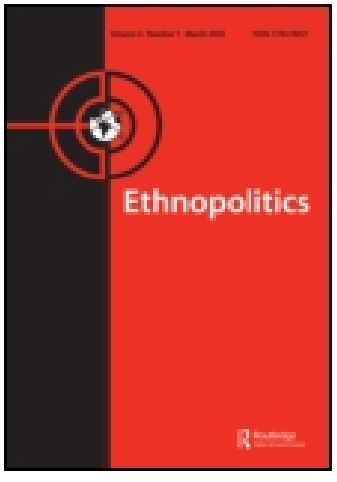

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Democratic and Legal Obstacles to Mediator-imposed Peace Plans

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Democratic and Legal Obstacles to Mediator-imposed Peace Plans

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What are international mediators to do if one or both parties to a conflict are unmoved by their efforts, or doubt their impartiality, or stubbornly decline to accept the (presumed) superior wisdom of their advice? The answer, in most cases, is that they announce that some progress has been made but the conflict is not yet ripe for settlement, and move on. In their recent initiatives in the cases of Cyprus and Kosovo, however, the mediators were authorized to try a different approach—one that James Ker-Lindsay describes as more 'robust and interventionist' than 'traditional' mediation, whatever that might be. It involved mediator-imposed timeframes to prevent the negotiations from dragging on endlessly and the option, as a last resort if the mediators deemed that no agreement could be reached, of their stepping in and proposing their own preferred terms of a 'final' settlement—which in both cases would require further steps: popular endorsement in two separate but simultaneous referendums in the case of Cyprus and ratification by the United Nations Security Council in the case of Kosovo.

While this approach represents a somewhat novel departure from the many previous attempts by the UN and others to mediate the long-frozen Cyprus conflict, it is by no means obvious that it sufficiently resembles arbitration (the rendering of a final decision that is backed by the authority of law) to justify labeling it with the neologism 'meditration'. Nor is it obvious that existing terminology is inadequate. Touval and Zartman (1985) usefully identify three broad types of mediation strategy or approach: *communicative/facilitative* (helping the parties to negotiate with one another); *formulative* (structuring elements of the agenda and introducing initiatives); and *manipulative/directive* (maneuvering the negotiations towards a preferred outcome). In Cyprus, the UN mediation was intended from the start to be formulative, but later added the option (with the consent of both parties) of becoming directive. The Kosovo mediation was plainly directive, with never more than a faint hope that formulation might suffice.

Historically, there has been considerable variation in the way mediations have been conducted (Bercovitch & Gartner, 2006). It is not unknown for mediators (without the slightest hint of arbitrator-like powers in their terms of reference) to assume an activist

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role in setting the terms of draft settlements, or to engage in arm-twisting, or even to issue threats, for example, to close down the negotiations or (in one extreme case) to precipitate the use of military force. George Mitchell, at a particularly frustrating impasse in the Northern Ireland peace negotiations, famously uttered this none-too-subtle threat of closure: 'I can only jump once', he said, likening himself to Humpty Dumpty (quoted in Curran & Sebenius, 2003, p. 138). Richard Holbrooke, the mediator of the Dayton Accords for Bosnia-Herzegovina, made clear at the outset of 'negotiations' (or, more accurately, 'non-negotiations') that he had the backing to do whatever was necessary to force an agreement, including further NATO bombing of Serbia (Curran *et al.*, 2004).

Mitchell's approach merits closer attention, as it was genuinely mediative and at different stages employed all three of the approaches identified above. Arguably, that constitutes a more significant and original departure from past practices than anything that took place in the Cyprus or Kosovo mediations.

Granted, he had no formal authority to impose a final draft; instead, he adopted mediating strategies that enabled him, in effect, to exert a large and at certain key points even a determinative influence. His 'Mitchell Principles' of commitment to non-violence and democracy became the criteria for determining whether parties would be included or excluded from the talks; his procedural rule of 'sufficient consensus' (and his practical tests to determine 'sufficiency') enhanced his discretion and authority over the negotiations, and his use of 'variable participant geometry' to shape the format and size of meetings enabled him to put his own distinctive stamp on specific aspects of the proceedings and laid the groundwork for his later coalition-building efforts in support of a general settlement (Curran & Sebenius, 2003). He also assembled a group of expert backroom advisers (he was, after all, a former US Senator) to anticipate objections and draft new proposals before positions became entrenched; and he used the media to advantage, adroitly picking moments to 'go public' in order to exert pressure on would-be spoilers. Finally, Mitchell's long and successful political career meant that he understood the cross-pressures that the participants were under and hence the need to draft an agreement that most (if not all) of them would find politically palatable and—no less important—saleable to their constituents when put to the test in a referendum.

