

MITIGATING CONFLICTS OF INTEREST IN REGIONAL GOVERNMENTAL ORGANIZATION CIVIL WAR MEDIATION¹

SCOTT SIGMUND GARTNER²

BENJAMIN PREMACK³

I. Introduction.....	786
II. International Conflict Mediation.....	789
A. Types of Wars	789
B. International Dispute Mediation	791
C. Regional Government Organizations as Mediators	794
III. Modern Trends in Bias Management.....	795
A. Bias Management in National Judiciaries.....	797
B. The Recusal Standard for Bias Management in the US Judiciary	798
C. Recusal Standards in Judicial Codes of Conduct	799
D. Constitutional Due Process and the Evolution of the US Recusal Standard.....	800
E. Caperton and the Creation of an Objective Standard.....	803
F. The Lesson from Caperton for International Civil War Mediation	806
IV. Mitigating Bias in Regional Governmental Organizations.....	806
A. The Challenge of Bias and Bias Mitigation	807
B. Dispute System Design	810
C. Recommendation	812
V. Conclusion	814
A. Example: Syria.....	815
B. Future Impact	816
C. Future Research.....	816

¹ This research was generously funded by the Folke Bernadotte Academy (Sweden). We would like to thank Professors Catherine Rodgers and Thomas Carbonneau of Pennsylvania State's Dickinson School of Law, and Professor Kyle Beardsley from Duke's Department of Political Science for their helpful suggestions.

² Professor, School of International Affairs, Affiliate Faculty of Dickinson School of Law and Department of Political Science, Pennsylvania State University; Visiting Professor, Department of Defense Analysis, Naval Postgraduate School, Monterey, California

³ Attorney, The Premack Law Office, PLLC, Seattle, Washington.

I. INTRODUCTION

As a result of the interconnected, regional nature of intrastate conflict, Regional Governmental Organizations (RGOs) are inherently biased civil war mediators. This unabated negative bias, and the conflicts of interest it generates, makes RGOs unattractive to both governments and insurgents. Civil war disputants only agree to employ RGOs to mediate when a conflict's costs are high, victory is unlikely, and there are few alternative resolution mechanisms – the most intractable disputes. Thus, the positive attributes that make RGOs effective mediators (i.e. shared cultural identities and long-term interests) are hard to observe in the intractable civil wars they mediate. We propose an institutional mechanism to help mitigate the negative bias-driven dynamics that foster the under-utilization of RGOs in civil war mediation. Implementation of our proposed conflict of interest recusal protocol would decrease disincentives to civil war mediation by RGOs, providing greater access to their unique peacemaking capacities.

Despite common assumptions to the contrary, civil war peace agreements mediated by regional governmental organizations (“RGO”) have a staggeringly high failure rate. The immediate failure rate for RGO mediation is over *three times* greater than that of other international organizations (“IO”) such as the United Nations. Fifty-two percent of civil war peace agreements mediated by RGOs fail in less than a week compared to sixteen percent of civil war peace treaties mediated by IOs.⁴ Conflict resolution in civil wars, as compared to interstate wars, is more “precarious.”⁵ This failure rate is starker when contrasted with bilaterally negotiated peace treaties for interstate wars, which fail in less than a week only three percent of the time – reflecting a comparative failure rate for RGO civil war mediation more than *seventeen times* greater. In a recent statistical analysis, whether or not a civil war treaty resulted from RGO mediation was *the best predictor of agreement failure*.⁶ Especially unsettling is the fact that the vast majority of armed conflicts today are

⁴ See Jacob Bercovitch & Scott Sigmund Gartner, *Is there Method in the Madness of Mediation? Some Lessons for Mediators from Quantitative Studies of Mediation*, 32 INT’L INTERACTIONS 329 (2006).

⁵ KYLE BEARDSLEY, *THE MEDIATION DILEMMA*, 16 (2011).

