance of Peace

<sup>53</sup> Chapter XV of the Charter sets out the functions of the Secretariat and the Secretary General, this accompanied with Chapter VI, Chapter VII and Chapter XIV set out the dispute settlement procedures available to the UN. While there is no specific mention of Good Offices anywhere in the Charter, subsequent practice, including resolutions of the Security Council and General Assembly, has made it an integral part of the UN's dispute settlements measures.

international peace and security' though as Kofi Annan has pointed out, 'successive Secretary Generals ...have invoked this article very sparingly.'<sup>54</sup> Hammarskjöld argued that Article 99 enables the Secretary General to undertake informal diplomatic activity with regard to international peace and security, which Johnstone asserts is the basis for good offices that arguably good offices has evolved from a much broader basis.<sup>55</sup> Article 98 grants to the Secretary General the capacity to, 'perform such other functions as are entrusted to him' by the Security Council, the General Assembly among others. These articles are the springboard from which the Secretary General's good offices role has emerged.

The Report on UN reform, *In Larger Freedom*, argues that to ensure the ongoing success of good offices continues additional resources for the further expansion of the role are required. '[U]sing the Secretary General's Good Offices to help resolve conflicts...but we could undoubtedly save many more lives...I urge Member States to allocate additional resources to the Secretary General for his good offices function.'<sup>56</sup> While this has not been followed by a formalisation of the role but it does indicate its prominence.

The initial steps into good offices by the UN Secretary General set the tone for what would follow. Crises in Iran, North Korea, Suez and Congo enabled the Secretary General to position the office at the centre of conflict management. The first time the Security Council made use of the Secretary General's good offices was in 1946 during the Soviet occupation of the Northern Azeri region of Iran, though the Secretary General had also been engaged here on his own initiative.<sup>57</sup> In the absence of the USSR, a resolution was passed which asked all parties to the dispute to report to the Secretary General on troop withdrawal, a Secretary General practice of post conflict monitoring which has since become a significant element of good offices.<sup>58</sup>

In 1950, Lie was invited by the Security Council to report on the circumstances subsequent to the North Korean invasion of South Korea. Lie, setting the tone for future reports, made his report in what has been described as a partisan, not purely "fact-finding" manner.<sup>59</sup> Franck points out that the making of reports on Security Council mandates to settle disputes allows the Secretary General to apportion blame and maintain a separate opinion to the disputants and indeed the Security Council itself.<sup>60</sup> Such requests for reports, which could be characterised as a form of inquiry, have become very common, with as many as 80 reports in 2010 alone.<sup>61</sup>

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<sup>54</sup> Kofi Annan, 'Dag Hammarskjöld and the 21<sup>st</sup> Century' Speech delivered on 6<sup>th</sup> September 2001 in Uppsala, Sweden. (2001) UN Chronicle No, 46

<sup>55</sup> Johnstone, 'The Role of the UN Secretary General' 443

<sup>56</sup> *In Larger Freedom*

<sup>57</sup> Subsequent ratification by the Security Council of an initiative of the Secretary General would become even frequent.

<sup>58</sup> UNSC Res 2, The Iranian Question (30<sup>th</sup> January 1946) this followed Soviet and British occupation of Northern Iran during World War II. The USSR eventually withdrew in May of 1946. In the same year a dispute regarding the northern Greek frontier with Yugoslavia caused the Security Council to create a Commission, which included the Secretary General, to resolve the dispute, though again Trygve Lie had already become involved of his own volition. Security Council Resolution 15, The Greek Question, 19<sup>th</sup> December 1946

<sup>59</sup> Gordenker, *Maintenance of Peace* 144

<sup>60</sup> Franck, 'The Secretary General's Role in Conflict Resolution' 360, 384

<sup>61</sup> Reports of the Secretary General to the Security Council dating from 1994 are available at the United Nations website at [www.un.org/documents/](http://www.un.org/documents/)

In March 1956, under instructions from the Security Council, Dag Hammarskjöld became embroiled in the Suez Crisis.<sup>62</sup> He reported on the level of compliance with the armistice agreement and made attempts to restore its effectiveness. He played a crucial role in bringing a relaxation in tensions and it has been reported that the parties involved in the armistice spoke of confidence in him.<sup>63</sup> The nature of this proactive engagement as a guarantor in the post conflict environment is an early indicator of what good offices was moving towards. The range of activities involved in this instance is also significant, even the short description here indicates a much broader role than that outlined in the treaty definitions already discussed.

It was in the Congo that Hammarskjöld really pushed the boundaries of the good offices role. As Gordenker points out, '[n]othing had more novelty than the role of the Secretary General in organising and directing the deployment of armed battalions.'<sup>64</sup> Prior to his Security Council mandate in the Congo, Hammarskjöld had already used his Article 99 powers to recommend the dispatch of peacekeepers to the region.<sup>65</sup> The autonomy Hammarskjöld had under the Security Council mandate was unprecedented.<sup>66</sup> This free-reign meant that he could respond to the pace of change on the ground. For the first time, the Secretary General was able to make decisions whose solutions were not already fixed by the Security Council. To illustrate just how the decisions were made in the Congo Hammarskjöld gave a line of authority to which a Secretary General should adhere when making determinations of what actions to follow. He argued she should first follow, 'the principles and purposes of the Charter which are fundamental law and accepted by and binding on all States.'<sup>67</sup> Secondly these were complemented with 'the body of legal doctrine and precepts that have been accepted by States generally and particularly as manifested in the resolutions of UN organs.'<sup>68</sup>

This explanation does not however present any possibility of good offices working within or being the realms of international law and thus weakens the potential for understanding its function more fully, particularly when the Secretary General becomes embroiled in constitutional transitional arrangements.<sup>69</sup> Yet, Hammarskjöld appears to be implying that it is only after guaranteeing compliance with the Charter, that the Security Council resolution becomes the guide to a Secretary General's actions. Kofi Annan also argued that, '[a] Secretary General must be judged by his fidelity to the principles of the Charter.'<sup>70</sup> This emphasises the office of Secretary General as an entirely independent actor not reliant upon the Security Council in conflict management.

