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978-1-107-02687-2 - Principled Negotiation and Mediation in the International Arena:

Talking with Evil

Paul J. Zwier

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## PRINCIPLED NEGOTIATION AND MEDIATION IN THE INTERNATIONAL ARENA

This book argues that it can be beneficial for the United States to talk with “evil” – that is, terrorists and other bad actors – if it uses a strategy that engages a mediator who both shares the United States’ principles and is pragmatic. The project shows how the United States can make better foreign policy decisions and demonstrate its integrity for promoting democracy and human rights if it employs a mediator who facilitates disputes between international actors by moving them along a continuum of principles, as political parties act for a country’s citizens. This is the first book to integrate theories of rule-of-law development with conflict resolution methods, as it examines ongoing disputes in the Middle East, North Korea, South America, and Africa (including Uganda, Sudan, Kenya, and Liberia). It uses a narrative approach, drawing on the author’s experiences with The Carter Center and judicial and legal advocacy training to give the reader a sophisticated understanding of the current situation in these countries and of how a strategy of principled pragmatism will give better direction to U.S. foreign policy abroad.

Paul J. Zwier is Professor of Law and the Director of the Program for International Advocacy and Dispute Resolution at Emory University. Zwier is the former director of public education for the National Institute for Trial Advocacy. He is one of the nation’s most distinguished professors of advocacy, negotiation, and mediation skills training. He is the author of numerous books and articles, including, most recently, *Torts: Cases, Problems, and Exercises*, 4th ed. (2012, with Weaver et al.); *Mastering Torts* (2009); *Supervisory and Leadership Skills in the Modern Law Practice* (2006); *Legal Strategy* (2006); and *Advanced Negotiation and Mediation Theory and Practice* (2005, with Guernsey). He has made professional presentations and consulted with dozens of NGOs, law firms, and other international organizations.

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# Principled Negotiation and Mediation in the International Arena

**TALKING WITH EVIL**

**Paul J. Zwier**

*Emory University, School of Law*



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## PREFACE

December 20, 2008. Ramallah, West Bank. The deadline for the ending of the Gaza cease-fire is fast approaching. I am sitting next to Rafiq Husseini, a senior executive with the Palestine Liberation Organization (PLO), and can sense his frustration. We were late for our meeting, having just arrived from Syria after a harrowing trip through Jordan. The room's fluorescent lighting makes us all squint. It's a little stuffy and you can smell the faint odor that comes with all-day travel in a small taxi. My companions, Hrair Balian, The Carter Center's director of Peace and Dispute Resolution Programs, and Robert Pastor, President Carter's former national security director for Latin America, are engaged in last-minute shuttle diplomacy on behalf of The Carter Center. They had previously accompanied President Carter in recent trips to Lebanon, to Syria where they talked with President Assad, and also to Hamas. They are carrying messages they hope will lead to an extension of the cease-fire in Gaza, while President Carter goes back to the United States to try to get the ear of the pre-inauguration Obama administration to help put pressure on parties to extend the cease-fire. If everyone could just communicate with each other, it might still be possible to break the deadlock on Gaza, and the parties could return to the bigger question of the two-state solution.

The U.S. ambassador to Israel, Richard Cunningham, has been less than interested in The Carter Center's (TCC's) efforts at shuttle diplomacy. The Bush II foreign policy refuses to talk to terrorists. The United States officially agrees with Israel that it is counterproductive for Israel to talk to Hamas before Hamas agrees to recognize Israel's right

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to exist, and the United States and Israel have declared that Hamas is a terrorist organization. The United States has also given Israel carte blanche to decide what it needs to do to secure itself. And besides, the United States doesn't talk to people it has declared "evil."

Balian and Pastor's efforts, however, are not directed at the Bush administration. They are trying for a quick bargain for peace between Hamas and the PLO, assuming that one of the main obstacles to extending the cease-fire between Hamas in Gaza and Israel is the inability of the Palestinians to speak with a unified voice. The Palestinian people are essentially without a say in what is about to happen in Gaza, while their elites quarrel about who is in charge.

Rafiq Husseini, confidant of Mamoud Abbas, president of the PLO, speaks on his behalf. Rafiq is deeply skeptical of Balian and Pastor's message. Balian and Pastor are carrying a message that Hamas – at least its leader, Kahlid Mishal – is interested in settling differences with the PLO and sharing power, leaving it to the PLO to speak for the Palestinians regarding the two-state solution. Mishal offers that if Hamas could administer the state in Gaza and the West Bank, Mamoud Abbas could speak with authority on behalf of the Palestinians to the Israelis.