⁶ Scott Sigmund Gartner, *Signs of Trouble: Regional Organization Mediation and Civil War Agreement Durability*, 73 J. Pol. 380 (2011).

civil wars; of the thirty-seven armed conflicts ongoing globally in 2012, only one was an interstate war.⁷

Notwithstanding the historical record, researchers and practitioners regularly champion the abilities of RGO mediators to promote peace. Scholars argue that peacemaking by an RGO “offer[s] the best [chance] of successful outcomes in international mediation.”⁸

Regional organisations are co-operative organisations based on geographical proximity, social and political similarity, interdependence, and a commitment to regional security. As such, regional organisations are more likely to be familiar with local issues, the situation and the parties in conflict . . . Their members are often immediately affected by the conflict and they cannot leave the post-negotiation situation. . . . Regional organisations thus have a vested interest in managing a regional conflict. Their closeness to, and knowledge of, the local context give them an advantage as conflict managers compared to an outsider, like the UN.⁹

RGO mediation promotion is not just found in research, it is also lauded in policy. The United Nations Security Council (“UNSC”) stated that RGOs are uniquely effective at addressing “the root causes of armed conflicts.”¹⁰ As a result, the UNSC “*encourages* the continuing involvement of regional and sub-regional organizations in the peaceful settlement of disputes, including through conflict prevention, confidence-building and mediation efforts.”¹¹

Why is there such a seemingly large disconnect between RGO mediation claims and results? We think the answer rests on the role of bias in civil war mediation. Bias derives from a mediator’s interest in the conflict.¹² Biased mediators “seem to be a phenomenon more applicable to civil wars than interstate conflicts.”¹³ Unlike domestic mediation, where mediator neutrality is taken for granted, there are opposing views

⁷ *Uppsala Conflict Data Program*, DEPARTMENT OF PEACE AND CONFLICT RESEARCH, UPPSALA UNIVERSITY, <http://www.pcr.uu.se/research/ucdp/> (last modified Feb. 26, 2014).

⁸ Jacob Bercovitch & Allison Houston, *The Study of International Mediation: Theoretical Issues and Empirical Evidence*, in *RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION* 27 (Jacob Bercovitch ed., 1995).

⁹ Ole Elgström et al., *Regional Organisations and International Mediation: The Effectiveness of Insider Mediators*, 3 *AFRICAN J. CONFLICT RESOL.* 11, 17-18 (2003).

¹⁰ S.C. Res. 1809, U.N. Doc. S/RES/1809 (Apr. 16, 2008).

¹¹ *Id.* at ¶ 2.

¹² See Molly M. Melin, *The Impact of State Relationships on If, When, and How Conflict Management Occurs*, 55 *INT’L STUD. Q.* 691 (2011).

¹³ Molly Melin & Isak Svensson, *Incentives for Talking: Accepting Mediation in International and Civil Wars*, 35 *INT’L INTERACTIONS* 249, 263 (2009).

about the effects of mediator bias on peacemaking.¹⁴ Some claim that (similar to domestic mediation) third-party bias can decrease disputants' willingness to participate in conflict resolution,¹⁵ limit peacemaking effectiveness,¹⁶ and restrict disputants to less effective conflict management processes.¹⁷ Others disagree, arguing that bias increases the likelihood of mediation success¹⁸ and claim that biased mediators are more effective and more successful than neutral mediators.¹⁹

In recognition of the possibility for the presence of both positive bias and negative bias, recent studies of civil war conflict management have attempted to move beyond identifying neutrality and examine whether mediators favor the government or the insurgents.²⁰ This increase in specificity represents an important step; conflict management research needs to disaggregate civil war mediation bias types. For example, Svensson notes that scholars "need to distinguish government-biased from rebel-biased mediation when exploring the question of biased mediation in the context of internal armed conflicts."²¹ Identifying these specific biases, however, may be difficult, especially when considering the interconnected nature of intrastate war and regional actors with cross-cutting ties. Critically, regarding RGOs, little is known about how to parse out bias within a mediator representing multiple third-party actors.²² The stakes are high; not only do mediators influence conflict outcomes,²³ but civil war mediation can fundamentally "interfere

¹⁴ Sinisa Vukovic, *Strategies and Bias in International Mediation*, 46 COOPERATION & CONFLICT 113 (2011).

¹⁵ Melin & Svensson, *supra* note 13, at 255; Greig, J. Michael & Patrick Regan, *When Do They Say Yes? An Analysis of the Willingness to Offer and Accept Mediation in Civil Wars*, 52 INT'L STUD. Q. 759, 778 (2008).