That was the first Secretary General to become embroiled in the Cypriot conflict. Although the conflict began in the mid-fifties it was not until 1964, at the behest of the Security Council,<sup>71</sup> that Thant became involved.<sup>72</sup> It has since provided a common thread in which all

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<sup>62</sup> UNSC Res 118 Complaint by France and the United Kingdom against Egypt (13<sup>th</sup> October 1956), UNSC Res 119 Complaint by Egypt against France and the United Kingdom (31<sup>st</sup> October 1956)

<sup>63</sup> Gordenker, *Maintenance of Peace* 157

<sup>64</sup> *Ibid.*

<sup>65</sup> Evan Luard, *A History of the United Nations, Volume 2, The Age of Decolonisation 1955-1965* (Macmillan Press Ltd 1989) 220

<sup>66</sup> UNSC Res. 143, *The Congo Question* (17<sup>th</sup> July 1960)

<sup>67</sup> Harold K Jacobson, *Networks of Independence: International Organisations and the Global Political System* (Alfred A. Knopf Publishing), 137

<sup>68</sup> *Ibid.* 137

<sup>69</sup> See for example the Annan Plan

<sup>70</sup> Podium: 'Impartiality does not mean Neutrality. From a speech by the Secretary General of the United Nations to the Council on Foreign Relations in New York' *The Independent* (London January 22<sup>nd</sup> 1999)

<sup>71</sup> UNSC Res. 186, *The Cyprus Question* (4<sup>th</sup> March 1964)

of Thant's successors have been occupied.<sup>73</sup> As the conflict itself progresses the methods utilised by the Secretary General also evolves. From the limited techniques employed by Thant to Annan's composition of an unsuccessful settlement, Cyprus is a good example of the particular role good offices plays. In March of 1966 the first of many unsuccessful efforts to find a solution was made. In 1974, after the Turkish invasion, Waldheim aided in the development of a framework for negotiation, nonetheless, he stated '[o]n leaving Nicosia in February 1977, I felt as if the UN had accomplished a great deal; all the same I realised that it would be some time before a settlement could be reached.'<sup>74</sup> That became even clearer during the 6<sup>th</sup> round of talks that April in Vienna, which brought no progress.<sup>75</sup> Boutros Ghali began intensive negotiations to resolve the dispute in 1993 maintaining that the, 'continuation of the status quo was not a viable option.'<sup>76</sup> This was welcomed by the Security Council though again it did not result in a resolution.<sup>77</sup>

Annan, while once again not succeeding in settling the conflict, utilised good offices in an expansive manner. His attempts to resolve the conflict moved far beyond the traditional role of facilitator to becoming an arbitrator and ultimately composer of a proposed final settlement. Under the Comprehensive Settlement of the Cyprus Plan, if the parties failed to negotiate a solution they agreed to put to their people an agreement devised by the Secretary General.<sup>78</sup> This vote occurred on the 24<sup>th</sup> April 2004, the Turkish Cypriots accepted it by a margin of two to one; however the Greek Cypriots refused to accede by a margin of three to one.<sup>79</sup> Afterward, echoing Boutros Ghali, Annan stated that, 'there is no apparent basis for resuming the Good Offices effort while the current stalemate continues'.<sup>80</sup>

What is intriguing about this round of negotiations is the authority Annan had to circumvent the parties and address the populations directly. While in the Congo, despite Hammaršköld's power to conduct battles on the ground, he did not have the authority to bypass the political representatives and go directly to the people with a resolution.<sup>81</sup> Even by the broadest of definitions, this power goes far beyond what would traditionally be regarded as good offices. It does exemplify just how much the role has grown and the trust parties and the Security Council now have in good offices, subsequent acrimonious comments aside.<sup>82</sup> The current Secretary General is once again attempting to apply his good offices as ongoing negotiations

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<sup>72</sup> These Security Council requests have continued since see for example SC Resolution 1517, The Situation in Cyprus 24<sup>th</sup> November 2003

<sup>73</sup> The Elders have also become involved in good offices in Cyprus, see < <http://www.theelders.org/cyprus> > accessed 11 October 2010

<sup>74</sup> UNSG Report, Cyprus, SG S/12523 (30<sup>th</sup> April 1977)

<sup>75</sup> Kurt Waldheim, *The Challenge of Peace* (George Widenfled and Nicholson Ltd. 1980) 73

<sup>76</sup> UN Doc S/24472 of 21<sup>st</sup> August 1992

<sup>77</sup> UNSC Res 889 Cyprus (15<sup>th</sup> December 1993)

<sup>78</sup> See the Annan Plan

<sup>79</sup> UNSG Report Mission of Good Offices in Cyprus, S/2004/437(28<sup>th</sup> May 2004), 1

<sup>80</sup> Ibid. 437, 1- 2

<sup>81</sup> Annan Plan

<sup>82</sup> Reported in The Washington Times, June 14<sup>th</sup> 2004, 'In a seven-page response to a highly critical report on the Greek-Cypriot attitude by Mr. Annan, Mr. Papadopoulos described proposals for better relations with the Turkish-Cypriot state as "outside the secretary-general's good offices mission" and in "direct contravention of the Security Council resolution and international law." He termed Mr. Annan's conclusions "insulting," "offensive" and "flawed" and said the United Nations was setting itself up as "judge and jury."' Though given both sides agreed to let the Secretary General putting forward a settlement this seems more like political posturing given international criticism. For a more critical discussion of the Secretary General in Cyprus see, Claire Palley *An International Relations Debacle: The UN Secretary General's Mission of Good Offices in Cyprus 1999-2004* (Hart 2005)

between the sides continue, with talks having resumed in May, 2010.<sup>83</sup> Yet, this is one example where the lack of clear guidance or insight into the remit of good offices has made the Secretary General an all too easy target for criticism and claims that he has gone beyond his remit. In the aftermath of the Annan Plan it was arguably easier for the participants to make claims that Annan had overstepped the mark both as Secretary General and in his use of good offices as the legal parameters in which modern good offices operates is nebulous at best.

The General Assembly has not been as prolific as the Security Council in asking the Secretary General to use his good offices. Nevertheless it has been the General Assembly which has confirmed the importance of the Secretary General in dispute settlement.<sup>84</sup> An early example of the General Assembly's commitment was the establishment in 1950 of a Permanent Commission for Good Offices.<sup>85</sup>

One of the most significant features of General Assembly activities has been Secretary General's occasional adjustment of his mandate under what is known as the "Peking Formula." If, after having received instruction from the General Assembly, a Secretary General finds that the mandate either restricts negotiations or alternatively criticises one or more of the parties to a degree that it hinders negotiations he will distance the good offices from the resolution. This first occurred in 1954 when Hammarskjöld was asked by the General Assembly to negotiate the release of US aircrew hostages that having crashed in Chinese territory and were being held. The resolution heavily condemned the Chinese action in detaining the aircrew.<sup>86</sup> In order to reach a deal, Hammarskjöld disengaged himself from the very resolution that gave him his mandate. He assured the Chinese Government that their acceptance of him as the negotiator did not imply acceptance of the condemnation. The General Assembly use of good offices while contemporaneously accepting impartial political and diplomatic activity on the part of the Secretary General was nascent in developing the autonomy of the role. Hammarskjöld considered these developments to 'led to the acceptance of an independent political and diplomatic activity on the part of the Secretary General as the neutral representative of the Organisation'.<sup>87</sup>