On behalf of Hamas, Mishal seems willing to try again to shut down the rockets all together, if the Israelis will deliver on their promises to increase the number of trucks allowed into Gaza to the number agreed to in June 2008. Hamas feels that it had been only a week late in its promise to shut off the rockets being fired from Gaza, and that when Israel refused to allow in trucks, it has had no option but to encourage the building of underground tunnels. This has led to its justification and tacit support for the more radical groups in Gaza to continue the rocket launchings. If Israel will let in sufficient trucks, Hamas will promise to work again to shut down the rockets. Hamas is even willing to compromise on issues of prisoner exchange, if that would help. Finally, Balian and Pastor reiterate Hamas's position reached in negotiations with President Carter – that Hamas will not stand in the way of the Palestinian's recognizing Israel, if a two-state solution is implemented and the Palestinians vote to recognize Israel. If the cease-fire could be extended and the two sides could cooperate in monitoring the border, the two-state solution negotiations could proceed.

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Bewildered, Rafiq Hussein questions us. “Isn’t The Carter Center’s delegation being naïve regarding Hamas? Hamas is not acting in good faith. It proved that by not showing up in Egypt in November 2008 after agreeing to a meeting there.” In Hussein’s opinion, Hamas is simply trying to buy time to arm itself and take over as the authority for the Palestinians all together. “Didn’t Hamas try to assassinate Mamoud Abbas this past summer? Haven’t they continued to send rockets into Israel? Why would they do that if they were acting in good faith?”

Pastor bristles on behalf of President Carter. “Whatever you say about President Carter, you can’t say he is naïve. Indeed, hasn’t President Carter demonstrated over the years of his work in the Middle East that he takes a courageous and realistic approach in these negotiations? Consider his history in the Middle East. Hasn’t his work in the Middle East cost him dearly (perhaps the second term of his presidency)? He knows very well the costs involved in trying to make peace in the Middle East.” Pastor suggests putting President Carter’s interests aside. “Doesn’t the current situation with Israel call for the PLO and Hamas to come together? How could the The Carter Center help?” What messages might The Carter Center delegation carry to Hamas about the PLO’s willingness to cooperate? Hussein agrees it’s worth a try to do what it takes to present a unified front to Israel and promises to do all in his power to share governing functions with Hamas, if that would end the impasse with Hamas and extend a cease-fire in Gaza.

So, Balian and Pastor carry this message to Hamas and then seek out contacts in Israel. They now seem to have a unified position to present to the Israelis. The Palestinians are ready to sign on to a new cease-fire extension, including ending rockets, closing tunnels, increasing the number of trucks allowed in to Gaza, and prisoner exchanges. But no Israeli group is willing to talk. Without official U.S. pressure on Israel, Israel seems determined to make an example out of Hamas in Gaza. It’s too late.

December 21, 2008. The cease-fire ends and the rest, as they say, is history. More than 1,300 Palestinians are killed; 13 Israelis are killed; 4,000 buildings are totally destroyed; 20,000 buildings are partially destroyed; thousands of Palestinians are homeless. As a witness to the last-minute diplomacy, all that followed seems so unnecessary to me. It could have been prevented if the United States had been open

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to dialogue with the enemy and willing to facilitate communication between the parties. Then, in 2012, the cycle of violence and distrust repeats itself all over again. Palestinians frustrated with conditions in Gaza become more supportive of Hamas. Hamas imports rockets from Iran. Rockets are fired at Israel. Israel again bombs Hamas targets and threatens invasion until they reach a cease-fire agreement mediated by Egypt. Ironically, the cease-fire is made with Hamas. From these experiences, the U.S. policy of not talking to Hamas didn't work. The question now on the table with the Obama administration at the start of its second term: Is it time for a new approach?

The question Rafiq Husseini asked Pastor in 2008 is the question that the United States, Secretary of State Hillary Clinton, and the Obama administration will have to answer as it attempts to articulate a new effective foreign policy going forward for the United States. What will be the U.S. position regarding talking to terrorists? How could talking to terrorists not encourage, or legitimize, them? How can talking with those who have sworn your destruction lead anywhere but to delays, deceit, and more violence? Is there a way to involve third-party mediators to facilitate a new way of making peace?