¹⁶ See Bernd Beber, *International Mediation, Selection Effects, and the Question of Bias*, 29 CONFLICT MGMT. & PEACE SCI. 397 (2012).

¹⁷ See Stephen E. Gent & Megan Shannon, *The Effectiveness of International Arbitration and Adjudication: Getting into a Bind*, 72 J. POL. 366 (2010); Stephen E. Gent & Megan Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, 55 J. CONFLICT RESOL. 710 (2011).

¹⁸ Isak Svensson, *Research on Bias in Mediation: Policy Implications*, 2 PENN. ST. J.L. & INT'L AFF. 17, 19 (2013); Andrew Kydd, *Which Side are you on? Bias, Credibility and Mediation*, 47 AM. J. POL. SCI. 597, 607 (2003).

¹⁹ Burcu Savun, *Information, Bias, and Mediation Success*, 52 INT'L STUD. Q., 25, 44 (2008).

²⁰ Svensson, *supra* note 18, at 25.

²¹ Isak Svensson, *Who Brings Which Peace? Neutral versus Biased Mediation and Institutional Peace Arrangements in Civil Wars*, 53 J. CONFLICT RESOL. 446, 464 (2009).

²² Kyle Beardsley, *Pain, Pressure and Political Cover: Explaining Mediation Incidence*, 47 J. PEACE RES. 395, 404 (2010).

²³ Svensson, *supra* note 21, at 465; Vukovic, *supra* note 14, at 118.

with the social contract between the rulers and the ruled.²⁴ Despite these concerns few have proposed remedies that mitigate bias's negative effects and promote its positive influences.

Unabated conflicts of interest inherent to the structure of RGOs limit the effectiveness of RGO mediation of civil wars. In the course of this paper we will explore the role of bias in conflict resolution both from the point of view of RGO mediation of civil wars and from the point of view of national judiciaries. We then apply this knowledge to the issue of bias and trust in RGO mediation and propose a procedural remedy to mitigate the negative aspects of bias and promote its positive influence.

II. INTERNATIONAL CONFLICT MEDIATION

To explore the role of bias in RGO mediation, it is critical to understand the different types of war, the unique aspects involved in civil war mediation, and the characteristics of RGOs.

A. TYPES OF WARS

Wars are commonly divided into two types: intrastate (civil wars) and interstate. Today, civil wars represent the most common type of conflict observed globally and are increasingly the most deadly.²⁵ Recent research shows, however, that civil wars frequently contain interstate elements, such as allied support to the incumbent government and the insurgents.²⁶ These studies make clear that the traditional delineation between civil and international wars is artificial – especially among civil wars violent enough to invite third-party mediation.²⁷ Conflicts with multiple rebel groups²⁸ embracing variable strategies,

²⁴ BEARDSLEY, *supra* note 5, at 17.

²⁵ See Kristian Skrede Gleditsch et al., *Armed Conflict, 1945–99: A New Dataset*, 39 J. PEACE RES. 615 (2002); Michael W. Doyle & Nicholas Sambanis, *International Peace Building: A Theoretical and Quantitative Analysis*, 94 AM. POL. SCI. R. 779 (2000); Bethany Lacina & Nils Petter Gleditsch, *Monitoring Trends in Global Combat: A New Dataset of Battle Deaths*, 21 EUR. J. POP. 145 (2005).

²⁶ See generally IDEAN SALEHYAN, *REBELS WITHOUT BORDERS: TRANSNATIONAL INSURGENCIES IN WORLD POLITICS* (2009); Kristian Skrede Gleditsch, *Transnational Dimensions of Civil War*, 44 J. PEACE RES. 293, 305-06 (2007).

²⁷ Kristian Skrede Gleditsch, Idean Salehyan & Kenneth Schultz, *Fighting Home, Fighting Aboard: How Civil Wars Lead to International Disputes*, 52 J. CONFLICT RESOL. 479, 480 (2008).