Du Cuéllar's employment of the Peking Formula during the Afghan conflict is one of the more striking examples of its use. The USSR's veto in the Security Council meant that the General Assembly played a prominent role in granting a mandate to begin negotiations.<sup>88</sup> The General Assembly resolution called for the immediate withdrawal of Soviet troops; this was

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<sup>83</sup> See UNSC Res 1898 Cyprus (14<sup>th</sup> December 2009) and UNSG Report The Secretary-General on his mission of good offices in Cyprus S/2009/610 (30 November 2009) See <http://www.uncyprustalks.org/> accessed 12<sup>th</sup> October, 2010 Secretary-General Welcomes Resumption Of Cyprus Talks, SG/SM/12917 (20 May, 2010)

<sup>84</sup> For example, General Assembly Resolutions *inter alia* UNGA Res 37/10 The Manila Declaration on the Peaceful Settlement of Disputes between States (15<sup>th</sup> November 1982), UNGA Res. 43/51 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field (5<sup>th</sup> December 1988), UNGA Res. 50/50 United Nations Model Rules for the Conciliation of Disputes between States (11<sup>th</sup> December 1995) UNGA Res. 57/26, Prevention and Peaceful Settlement of Disputes, (3<sup>rd</sup> February 2003)

<sup>85</sup> UNGA Res 379(V) Establishment of a Permanent Commission of Good Offices (17<sup>th</sup> November 1950)

<sup>86</sup> UNGA Res 906/(IX) Complaint of Detention and Imprisonment of United Nations Military Personnel in violation of the Korean Armistice Agreement (10<sup>th</sup> December 1954)

<sup>87</sup> Gordenker, *Maintenance of Peace* 157 This was repeated in Cambodia, UNGA Res 34/22 The situation in Kampuchea (14<sup>th</sup> November 1979), UNGA Res 44/22 The situation in Kampuchea (16<sup>th</sup> November 1989) and UNSG Report A/41/707 (14<sup>th</sup> October 1986)

<sup>88</sup> UNGA Res 35/37 The Situation in Afghanistan and its Implications for International Peace and Security (November 20<sup>th</sup> 1980)



entirely unacceptable to the USSR and the Afghan Government it was supporting.<sup>89</sup> In order to conduct negotiations without the resolution stymieing dialogue the Secretary General distanced himself from it with successful results.<sup>90</sup> Urquhart described the Secretary General's involvement as 'offer [ing] a compelling example of an exceedingly difficult and long step by step process of UN conflict resolution in a situation in which others could not or did not wish to act.'<sup>91</sup> Further efforts were undertaken to resolve the domestic upheaval in Afghanistan after the Soviet withdrawal; however the collapse of the Najibullah regime in 1992 and the rise of the Taliban left little room for negotiation.<sup>92</sup>

Outside of the Security Council and General Assembly mandates, the Secretary General has employed good offices in a number of other occasions. In 1983 De Cuéllar together with the Secretary General of the OAS and the Contadora Group worked together to finalise a settlement of the many disputes that were entrenched in Central and South America.<sup>93</sup> As each dispute possessed its own particular characteristics a number of different conflict management methods were employed. Their efforts resulted in the Arias plan, the Esquipalas Accords I and II and the Declaration of Costa del Sol (these agreements included El Salvador, Guatemala, Honduras, Nicaragua, and Costa Rica).<sup>94</sup> De Cuéllar's involvement in Central America continued it was reported that on his last day in office, 'he refused to leave until the last intractable differences were settled, continuing his mediation 6 hours past the time he was due to depart.'<sup>95</sup> His personal involvement in settling the conflicts in Central America was decisive and without his intense motivation, it is doubtful that it would have been such a successful outcome. The fact that the majority of the activities undertaken were outside a Security Council or General Assembly mandate, helped to cement the independent good offices role.

The ability of the Secretary General to use Article 99, though it has been sparingly applied, in circumstances where he felt there was a threat to international peace and security, aided in the development of autonomous initiatives. In 1972 Waldheim used Article 99 to highlight the problem of international terrorism. This was an interesting departure in that it was not a specific incident, but a global problem, which was largely not state-specific, impacting upon international peace and security. In 1978 Waldheim again invoked Article 99 regarding the deteriorating situation in Lebanon. The Security Council, following his report, adopted a resolution giving Waldheim responsibility for the setting up peacekeeping force for Lebanon.<sup>96</sup>

A more recent development has been the use of good offices entirely outside the realm of the UN. This occurs where a request is made by parties to a dispute to the Secretary General to use his good offices. Probably the most famous incident of this type was the Rainbow Warrior Dispute.<sup>97</sup> An important aspect of this new departure is the amount of confidence now placed in the office of Secretary General and the authority that has been assigned to her. This confidence is quite distinct to that which comes through the Charter and is used by the Security Council or the General Assembly. How much this new authority depends on the

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<sup>89</sup>UNGA Res ES-6/2, (14<sup>th</sup> January 1980)

<sup>90</sup>UN Press Release SG/SM/4124 (20<sup>th</sup> April 1980)

<sup>91</sup>Benjamin Rivlin & Leon Gordenker (eds) *The Challenging Role of the UN Secretary General Making "The Most-Impossible Job in the World Possible"* (Praeger Publishing 1993) 155

<sup>92</sup>UN Press Release SG/SM/4727/REV. (10<sup>th</sup> April 1992)

<sup>93</sup>Consisting of Columbia, Mexico, Panama and Venezuela

<sup>94</sup> Rivlin & Gordenker *The Most Impossible Job* 177-178

<sup>95</sup> Rivlin & Gordenker *The Most Impossible* 181

<sup>96</sup> UNSC Res 425, Israel-Lebanon, (March 19<sup>th</sup> 1978) UNFIL

<sup>97</sup> Rainbow Warrior Dispute (1987) 26 ILM 1346

individual personality of the incumbent or the political climate at the time is unclear. Some observers have argued that when De Cuéllar took over as Secretary General in 1982 that his predecessors had created a, 'dispute settlement role' that could be in opposition to the position taken by most of the members of the UN.<sup>98</sup> Yet, not agreeing with an opinion or the general mood of the membership and being in conflict to a resolution are not equivalent; especially should the resolution be adopted under Chapter VII by the Council.<sup>99</sup> The Secretary General must therefore tread carefully when choosing which conflicts in which to become embroiled on the invitation of the disputants or under her own accord. While there is little or no possibility of review of the internal workings of the UN, Secretaries General have previously found their positions untenable due to opposition from member states, though this question relates more to the office of Secretary General than specifically to good offices.