In other words, how should the United States approach the task of wielding its influence in the Middle East and around the world when it requires speaking with "evil"? Should the United States facilitate talks with North Korea or Cuba? Should it talk to rebel groups who may have committed war crimes on its own people as rebel leaders have in Uganda, the Congo, Somalia, and Sudan? Or, should the United States talk to governments that have repressed their own citizens, such as in Sudan, Kenya, Zimbabwe, and Iran? Should the United States do business with those who pretend to act democratically but hide behind corrupt and inept courts that oppress the opposition and make rich the elite who pretend to govern? Should the United States naively talk with enemies of freedom and democracy, presuming that they could come around to taking a good faith approach to ending the conflict and come out in favor of a process for making peace? Or, should the United States pursue only its own self-interest in the Middle East at the cost of justice to peoples wrapped up in the conflict? Should the United States instead pick one of the parties to support and give that party (Israel, for example) a free hand to deal with its enemies? What

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should direct the U.S. foreign policy in the Middle East and around the world? What exactly was wrong with the Bush II approach? Finally, and most importantly, should the United States engage a mediator to work in accord with its principles to try to make peace? Is there any cohesive principled approach that the United States can take in using a mediator even when talking with “evil”?

This book argues that it can be useful for the United States to talk with “evil” – that is, terrorists and other bad actors – if the United States uses a strategy that engages a mediator who both shares its principles and is pragmatic. The project shows how the United States can both make better foreign policy decisions and demonstrate its integrity for promoting democracy and human rights if it takes a principled yet pragmatic approach in talking to those with whom it disagrees. But, because its motives as a super power will often be in question, this book argues that the United States most often needs to turn over the talking to a mediator.

The United States should see its role on the international stage as one that engages a facilitative mediator like those that might be engaged in a domestic dispute. Such a mediator should be neutral in helping the parties determine historical facts and should support solutions that promote its values. The mediator should view its role in mediation disputes between international actors as moving them along a continuum of principles as the parties act for a country’s citizens. These principles are: act first for peace, then for legitimate government by way of elections, then promote the development of free-market conditions that promote private property and equal access to opportunity, and, finally, promote the development of a consistently and fairly applied rule of law. The mediator’s focus for this last principle should not be to pursue its own market advantage but to ensure the in-country market incentives deliver actual value (as set by the nation’s citizens) that corresponds with the value and merit of an individual’s contributions to the society. This way, the country can better promote the rights of women and minority groups. The project should help the U.S. foreign policy makers to better advocate for the options that promote these principles and better ensure that the decisions themselves are “owned” by the citizens of the parties in the dispute.

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Some authors have attempted to describe a negotiation and mediation process for promoting peace and justice (see Bloomfield, Nupen, and Harris, *Democracy and Deep-Rooted Conflict: Options for Negotiators*). Others have written books that have focused on the language of problem solving as a tool to providing creative solutions to conflicts (see Fisher and Ury, *Getting to Yes*; Fisher et al., *Coping with International Conflict*). Others, still, have edited works that take a sociological approach to conflict resolution (Coleman and Deutsch, *Handbook of Conflict Resolution*). There is no book that I know of that has tried to integrate theories of rule-of-law development with conflict resolution methods. Neither has anyone tried to use lawyer strategies in negotiation and mediation to map out a way to make foreign policy decisions that are integrative – decisions that are principled and allow for national interest to play a role for pragmatic considerations; weighing expected costs and benefits of each option without becoming too concerned with how the United States benefits economically.

U.S. foreign policy needs a better theoretical base for its motives to be better understood and to prevent its opponents from ascribing imperialist motives to its interventions. In particular, with regard to interventions short of war, even U.S. allies struggle with understanding what principles will guide the United States in talking to evil (terrorists and other bad actors). Acting without a clear understanding of the relationship between its principles and its pragmatic self-interest undermines the United States' effectiveness. Where the United States acts without a careful analysis of both its principles and pragmatic considerations, it risks taking the wrong or illegitimate side of the conflict and further undermining its principles.

In addition, the project puts forward a renewed understanding that the United States must not act precipitously, but must ensure its actions are simple to execute. Execution of international strategies is always risky, especially where the United States lacks extensive experience in managing interventions. Effects, therefore, are likely to be difficult for the United States to control. This is a necessary feature of U.S. choice of government because U.S. governments, by law, turn over at least every eight years. While such a turnover protects against corruption and entrenchment, the learning curve for each administration is very

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steep for international decision makers. The option that is simplest to execute is often the least risky.