²⁸ See David E. Cunningham, *Who Should Be At The Table: Veto Players and Peace Processes in Civil War*, 2 PENN. ST. J.L. & INT'L AFF. 38 (2013).

interests, and proclivity for violence further complicate an already complex picture.²⁹

Four types of actors are commonly involved in civil wars: the incumbent government, the insurgents, allies of the government, and allies of the insurgents. Allies provide incumbent governments and insurgents with arms, funds, intelligence, diplomatic support, supplies, military training, and military force through direct intervention. They also provide insurgents with sanctuary and protection. Together, civil wars reflect an intricate, shifting web of ties.

The varied and complex nature of civil wars can be seen by contrasting a few well-known examples. In the 2011 civil war in Libya, under the legal cover of a UN Security Council Mandate, powerful NATO (North Atlantic Treaty Organization) countries – such as the United Kingdom³⁰ – as well as smaller, regional countries – such as Jordan³¹ – used airpower to support the rebels. At the same time, France – another major power – provided substantial quantities of arms to the rebels.³² Similarly, during the civil war in Chad between 1965 and 1979, France provided direct military support to the ruling government while Libya provided arms and other forms of support to the rebels.³³ Finally, the deadly (three million estimated fatalities), ongoing civil war in the Democratic Republic of Congo involves the majority of the countries in Southern Africa with the incumbent government forces supported by neighboring Angola, Namibia, and Zimbabwe pitted against rebels supported by Uganda and Rwanda.³⁴ Together, these three examples illustrate the complex, international nature of intrastate civil wars, the fluid dynamics of international support, the blurring of civil and international wars, and the critical role of both global and regional actors

²⁹ See Victor Asal & Jonathan Wilkenfeld, *Ethnic Conflict: An Organizational Perspective*, 2 PENN. ST. J.L. & INT'L AFF. 91 (2013).

³⁰ *Libya: NATO to Take Command of No-Fly Zone*, BBC NEWS (Mar. 25, 2011, 7:59 AM), <http://www.bbc.co.uk/news/world-africa-12856665>.

³¹ *Jordan Sends Jets to Support Libya No-Fly Zone*, REUTERS (Apr. 6, 2011), <http://af.reuters.com/article/topNews/idAFJOE7350AT20110406>.

³² Brian Whitaker, *Is France Right to Arm Libyan Rebels*, THE GUARDIAN (June 30, 2011, 9:54 AM), <http://www.guardian.co.uk/commentisfree/2011/jun/30/france-arm-libyan-rebels>.

³³ *Civil War in Chad (1965-1979)*, GLOBAL SECURITY (Nov. 7, 2011, 3:27 AM), <http://www.globalsecurity.org/military/world/war/chad2.htm>.

³⁴ *Democratic Republic of Congo Profile*, BBC NEWS (Nov. 7, 2013, 5:12 AM), <http://www.bbc.co.uk/news/world-africa-13283212>.

in intrastate conflict.³⁵ They thus make clear the need to recognize the interconnected dynamics that drive conflict and mediation.³⁶

B. INTERNATIONAL DISPUTE MEDIATION

The employment of third parties to help peacefully resolve conflicts has a long and widespread history.³⁷ Today, mediation is the most prevalent form of third-party intervention in international conflicts.³⁸ Mediation is “a process of conflict management, related to but distinct from the parties’ own efforts, where the disputing parties or their representatives seek the assistance, or accept an offer of help, from an individual, group, state or organization to change, affect or influence their perceptions or behavior, without resorting to physical force or invoking the authority of the law.”³⁹ Mediation is particularly useful when: a conflict has gone on for some time, the efforts of the parties involved have reached an impasse, neither party is prepared to countenance further costs or escalation of the dispute, both parties are ready to engage in direct or indirect dialogue, and both parties are prepared to accept some form of external help and surrender some control over management of their conflict.⁴⁰

³⁵ See SALEHYAN, *supra* note 26; Kristian Skrede Gleditsch et al., *supra* note 27, at 480 (2008); Navin Bapat, *Insurgency and the Opening of Peace Processes*, 42 J. PEACE RES. 699 (2005).

³⁶ See Holley E. Hansen et al., *IO Mediation of Interstate Conflicts: Moving Beyond the Global versus Regional Dichotomy*, 52 J. CONFLICT RES. 295 (2008).