Inevitably there have been times when the Secretary General's good offices have been futile or efforts to resolve a conflict elusive. This is probably best exemplified by the continuing attempts to reach a settlement in Cyprus. Though the bloodshed ended quite some time ago the intransigence of both sides has left successive Secretaries General in the unenviable position of attempting to find an accommodation that for some forty years has been unattainable.

The Security Council and the General Assembly have continued to make use of the now varied good offices role. Their assignment of such important missions, the independence that they have afforded to the Secretary General's office and their support of the initiatives of the Secretaries General have proven the depth of confidence now given to the good offices role. The legal basis of the Secretary General's good offices is not clearly demarcated. De Cuéllar stated that the Secretary General 'is a world citizen because all the world problems are his problems; the Charter is his home and his ideology and its principles are his moral code'.<sup>100</sup> This is nowhere clearer than in good offices.

Dixon noted in 1996 that the end of the Cold War was 'a crucial turning point in the management of international conflict' as pacific settlement of disputes emerged from the quagmire it had become immersed in.<sup>101</sup> Franck predicted that good offices would stagnate.<sup>102</sup> Good offices did perhaps look as if it would reduce in importance. This is most visibly seen in the limited role De Cuéllar had after the Iraqi invasion of Kuwait, with his mandate limited to meeting with the Iraqi Foreign Minister Tariq Aziz.<sup>103</sup> This circumscribed role left no room for negotiation other than merely requesting that the Iraqis leave Kuwait immediately. Yet Annan would later play a significant role during the lead up to the invasion of Iraq in 2003 which suggests that good offices have continued to play a prominent role in the work of the Secretary General.<sup>104</sup>

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<sup>98</sup> Adams & Kingsbury United Nations 148

<sup>99</sup> See further on the role of the Chapter VII, A. Tzanakopoulos 'Disobeying the Security Council: Countermeasures against Wrongful Sanctions' (Oxford Univ. Press 2011)

<sup>100</sup> Adams & Kingsbury United Nations 142

<sup>101</sup> Dixon, 'Third-party Techniques' 653

<sup>102</sup> Thomas, Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1997) 180

<sup>103</sup> UNSC Res 669 Iraq-Kuwait (24<sup>th</sup> September 1990), 'Welcoming the Secretary General's use of his Good Offices to advance a peaceful solution based on the relevant resolutions of the Council...'

<sup>104</sup> UNSG Report on children and armed conflict in Myanmar S/2009/278 (9<sup>th</sup> June, 2009) The UN Department of Political Affairs advises that it is currently giving good offices support to UN envoys or special advisers for Cyprus, Western Sahara, Myanmar, and the FYROM-Greece name dispute. See <[http://www.un.org/wcm/content/site/undpa/main/about/field\\_operations](http://www.un.org/wcm/content/site/undpa/main/about/field_operations)> accessed 12 October, 2010

### A. *Good offices today*

Thus there is no satisfactory legal definition of what good offices entails. The form which it takes largely depends on the circumstances in which it is requested or the mandate given to heads of international organisations by the institutions themselves. As a broad concept it is rarely abhorrent to disputants; it can conform and therefore adapt and evolve as negotiations advance. There is no catalogue of its exact content; rather it is intended to settle the conflict in the manner most suited to the situation. This can also be problematic, especially when the chief officer of an organisation has a panoply of other responsibilities and duties that potentially clash with a good offices' role. Where the delineations are unclear, vigilance is required to ensure that it always remains within the scope of what the particular institutions want their heads of organisation to become involved in and what is legitimate within the constitutional settlements of a state or states. This is where *lex pacificatoria* may be useful in establishing a parameter within which the process operates which is not dependent upon the bounds of traditional treaty law both between states and international organisations.

This section is not intended as an exhaustive analysis of the good offices of heads of international institutions. Rather it is an attempt to present the unstructured nature of the forms and processes associated with the practice of good offices in modern conflict resolution. What is clear from this synopsis is that contrary to the legal definitions presented by the various treaties discussed earlier good offices is a much more intricate form of conflict resolution than merely acting as a go-between. There are five basic arguments that set out the unique nature of good offices and why a re-conceptualisation of its legal basis is required to full encapsulate its present operation.

Firstly, a good offices practice has emerged, particularly in the Charter era that downgrades the importance of early treaty definitions. Secondly, good offices can follow the temporal and participant shifts in a particular conflict and is able to adapt to such changes. The most obvious example of this has been in Cyprus, where the evolution of the Secretary General's role has been an exemplar of how good offices can adapt to changing circumstances. Thirdly, good offices can be purely inter-state and thus international, entirely domestic or a mix of both, thus requiring a hybrid international/domestic legal understanding of good offices itself and the resultant peace settlement. The contrast in activities between the UN and Commonwealth Secretaries General is prime examples of the contrasting roles which good offices may fulfil that do not neatly come within the traditional international/domestic law dichotomy and the roles of international actors themselves as conflict management agents. Fourthly, good offices can continue in the post conflict scenario in the form of guarantor of enforcement and compliance.<sup>105</sup> This is clear in the Secretary General's involvement in Suez and Cyprus, where monitoring of conflicts and the reports produced by the office of Secretary General played an important role in the post conflict scenario. Finally, good offices are subjective in that it is confidence in both the individual and the office which is paramount. Thus the evolution of both the office of UN and Commonwealth Secretary General, both in the good offices role and besides, have been significant in understanding why such trust is placed in the offices and the individual's abilities to bring about an end to conflict.

This combination of factors makes the characterisation of good offices within the international/domestic law divide complicated. While it may be possible to discuss the UN

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<sup>105</sup> A further example of this is Annan's role during the Israeli withdrawal from Southern Lebanon in 2000, UN Documents S/2000/460 (22 May 2000) & S/2000/590 (16 June 2000)

Secretary General's good offices within the confines of the institution itself, understanding good offices as a more extensive form of conflict resolution presents obstacles. The most significant of which is while mediation, conciliation and other forms of conflict resolution are largely defined by the actual practice involved, good offices is centred around the actor who is undertaking the role. As such good offices can encompass any number of forms of conflict resolution, it may be entirely international or domestic or combination of both, good offices is defined by the actor undertaking the role, not by the form of conflict resolution that is undertaken. As there is currently little guidance other than what has been built through practice this leaves a gap in the analysis and the law. The next section will question whether Bell's *lex* presents a suitable resolution to this fissure.

## V. *LEX PACIFICATORIA*

Bell proposes *lex pacificatoria* as 'a new law of the peacemakers'<sup>106</sup> distinguishable from both international and domestic law.<sup>107</sup> This necessitates an analysis of law in peacemaking which is different to the traditional delineations that have in the past sustained legal analysis in conflict resolution. Good offices would inevitably come within this new conception of law as it is often the main or part of an array of processes employed to establish permanent peace. Yet before examining good offices within *lex pacificatoria* it will be necessary to discuss Bell's theory in more detail.