The need for a better understanding of its principles and interests is particularly important with the arrival on the international stage of the International Criminal Court. The United States' choices often relate to taking a position regarding the best way to promote an international rule of law. Should the United States support the ICC's indictments of alleged war criminals? What should be the United States' position concerning Truth and Reconciliation Commissions? Many are struggling to determine what principles, if any, still guide U.S. foreign policy in these matters and how to balance principles of Peace First, Democracy, Access to Justice, and Rule of Law with the foreign policy mantras of not entering into a war without the support of the international community – a clearly defined objective – and an exit strategy.

This book is intended for a wide-ranging audience – anyone who cares about how the United States acts on an international stage and is concerned about trade-offs between making peace and the rule of law. In addition to policy makers, the book is intended to be of interest to undergraduate students who, though not lawyer-trained, are interested in international studies and how the rule of law impacts international conflicts. This segment of the audience might be majoring in political science, international studies or international relations, or conflict resolution. The book is also aimed at students in graduate programs of international studies/relations and international development, those who study game theory and strategic decision making, or those who study conflict resolution more generally. It is also aimed at the legal market and, in particular, those studying international and comparative law and/or jurisprudence. These audience segments should benefit from a better understanding of how the law operates – not just what the law says, but how it is used in practice to legitimate resolutions of disputes. The law is a vital part of the just resolution of any conflict. The trade-offs between Truth and Reconciliation Commissions, the International Criminal Court, and national courts should inform these readers about what positions the United States needs to pursue when it acts as a mediator or engages others to mediate a dispute. Seeing conflict on a continuum from war to peace to elections to rule of law

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(sustainable peace) should help promote a better, more nuanced U.S. foreign policy.

The book is designed to show how we have gotten to the present state of confusion, bouncing back and forth between self-interest and moral dogmas concerning good and evil. It demonstrates a process that provides for both principles and pragmatism. It will use this process to examine on-going disputes in the Middle East, North Korea, South America, and Africa, including Uganda, Sudan, Kenya, and Liberia. The project, therefore, may also be of interest to historians and, in particular, those studying the current history of the conflicts in these countries. The book uses a narrative approach, drawing on experiences the author has had with The Carter Center and doing judicial and lawyer advocacy training in these countries, to give the reader a sophisticated understanding of the current situation in these countries and to show how a strategy of principled pragmatism will give better direction to U.S. foreign policy in these countries.



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I would like to acknowledge the help of mentors, colleagues, co-teachers, and students in the writing of this book. My mentor Joseph Harbaugh first introduced me to negotiation theory when I was his graduate assistant at Temple Law School. He directed my reading, introducing me to Fisher and Ury's *Getting to Yes*, and Carrie Menkel Meadow's problem-solving theories for reframing negotiations discussions. He also invited me to join him in the PLI Negotiation project and we coauthored a negotiation interactive game called HSN v. OCN. In addition, he provided much encouragement and valuable suggestions for the manuscript.

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to help winnow options and use risk assessments to ensure careful and comprehensive analysis of potential settlements. Maude Pervere is simply the most creative and insightful teacher of negotiations I know. I also learned much from Steve Lubet and Robert Burns.

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Special thanks to my co-teacher Hrair Balian, who was generous enough to include me in a TCC delegation to the Middle East. His experience in the Balkans, as well as in the Middle East, informs much of my thinking. His passion for peace in the Middle East is unmatched by anyone I know, save perhaps by his boss, President Jimmy Carter. President Carter has been the seminar's continuous example providing lessons on the value of detailed preparation, understanding the historical context and vital facts of a dispute, insisting on free elections and human rights, the value of negotiating on a single document, and a passion for peace that refuses to take no for an answer, and is courageous in the face of personal threats and political unpopularity.

Hrair Balian was vital to my understanding of the Middle East and is a brilliant co-teacher of the Negotiation Seminar at Emory Law School. His associate, Nathan Stock, also provided both valuable insights and a careful edit of the entire book. I also need to acknowledge the research support provided by The Carter Center interns in our design of seminar simulations. These provided invaluable insights into many of the chapters: in particular, Tom Crick provided much useful research on Sudan and Uganda. Hanna Camp did the same regarding Bolivia, Peru, and Chile, as did TCC's John Murphy, with a paper on the nature of border disputes. Advocacy Center Fellow Alex Barney was vital to the research and preparation of the chapter on Liberia.

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