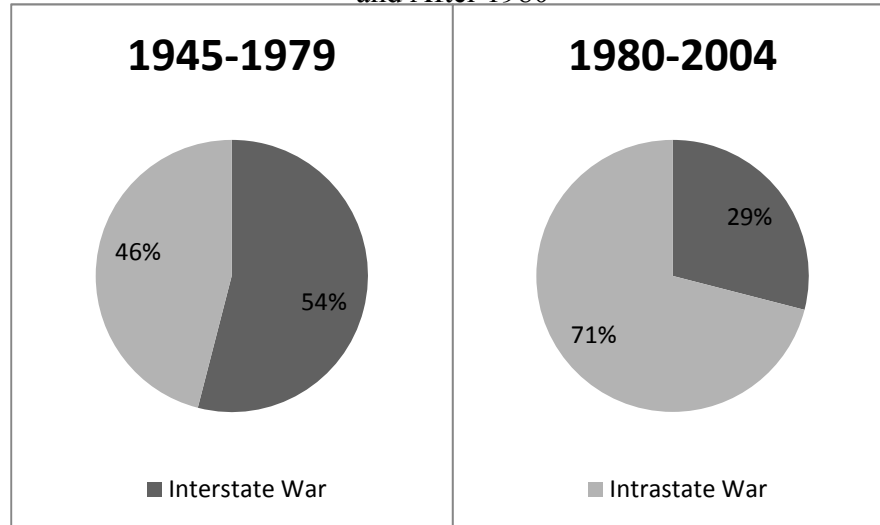
³⁷ See PHILLIP H GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS CULTURAL PERSPECTIVE* (1979).

³⁸ See Scott Sigmund Gartner & Amy C. Gaudion, *Translating Scholarship into Policy*, 2 PENN. ST. J.L. & INT’L AFF. 1, 2 (2013).

³⁹ Jacob Bercovitch, *The Structure and Diversity of Mediation in International Relations*, in *MEDIATION IN INTERNATIONAL RELATIONS: MULTIPLE APPROACHES TO CONFLICT MANAGEMENT* 1, 7 (Jacob Bercovitch & Jeffrey Z. Rubin. Eds., 1992).

⁴⁰ See JACOB BERCOVITCH & SCOTT SIGMUND GARTNER, *INTERNATIONAL CONFLICT MEDIATION: NEW APPROACHES AND FINDINGS* (2009).

Figure 1: Conflict Management Frequency by Dispute Type, Before and After 1980



The occurrence of civil war peacemaking has “skyrocketed” beyond the rapid increase in intrastate conflicts.⁴¹ Comparison of the periods before and after 1979 shows that the frequency of civil war peacemaking rose from 46% to 71% of all conflict resolution efforts.⁴² Until recently, research on conflict resolution “focused almost exclusively on *interstate* conflicts” and ignored *intrastate* conflicts – the topic examined here.⁴³

Three aspects of international dispute mediation are especially important for understanding the relationship between RGO and mediator bias: involvement in mediation is voluntary at all phases, in the anarchic, international world outcomes are non-binding, and mediation contains high expected costs for both the disputants and the mediator.⁴⁴

International dispute mediation represents a process that is voluntary in all phases. Unlike domestic mediation, no judge can order disputants or a third-party mediator to participate. The mediator must be willing to offer assistance and the disputants must be willing on their own accord to accept the third-party’s offer to mediate. If one side thinks

⁴¹ Gartner & Gaudion, *supra* note 38 at 2.

⁴² The year 1979 both roughly splits the ICM dataset in half and represents a critical global turn with the Soviet Invasion of Afghanistan and resumption of Cold War dynamics. See Figure 1.

⁴³ Svensson, *supra* note 18 at 19.