In 2006 Bell pointed to recent common trends that she argues gave rise to this new area of law.<sup>108</sup> Firstly, the end of the Cold War has seen an increase in the volume of violent conflicts that are entirely intra-state, secondly a new form of negotiation has evolved which focuses on direct talks between governments and armed groups, thirdly this resulted in patterns of resolution methods being established which drew a path between ceasefires and subsequent agreements resulting in new power distributions.<sup>109</sup> Bell later expanded this framework to include peacemaking in a much broader historical context. While many of the features described by Bell have come to prominence in the post Cold War, the elements just identified could certainly also be recognised in the evolution of good offices just discussed.<sup>110</sup> This is probably most evident in the changes in resolution methods brought about in the practice of good offices.

Sovereignty's place as the dominant feature of a traditional international law is at the core of Bell's argument for a realignment of the law.<sup>111</sup> Affirming the importance of human rights, self-determination and peacekeeping in the development of this *lex*, Bell contends that the traditional accounts do not accurately represent the impact that peace agreements have had

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<sup>106</sup> Bell, *On the Law of Peace* 285, Bell has also written on this idea in Christine Bell 'Peace Agreements: Their Nature and Legal Status' (2006) 100 *AJIL* 373, Christine Bell *Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'* (2009) 3 *IJTJ* 27

<sup>107</sup> Lesaffer discusses Gentili's development of *jus ad pacem*, though Bell's *lex* is not restricted to the post conflict scenario. Randall Lesaffer, 'Book Review, Christine Bell, *On the Law of Peace Agreements and Lex Pacificatoria*' (2011) 24 *LJIL* 519 -520

<sup>108</sup> Bell, *Peace Agreements* 373

<sup>109</sup> Bell, *Peace Agreements* 373-374

<sup>110</sup> The scope of the *lex* is very broadened by the discussion of the place of the Westphalian account of international law's development and an in the analysis of indigenous peoples in settlements.

<sup>111</sup> See for example Kall Raustiala, 'Rethinking the Sovereignty Debate' (2003) 6 *Journal of International Economic Law* 841

upon sovereignty and law.<sup>112</sup> She concludes that the, ‘twentieth century consolidation of treaty-making practice as a practice between states can be viewed as an aberration from what went before.’<sup>113</sup> This is exemplified by the role of the Elders,’ Tony Blair and most importantly the heads of international organisations now play in good offices.<sup>114</sup>

Peace agreements are essential in this *lex*’s composition; their formation, trajectories, classification and most importantly their hybrid nature illustrate why *lex pacificatoria* ought to be considered as separate both in practice and in analysis from traditional approaches to law. Bell defines peace agreements as, ‘documents produced after discussion with some or all of the conflict’s protagonists that address militarily violent conflicts with a view to ending it.’<sup>115</sup> Neither low level civil disturbances nor border incidences fall within this classification. The rise of peace agreements, the patterns into which they fit and their historical development set the confines of the *lex* perhaps better than the definition of peace agreements. Bell sets out three tenants of peace agreements, firstly they are both local and global, secondly they are hybrid international and domestic documents and thirdly they are simultaneously both process and substance.<sup>116</sup> Bell’s assertion that peace agreements are both global and local alludes to their local particularities but that they are also globalised in their incorporation of shared understandings of law. This in itself could lead to a disparate and anarchic array of examples, however if it is to be understood that Bell is implying that it is the identification of these two within peace agreements and not substantive examples, then it is a more sustainable argument.

The move towards local ownership of peace agreements shifts the emphasis from the state and to international law at a range of governance levels.<sup>117</sup> This necessitates an understanding of constitutionalism as core to the character of peace agreements. Bell’s examination of hybridity attempts to reconcile peace agreements as treaties and Westphalian international law. Bringing the Vienna Convention on the Law of Treaties,<sup>118</sup> the Geneva Conventions,<sup>119</sup> as well as customary international law together,<sup>120</sup> generates an understanding of the law that is not restricted to the state and persuasively makes an argument for a re-assertion of a broader understanding of treaties.

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<sup>112</sup> Bell, On the Law of Peace Chapters 2, 3 and 4. As an example of the more traditional historical accounts see Antonio Cassese, *International Law* (4th edn OUP 2005), Chapter 2, Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th edn Routledge 1997) Chapter 2, or Martti Koskenniemi, ‘Future of Statehood, The Symposium: After the Cold War: International Law in Transition, (1991) 32 HJIL 397

<sup>113</sup> Bell, On the Law of Peace 101

<sup>114</sup> The works of the subaltern movement also reflect this broader understanding of non-state actors and if this were the sole basis of Bell’s argument it would be questionable whether it requires an entirely new categorisation to encompass her interpretation of international law. See for example, Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004) Chapter 1

<sup>115</sup> Such questions as the identification of the protagonists are not settled, though these may also be related to other elements requiring opaqueness in some incidences of peace building Bell, On the Law of Peace 53, Bell examines a number of definitions that have already emerged and underscores some of the issues with these.

<sup>116</sup> Bell, On the Law of Peace 22

<sup>117</sup> Illan Wall, ‘On the threshold of Law: On the Law of Peace – *Peace Agreements and the Lex Pacificatoria* by Christine Bell’ Forthcoming, (2010) Irish Yearbook of International Law, available on SSRN at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1692822](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1692822)

<sup>118</sup> Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 and Vienna Convention on the Law of Treaties between States and International Organisation or between International Organisations (1986) 25 ILM 543

<sup>119</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces 75 UNTS 3

<sup>120</sup> Bell, On the Law of Peace 135

In one of the few pieces to tackle Bell's *lex*, Lang argues that a core problem with her theory is that in not establishing peace agreements as treaties their value as enforceable law is undermined and what results is soft law.<sup>121</sup> Lang points to the ICJ's decision in the *Armed Activities* case as an example of the detrimental impact of downgrading peace agreements upon their actual enforcement.<sup>122</sup> He argues that the proposed *lex* operates as a form of soft law which will not have the requisite muscle to keep participants to their promises, surely a central premise of peacemaking. As such it will also undermine the long development of international law as binding. If correct this would be a persuasive argument against this *lex* but his analysis is based upon a misinterpretation of Bell's theory.