In the case of Kosovo, considerations of democracy did not play a part, for the reasons that Ker-Lindsay gives. He also rightly points to the imposition of the Ahtisaari Plan as one reason for the messy and legally dubious outcome. Another, I would suggest, was the unconvincing rationale that Ahtisaari proffered for riding roughshod over Serbia's awkwardly strong case under international law—that Kosovo was 'a unique case' and would 'not create a precedent'. Finally, there was a curious absence of mind about the end game. As then EU Commissioner for Enlargement, Olli Rehn, put it: 'we have no exit strategy, only an entry strategy' (quoted in Brey, 2007).

In the case of Cyprus, it is not hard to understand why the UN chose to adopt the approach it did or why it enjoyed the support and cooperation of other national and international bodies, including, most importantly, the EU. After nearly 40 years of UN involvement in Cyprus, punctuated with numerous fruitless attempts to mediate, it was time to try something different. Kofi Annan was surely correct in his belief that EU expansion, with Cyprus as one of the prospective new members, combined with political developments in Turkey that gave new impetus to that country's quest for EU accession, had created a unique window of opportunity (Bahcheli & Noel, 2005). Moreover, the EU timetable meant that key deadlines were already in place and non-negotiable. On this basis, the UN

proceeded to launch what was probably the most elaborate mediation ever undertaken. If detailed knowledge, long experience, sophisticated theoretical understanding and expert technical draftsmanship could ensure the success of a peace agreement, the resulting Annan Plan would surely have been the most successful agreement ever concluded. What then caused it to fail?

I agree with Ker-Lindsay that the imposition of the final terms by the mediator was one factor that contributed to its failure. Such interventions almost inevitably arouse negative reactions in cases of ethnonational conflict, and Greek Cypriots in particular have an acute sense of resentment over past impositions by outside powers. But there were also other factors at work. The underlying reason for the failure, I would venture, resides less in the character of the mediation itself than in the politics surrounding the mediation. Democratic referendum fights tend to be partisan, rough-and-tumble affairs whose outcome is hard to predict, apart from the general rule that a no vote is easier to get than a yes vote. Beyond the specifics of the Plan itself, a context of positive incentives needed to be put in place that would make the Plan more saleable to both sides. The UN and EU leaders must have understood that the referendum requirement meant that eventually the genie of democracy would have to be let out of the bottle. Yet they ignored contextual factors, misread the political situation in Cyprus, north and south, and miscalculated accordingly.

With hindsight, it is easy to fault their judgment. Critics may point to the EU's 2002 decision to admit Cyprus to full membership regardless of whether a peace agreement had been signed as a serious and possibly fatal misstep. It meant that Greek Cypriots, with their main reward already in the bank, would have little incentive to vote yes. Critics may also point to the failure of EU and UN officials to recognize a clear warning sign in 2003 when Greek Cypriots elected Tassos Papadopoulos—a long-time nationalist hardliner—as president by an unusually wide margin. Moreover, he had defeated an incumbent, Glafcos Clerides, who had not even endorsed the Plan but could not overcome suspicions that he might. Exit polls showed that 30% of voters voted *solely* on the Annan Plan and another 40–45% voted partly on it (Civilitas Research, 2003). However, in 2002 the EU leaders had what must have seemed good and sufficient reason (relating to their higher priority of keeping the ten-member expansion on track) for dropping the peace agreement precondition for Cyprus; and in 2003 they had the bulk of expert opinion on their side in believing that it was Rauf Denktash, the Turkish Cypriot leader, not Papadopoulos, who was the main obstacle.

In the end the final verdict on the Annan Plan was rendered by the people, freely and fairly, as was their democratic right. It is not necessarily a fault of the mediator when voters vote as they please.

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