⁴⁴ See BERCOVITCH & GARTNER, *supra* note 40.

total victory is near or the costs of continued fighting are low and the gains are high, they may reject a mediation offer. On the other hand, both disputants might think the likelihood of military success is low and the costs of continued conflict are high, but they may not agree on a mediator or the mediator they want may not be available. Thus, initiation of mediation in a violent dispute requires a number of voluntary choices by at least three actors: the two disputants and the mediator.⁴⁵

Mediation represents a joint effort in which an outsider guides and facilitates some aspects of the process, but final decision-making power remains with the disputants. Disputants give consent to participate in the process, but, unlike arbitration, do not provide *ex ante* consent to abide by any outcome.⁴⁶ Instead, even after a final decision is made adherence to that outcome requires voluntary compliance by the disputants. Thus in an anarchic world with no agreed upon contractual enforcement, settlements need to be mutually acceptable and attractive. To be durable, agreements must continue to serve the interests of all the parties.⁴⁷

The costs associated with mediation vary with the type of actor and dispute.⁴⁸ Conflict management represents a long process with many (on average over thirty) failures before success occurs.⁴⁹ Governments likely see one cost of mediation as the status gained by insurgents sitting, seemingly as equals, at a peacemaking table.⁵⁰ Governments tend to characterize opposing insurgents as simple crooks or violent killers, the state often denounces insurgents as common criminals, thugs, or terrorists.⁵¹ On the other hand, the cost for insurgents is a lack of control over mediation outcomes given the power asymmetry with a standing government. Mediators' costs include: forgoing other peace efforts, reputation damage from failure, political costs, and operational

⁴⁵ Molly Melin et al., *Fear of Rejection: The Puzzle of Unaccepted Mediation Offers in International Conflict*, 30 CONFLICT MGMT. & PEACE SCI. 354, 364-65 (2013).

⁴⁶ See SARA McLAUGHLIN MITCHELL & EMILIA JUSTYNA POWELL, DOMESTIC LAW GOES GLOBAL: LEGAL TRADITIONS AND INTERNATIONAL COURTS (2011); Stephen E. Gent & Megan Shannon, *Bias and the Effectiveness of Third-party Conflict Management Mechanisms*, 28 CONFLICT MGMT. & PEACE SCI. 124 (2011).

⁴⁷ Scott Sigmund Gartner & Molly M. Melin, *Assessing Outcomes: Conflict Management and the Durability of Peace*, in SAGE HANDBOOK ON CONFLICT RESOLUTION 564 (Jacob Bercovitch, Victor Kremenyuk & I. William Zartman eds., 2009).

⁴⁸ BEARDSLEY, *supra* note 5, at 22.

⁴⁹ Birger Heldt, *The Lack of Coordination in Diplomatic Peacemaking*, 2 PENN. ST. J.L. & INT'L AFF. 9, 11 (2013).

⁵⁰ Melin & Svensson, *supra* note 13, at 266.

⁵¹ Bapat, *supra* note 13, at 700.

expenses.⁵² Disputants and potential mediators all look at the human, economic, and diplomatic costs of additional violence, chances for victory, and the costs of possible mediation when considering conflict resolution.⁵³

C. REGIONAL GOVERNMENT ORGANIZATIONS AS MEDIATORS

The latter half of the twentieth century has seen a dramatic increase in the number of RGOs. Today, “regional organizations are the most common type of IOs in the world system.”⁵⁴ As the number of RGOs has increased so has their role in conflict management,⁵⁵ creating widespread concern given their high failure rate.⁵⁶ RGOs share a number of common characteristics. First, they represent their members. Second, RGOs originate with formalized treaties or charters and tend to focus on either economic or political issues. For example, the Arab League, founded by the Charter of the Arab League in 1945, has primarily a political focus. Third, RGOs are formal institutions with prescribed rules, regulations, and procedures. Critically, these rules frequently address conflict resolution. Often, RGO mediation participation is institutionalized in the organization’s legal creation. For example, Article V of the Arab League Charter states that: “The Council shall mediate in all differences which threaten to lead to war between two member-states, or a member-state and a third state, with a view to bringing about their reconciliation.”⁵⁷

Scholars and practitioners frequently champion the unique effectiveness of RGO civil war mediation. Beliefs about RGO civil war

⁵² See Leslie G. Terris & Zeev Maoz, *Rational Mediation: A Theory and a Test*, 42 J. PEACE RES. 563 (2005); Jacob Bercovitch & Gerald Schneider, *Who Mediates? The Political Economy of International Conflict Management*, 37 J. PEACE RES. 145 (2000).

⁵³ See Melin et al., *supra* note 45.