The form of hybridisation that Bell suggests does not necessarily result in the creation of soft law, nor does it demote any agreement or seek to change how these agreements are enforced. Instead, what Bell potentially establishes is a succinct understanding of these agreements as hybrid documents and not simply fitting them to categories, either international or domestic, as is convenient for enforcement. The composition of the Annan Plan in Cyprus could be an example of this hybridity. Bell in looking to the Vienna Convention on the Law of Treaties and customary international law indirectly addresses some of the concerns associated with defining all peace agreements as treaties.<sup>123</sup> What Lang may be missing in his analysis is that if international legal personality is adhered to without reference to the equally important idea of subjectivity, and Westphalian methods of categorisation of law are clung to in all cases what will result is misapplication of the law.

Hybrid self-determination in Bell's *lex* means state redefinition, disaggregation and dislocation of power. State redefinition results from peace agreements fundamentally changing a state's character. While this initially may be symbolic it results in change at a constitutional level that eventually leads to renewed legitimacy for that state.<sup>124</sup> Arguably, legitimacy cannot be entirely based upon this assumption of change; this would require both the substance of the peace agreement and the process by which it is achieved, to find their legitimacy in the constitutionalised nature of the agreement. This would require too many assumptions regarding the nature of all peace agreements. State-redefinition arguably does occur, but its role as a legitimising factor as described by Bell is less convincing. The disaggregation of power re-conceptualises state power and sees it as addressing a state's internal sovereignty. It encapsulates sub-division of power, incorporation of a human rights regimes and changes in governance.<sup>125</sup> Dislocation of power is a more detailed concept, it moves power away from the territorially defined state and introduces one or both of two devices; that of bi or multi nationalism and international supervision, as is exemplified by the Secretary General in Suez. Thus traditional sovereignty is replaced in the law of peace by a more fluid understanding of its construction. International supervision generally requires a state to incorporate changes to ensure accommodation and inclusion of various groups, which can include good offices.<sup>126</sup> This is closely linked to disaggregation of power and introduces another element into the process of governance.

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<sup>121</sup> Andrej Lang, "Modus Operandi" and the ICJ's Appraisal of the Lusaka Ceasefire Agreement in the *Armed Activities* Case: The Role of Peace Agreements in International Conflict Resolution', (2008) 49 NYU JIL 107, 147-154 Lang's arguments are based upon Bell's article in the AJIL and not Bell's book.

<sup>122</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* 2006 ICJ Reports 204

<sup>123</sup> Bell, On the Law of Peace 108, 135

<sup>124</sup> Bell, On the Law of Peace 106

<sup>125</sup> Ibid.

<sup>126</sup> Bell, On the Law of Peace 106 - 107

Though the characterisations are not always as straightforward as just described, when these three elements are taken together hybrid self-determination emerges. However these three do bring together Bell's idea of an international transitional constitution as potentially a more relevant description of what peace agreements entail and may indirectly answer some of Lang's concerns.<sup>127</sup>

Bell describes these categories as flexible and dynamic and argues that they reinforce the importance of law in understanding peace agreements but also the need to move beyond positivist definitions.<sup>128</sup> Peace agreements should establish a set of obligations that will best lock state, non-state, international and domestic actors into relationships capable of implementing the peace agreement, as was done in the proposed Annan Plan.<sup>129</sup> The content of these agreements veer between ambiguity, when it is necessary to get agreement where there is none, and precision, when transitional arrangements will only operate with clear deadlines.<sup>130</sup> According to Bell this does not, as Lang assumes, mean that these lack form as legal documents, but simply illustrates law's varying place in the transition from conflict to peace. However, if law varies to the degree suggested by Bell, does it play a largely secondary role in peace-building exercises. This is not to agree with Lang, but rather to acknowledge the complex contextual parameters of negotiation that emerge in these situations.

Bell does not suggest that this is an entirely new body of law. Rather it is its hybrid character which highlights the traditional forms of categorisation as insufficient to fully understand the law that requires this *lex*, if it is to achieve its aims, to coherently situate law in peacemaking; otherwise it is merely being an exercise in rebranding. Much as the traditional treaty based definitions of good offices do not reflect its attachment to who is carrying out the role rather than a particular form of conflict resolution. This emergent field may also be symptomatic of the changes that have been perceived in the place of the state within international and transnational law.<sup>131</sup> It is also indicative of the move away from state-led good offices. While the debate on the place of the state is far from settled it has created room for analysis such as Bell's.

Bell suggests that a common body of law has emerged that creates a constitutional order which is symptomatic of a new law. 'Over the last fifteen years, an expertise has built up within international organisations, in particular the United Nations, and in the foreign offices

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<sup>127</sup> Anne-Marie Slaughter among others as well as ideas of legalisation and compliance, including queries regarding the legalised nature of obligations, the precision of the drafting process and the delegation to the third parties of enforcement and interpretation. See for example, Anne-Marie Slaughter, '*A New World Order*' (Princeton University Press 2004), Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, Duncan Snidal, 'The Concept of Legalization' (2000) 54 (3) IO 401, Ann-Marie Slaughter, 'International Law and International Relations Theory: A dual Agenda' (1993) AJIL 205, Anne-Marie Slaughter & William Burke-White, 'An International Constitutional Moment' (2003) 43 HJIL 1

<sup>128</sup> Bell, On the Law of Peace 138

<sup>129</sup> Bell, On the Law of Peace 161

<sup>130</sup> Bell, On the Law of Peace Chapter 8

<sup>131</sup> See for example, Slaughter & Burke-White, 'The Future of International Law Is Domestic' Andreas Fischer-Lescano, 'Redefining Sovereignty via International Constitutional Moments?' available at <http://ssrn.com/abstract=873905>, J. A. Caparoso, 'The European Union and Forms of State: Westphalian, Regulatory or Post-Modern' (1996) 34 CMLR 29, A. Claire Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis Of Legitimacy' (2001), 27 Review of International Studies 133, Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 Virginia Journal of International Law 1

of many Western states that can be argued to have generated its own momentum...'.<sup>132</sup> If this is indeed the case then good offices should fit well into Bell's theory.