⁵⁴ Jon C. Pevehouse, *With a Little Help from My Friends? Regional Organizations and the Consolidation of Democracy*, 46 AM. J. POL. SCI. 611, 616 (2002).

⁵⁵ Scott Sigmund Gartner, *Civil War Conflict Management*, in PEACE AND CONFLICT 71 (Birger Heldt, guest ed., J. Joseph Hewitt, Jonathan Wilkenfeld & Ted Robert Gurr, eds., 2012).

⁵⁶ In comparison to other global trends such as democratization, democratic states are both more likely to engage in third-party dispute mediation and less likely to violate peace agreements – especially between each other. Sara McLaughlin Mitchell & Paul F. Diehl, *Caution in What you Wish For: The Consequences of a Right to Democracy*, 48 STAN. J. INT’L L. 289, 298 (2012).

⁵⁷ Charter of the Arab League, art. V., available at <http://www.refworld.org/docid/3ae6b3ab18.html>.

mediation efficacy draw on three core arguments.⁵⁸ First, RGO members likely share political, economic, social, and cultural features with the disputants.⁵⁹ “They are ‘partial insiders,’ closely connected to the conflict at hand, with an intimate knowledge about local conditions, shared norms or experiences with the parties in conflict, and a stake in the outcome of the conflict.”⁶⁰ Shared identities are critical for mediation success. RGOs “mediate within the same cultural and value system – and this, it seems, promotes agreement more than any other factor.”⁶¹ Second, neighboring states have a greater commitment to peacemaking than outsiders because they have a “stake in the outcome of the conflict.”⁶² This commitment creates trust between mediators and disputants because local mediators “must live with the consequences of their work.”⁶³ This type of trust is critical for effective conflict resolution.⁶⁴ Third, unlike major powers such as the United States or IOs such as the UN and its major-power dominated Security Council, disputants are less likely to view RGO mediation as insidious efforts at colonization.⁶⁵ Thus, while RGO charters, UN policy, and extensive scholarship encourage RGOs to mediate local disputes, one critical procedure is almost universally absent from their rules and institutions: methods to address bias in the mediation process. Less often recognized, however, is that each of these three factors contributing to RGO mediation efficacy can also contribute to perceptions of RGO conflicts of interests.

III. MODERN TRENDS IN BIAS MANAGEMENT

Impartiality and fairness in conflict resolution rely upon two pillars of natural justice: *nemo judex in sua causa* (no one should be judge in his own cause) and *audi alteram partem* (no person should be judged without the right to be heard).⁶⁶ The term “bias” is often used

⁵⁸ Nguyen, T. H. Y., *Beyond Good Offices? The Role of Regional Organizations in Conflict Resolution*, 55 J. INT’L AFF. 463, 484 (2002).

⁵⁹ Paul Wehr & John Paul Lederach, *Mediating Conflict in Central America*, 28 J. PEACE RES. 85 (1991).

⁶⁰ Elgström et al., *supra* note 9, at 13.

⁶¹ Bercovitch & Houston, *supra* note 8, at 27.

⁶² Elgström et al., *supra* note 9, at 13.

⁶³ Wehr & Lederach, *supra* note 59, at 87.

⁶⁴ See Marie Olson & Frederic S. Pearson, *Civil War Characteristics, Mediators, and Resolution*, 19 CONFLICT RESOL. Q. 421 (2002).

⁶⁵ See Gartner, *supra* note 6.

⁶⁶ Chan Leng Sun, *Arbitrators’ Conflicts of Interest: Bias by Any Name*, 19 SAcLJ 245 (2007).

interchangeably with “prejudice,” and is typically defined as a tendency that affects an actor’s capacity to act impartially. The US Supreme Court refers to bias in its capacity for affecting judicial prejudgment.⁶⁷

Bias, in turn, can create a harmful conflict of interest whenever there is the possibility that a judge or mediator might lack independence and impartiality. Even the appearance of bias alone can undermine voluntary conflict resolution.⁶⁸ The United Nation’s *Universal Declaration of Human Rights* (1948) Article 10 declares that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”⁶⁹ This reflects the common law ideal that conflict resolution decision makers should reach their conclusions “utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors.”⁷⁰