### A. *Third Parties*

Third party participation in conflict resolution, including contributions that may or not be legal, questions of regulation and the 'grey zones of accountability,' have, as is evident in the earlier discussions on good offices, traditionally been difficult to analyse. In peacemaking, third parties can act as both external and self guarantors. As norm promoters they are placed at the core of peace agreements. Beyond the more traditional definitions of good offices, roles in interpretation and enforcement place third parties and thus good offices at the centre of this *lex*. Bell puts forth the contention that the more third parties are decision makers or enforcers the more legalised the process itself becomes.<sup>133</sup> Thus international third parties become part of the domestic constitutional order, as arguably Annan did in Cyprus, and therefore the peace agreement is as domestic as it is international. The resultant law is thus entirely hybrid in nature and invokes a non-Westphalian account of both international and domestic law. The hybrid nature of the *lex* and the impact of hybrid self-determination are significant linked by Bell to the idea of the post-sovereign state.<sup>134</sup>

In describing the difficulties involved in international transitional constitutional arrangements Bell incorporates the concept of constitutionalisation to conclude that it is necessary in further understanding the nature of peace documents.<sup>135</sup> This is linked to issues of legitimacy which third parties may face as interlocutors or constitutional actors. Questions of ownership can be difficult. Authority for third party involvement may fluctuate due to changes in parties, the state and other aspects and this should not be underestimated as a factor for peace-makers.<sup>136</sup> Certainly this has arisen for instance, with regard to the Secretary General and Cyprus, where the authorisation has come from the Secretary General, the parties themselves and self-initiation. The form of involvement has also evolved as the conflict has progressed. As Bell acknowledges third party involvement may result in both notions of positive social change and also imperialist or neo-colonial interpretations which as identified in the sub-altern movement can ultimately be destructive.<sup>137</sup> The necessity of developing the Peking Formula underpins this argument. Wall cautions that Bell's proposition could be used as a neo-imperialist tool to allow for third party involvement to reconfigure states in a mode which is judged more suitable to democratic ends.<sup>138</sup> It is necessary for Bell to establish more definitively the parameters of third party involvement, though this does not undermine the overall cohesiveness of her argument.

Bell argues that from the scale of peace agreements a large number of common trends appear to create a law of the peacemaker that is discernable, autonomous and that stands as a

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<sup>132</sup> Bell, *On the Law of Peace* 43

<sup>133</sup> Bell, *On the Law of Peace* 175

<sup>134</sup> Bell, *On the Law of Peace* 231

<sup>135</sup> Bell, *On the Law of Peace* Chapter 10 See for example, Martin Loughlin & Neil Walker (eds.) *The Paradox of Constitutionalism* (Oxford University Press 2008), Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalisation of International Law* (Oxford University Press 2009), Jeffery L. Dunoff & Joel P. Trachtman, (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009)

<sup>136</sup> Bell, *On the Law of Peace* Chapter 13

<sup>137</sup> See for example Anghie, *Imperialism, Sovereignty*

<sup>138</sup> Wall, 'On the threshold of Law'



reasonable alternative to domestic law that may be considered partisan or international law and is stymied by the Westphalian order.<sup>139</sup> This common body of law creates a cosmopolitan order which is symptomatic of a new law. The participation of third parties in this process is an integral facet of this new order.

## VI. Does understanding Good Offices through the lens of *lex pacificatoria* offer a better understanding of its nature

Good offices may, with some qualifications, be a good exemplar of Bell's *lex*. Good offices in the milieu of conflict resolution certainly fit within the narrative proposed by Bell. The rise of peace agreements and the patterns of resolution which are central to Bell's *lex*, are discussed in this section to attempt to decipher whether good offices is a model for the application of the *lex* or if it only partially explains its character. As Bell's *lex* only applies to violent conflicts it can only be this aspect of good offices where it is relevant. This leaves a large swath of good offices still bereft of a contextual analysis. The work undertaken within international administrative law may offer some opportunity for understanding good offices in its broader context.<sup>140</sup>

Arguably Bell's description of the re-emergence of a non-Westphalian view of treaty law since the Cold War is both undermined and reinforced by the practice of good offices.<sup>141</sup> Certainly state-led good offices come within the traditional account of international law; however, the roles played by the heads of organisations herald a move away from the state.<sup>142</sup> These actors in international law have presented themselves as independent of both the participants in the conflict and their organisations. This is epitomised by the activities of the UN Secretaries General in Cyprus and South America, where the office has acted not to represent any particular sovereign view but rather to establish peace.<sup>143</sup>

The three characteristics of peace agreements outlined by Bell; local and global, hybrid and process and substance, are identifiably as attributes of the type of settlements which have resulted from good offices. The local implications of good offices coupled with the global impact of their use are evident in the examples already discussed. Though importantly, in the historical context, these were undertaken within a Westphalian understanding of the role of peacemakers. Yet the hybridity of the law as outlined by Bell is evident in the actions undertaken, predominantly by the UN Secretary General, in good offices.

The examples of peace monitoring agreements, the Commonwealth's solely intra-state involvement, the Annan Plan, among other examples, present difficulties for the state-led understanding of international law.<sup>144</sup> The involvement with non-state actors, the domestic

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<sup>139</sup> Bell, *On the Law of Peace* 285

<sup>140</sup> See for example, Benedict Kingsbury & Lorenzo Casini 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 *International Organizations Law Review* 319, Benedict Kingsbury, 'The Concept of 'Law' in Global Administrative Law' (2009) 20 *EJIL* 23, Nico Krisch & Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *EJIL* 1

<sup>141</sup> Bell, *On the Law of Peace* 101

<sup>142</sup> See also Jürgen Habermas, (C. Cronin trs) *The Divided West* (Polity Press 2006) 115 -116

<sup>143</sup> The Annan Plan

<sup>144</sup> For details of the Commonwealth's involvement in good offices see <<http://www.thecommonwealth.org/subhomepage/190691/>>accessed 12 October, 2010 and the UN Department

constitutional implications of the actions undertaken, alongside the mainly international actors who are using their good offices to resolve the dispute, makes the hybridity presented by Bell attractive as a concept. It helps to unravel the parameters in which good offices are understood as it focuses upon the nature of the conflict and not on the actors, as domestic or international.

The fears that are expressed by Lang regarding unenforceability are not easily observable within good offices.<sup>145</sup> This may be due to the associated responsive form that good offices takes which often means that whether the resulting agreement has been enforceable under international law has been a consideration or at least has rarely been litigated.<sup>146</sup> Nonetheless, if this is the case it does not allay Lang's more general concerns. Yet, as has already been discussed, hybridity does not result in soft law and nor it is contended here, does good offices. The idea that this *lex* is both process and substance does resonate with good offices. In operation the adaptable nature of good offices allows it to be at once or alternatively both process and substance and as such adapt the changing parameters of the conflict.

Bell's argument that third parties may be both external and self guarantors as well as norm promoters certainly comes within good offices' remit and is recognisable as central to the role that good offices fulfil. Good offices tend to come within a legalised framework either as part of the treaty or an institutional system, for example the UN. In presenting good offices as part of the *lex* any attempts to understand it purely as an international phenomenon may be abandoned. Two aspects of Bell's *lex* will be central to this; hybridity together with process and substance. The strength of good offices lies in its ability to adapt. This, however, should not eschew the legitimisation that is important particularly in constitutionalisation, dislocation of power and state re-definition that takes place during conflict resolution.<sup>147</sup> Though it is questionable whether the legitimacy suggested by Bell can be achieved solely through these two elements combined, it does go some way to explain the character of peace settlement.

Even prior to the end of the Cold War, which both Bell and Franck consider to be an essential turning point in conflict resolution, in Afghanistan or South America certain good offices operations had already focused on non-state actors.<sup>148</sup> These direct talks tend to use broadly similar methods that do appear to resonate with the pattern which Bell suggests is emerging. Though the publication of the outcomes belies what De Cuéllar described as 'quiet diplomacy' the more recent transparency, for example in Cyprus, does suggest that it may be emerging from the shadows.<sup>149</sup> The patterns which have developed over the past 60 years have set the confines of good offices and this may be paralleled in the patterns of peace agreements which as Bell suggests have begun materialize as a coherent model.

Arguably the introduction of Bell's *lex* to good offices would sit comfortably within the legalisation of international relations and more particular institutional relations that since the

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of Political Affairs see, <[http://www.un.org/wcm/content/site/undpa/main/about/field\\_operations](http://www.un.org/wcm/content/site/undpa/main/about/field_operations)> accessed on 12 October, 2010

<sup>145</sup> Lang, *Modus Operandi*

<sup>146</sup> Though there are naturally exceptions such as the *Armed Activities* case that Lang discusses *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* [2006] ICJ Reports 204

<sup>147</sup> Bell, *On the Law of Peace* Chapter 10

<sup>148</sup> UNGA Res 35/37 The Situation in Afghanistan and its Implications for International Peace and Security (November 20<sup>th</sup> 1980), Rivlin & Gordenker 155, Franck, 'The Secretary General's Role in Conflict Resolution' 360,

<sup>149</sup> Adams & Kingsbury *United Nations* 133

end of the Cold War has become apparent.<sup>150</sup> Bell's discussion of legalisation and compliance raises questions of the relative utility of this process within good offices. What possibly can be gained from attributing a legal framework to a form of conflict resolution which, as already demonstrated, has functioned successfully and perhaps better than it otherwise would have due to its lack of legalised structure? One answer is that as good offices develops into taking more domestic constitutional roles as well as its non-statist approach than has previously been the case it makes it now incumbent upon it and the actors involved to partake in a legitimised structure which neither international or domestic law wholly provide.

There are aspects of good offices are left unanswered by the *lex*. As practitioners of good offices, what are the specific actions that they may or may not take? If it is entirely an internal dispute are they domestic actors or does the presence of such actors internationalise the conflict, if they become signatories or monitors of peace agreements do they thus take on constitutional positions and what of the conflicting obligations of the institutions that the heads of organisations represent. These issues raise uncertainties as to the question of legitimacy which third parties must face as interlocutors or alternatively as constitutional actors within a legal classification of any kind. Questions of ownership can be particularly difficult in processes that include third parties. Authority for third party involvement may fluctuate due to changes in parties, the state, addition of other actors or other similar factors and this should not be underestimated as a dynamic aspect of the approach of peacemakers to their charge.<sup>151</sup> As Bell acknowledges third party involvement may result in notions of positive social change also in imperialist or neo-colonial interpretations.<sup>152</sup> The Peking Formula is one manner in which the UN Secretary General has sought to distance himself from the condemnation of the Security Council, but this action may be equivocal in achieving distance from accusations of hegemony.<sup>153</sup>

The pattern of conflict resolution which, particularly the UN Secretary General, has been setting can certainly be characterised as hybrid, the implications of their roles can be local and global, in which the third party actors are characterised by their position as non-state international actors whose legal role is nebulous at best. Bell's *lex* describes a landscape of conflict resolution which good offices comfortably fits within. While leaving a lot of questions open to further discussion it presents a cohesive method of tackling some of the issues which good offices, as an unregulated form of conflict resolution, has produced particularly since the advent of the non-state actor as the driving force behind it.

## VII. CONCLUSION

Good offices operates as a distinct form of conflict resolution. As a form of conflict resolution that is defined by who is undertaking the office as opposed to the form it takes, it is set apart from other forms of conflict management. Its lack of legalised characteristics has allowed it to evolve into a dynamic form of conflict management. The qualities that have emerged as integral to its operation, ability to evolve alongside the conflict, the international actor as a central figure in its process, the involvement in the entirety of a conflict from prior

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<sup>150</sup> Abbott, Keohane, Moravcsik, Slaughter, Snidal, 'The Concept of Legalization', Martha J. Finnemore & Stephan Toope 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 International Organization 743

<sup>151</sup> Bell, On the Law of Peace Chapter 13

<sup>152</sup> Ibid.

<sup>153</sup> Gordenker, *Maintenance of Peace* 157

to the descent into violence to potentially long after it has ended, presents good offices as a core part of third party management of conflicts. What Bell's *lex* offers is a source of analysis to understand the parameters of good offices where traditional international and domestic law categories are insufficient and do not allow for a cohesive analysis.

Bell's *lex* establishes a structure within which conflict resolution and management is understood, not as either an arm of international or domestic law but rather as a discipline with its own principles that is best understood in its own right. As Wall argues, Bell's proposal incorporates aspects of jurisprudence that are not often considered integral to understanding the nature of international or domestic law.<sup>154</sup> While certain aspects of the substance and process structure, for example, are not as yet fully developed, as it stands, Bell's *lex* is a sound basis under which to conduct a more ordered and coherent analysis of good offices. The pattern that has developed over the past century and identified by Bell, can readily be recognised in good offices and the *lex* provides at least an opportunity to readily discuss these issues.

Good offices can no longer meander between conflicts without questions of legitimisation and legalisation being raised. It is, at times, suggested that transparency and analysis would constrain the actions of those who seek bring about pacific settlement through good offices, but this does not outweigh the need for legitimacy.<sup>155</sup> The pattern that is described by Bell requires third parties that become involved in constitutional settlement and the dislocation of power good offices to at the very least be considered a large player in the conflict management arena. In broader arguments regarding global legal governance, the place of such legitimisation structures is vital, though good offices may still be left relying on certain institutions and processes to provide this foundation.

In the evolving background of conflict resolution and management good offices has emerged as central to the processes employed to bring about the end of violent conflict. Good offices has moved from the purview of states, to international institutional actors to the current activities of the Elders or indeed Tony Blair. As long as this evolution continues the inadequacies of the legal investigation into the structures behind good offices will lead only to accusations of illegitimacy and ultimately that international actors, such as the UN Secretary General, are acting outside of their remit. At the very least Bell has provided a framework in which at least some of the problems that have been thrown up by the practice of good offices can be debated in a coherent and constructive manner.

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<sup>154</sup> Wall 'On the threshold of Law: On the Law of Peace'

<sup>155</sup> UN Secretary General. De Cuéllar described good offices as, 'quiet diplomacy', Adams & Kingsbury United Nations 133