Dispute resolution systems have developed a toolbox of methods to address actual or suspected bias. In arbitration each party often appoints an arbitrator and together the two party-appointed arbitrators select a third who serves as the chair. It is assumed that the two party-appointed arbitrators will be biased, but that an independent and impartial chair will mitigate this bias.⁷¹ Mediation is often supported by these bias mitigation tools as well as others such as the creation of screening walls to control the spread of confidential information within an organization.⁷²

Judiciaries depend on upon voluntary recusal standards which in turn rely upon self-policing by the decision maker whenever there is a question of bias. Competency and impartiality are recognized as

⁶⁷ *Caperton v. AT Massey Coal Co., Inc.*, 556 U.S. 868, 868 (2009) (citing *Withrow et al. v. Larkin*, 421 US 35 (1975)).

⁶⁸ Chan Leng Sun, *supra* note 66, at 251; see also Dawn M. Evans, *How to Identify and Avoid Conflicts of Interest*, State Bar of Michigan Ethics Resources (2011), available at <http://www.michbar.org/opinions/ethics/Articles/conflictsofinterest.pdf>.

⁶⁹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III), art. 10 (Dec. 10, 1948).

⁷⁰ Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 4 (1994).

⁷¹ Robert D. Taichert, *Why Not Provide for Neutral Party-Appointed Arbitrators?*, 57 DISP. RESOL. J. 22 (2003).

⁷² Paul M. Lurie, *Alternatives to the High Cost of Litigation: Using Screening Walls and Advance Waivers to Manage Mediation Conflicts of Interest*, 24 INT’L INSTIT. FOR CONFLICT PREVENTION & RESOL. 1, 56-58 (2006). See also Christopher J. Dunnigan, *The Art Formerly Known as the Chinese Wall: Screening in Law Firms: Why, When, Where, and How*, 11 GEO. J. LEGAL ETHICS 291 (1997).

necessary for an effective judiciary internationally.⁷³ Voluntary recusal is the common method to address issues of judicial bias. This relies heavily on the judge's perceptions of their own ability to act independently and impartially from the perspective of a neutral and independent third party. We will now discuss perceptions of bias in the context of national judiciaries to establish how other dispute resolution systems have historically managed bias. This precedent is illustrative about how RGOs should conceptualize bias management to minimize the impact of negative bias and optimize the parties' trust in the mediation process and the mediated agreement.

A. BIAS MANAGEMENT IN NATIONAL JUDICIARIES

Judicial recusal standards address the principles by which a judge should determine whether recusal is necessary in a particular situation to address the presence of actual or perceived bias. Judicial recusal in the courts of last resort of Canada, the United Kingdom, Australia, and South Africa was examined by R. Matthew Pearson in 2005.⁷⁴ Pearson found that there is striking similarity between all of these nations in the substantive inquiry of their judicial recusal standard. Every one of these nations seeks to "preserve public confidence" as a "fundamental goal of judicial systems" and to "assess the propriety of recusal from a neutral and independent perspective."⁷⁵ These nations employ a subjective test by which a judge is directed to assess bias from their own point of view "rather than considering the *appearance* of impropriety or giving any substantial weight" to the parties' perceptions.⁷⁶ The subjective recusal standard for measuring bias in these four countries is particularly illustrative as a poor example in answering the question of how bias and conflicts of interest should be handled in RGO mediation of civil wars.

Civil war mediation rests on the public perception of the fairness and justice of the mediated outcome. If the insurgents do not have

⁷³ Debra Lyn Bassett & Rex R. Perschbacher, *Perceptions of Justice: An International Perspective on Judges and Appearances*, 36 FORDHAM INT'L L.J. 136 (2013) (citing R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799 (2005)).

⁷⁴ R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1815-25 (2005).

⁷⁵ *Id.* at 1827-28.

⁷⁶ Bassett & Perschbacher, *supra* note 73, at 146.

confidence in the mediator they are more likely to not respect the mediated outcome and it is more likely to fail. The crux of the matter is not whether subjectively the mediator feels they can approach the mediation impartially, it is whether objectively the conflicting parties feel that the outcome was reached impartially without the appearance of impropriety. The objective inquiry employed by our example, the US judiciary, may provide a more effective standard by which to measure bias in these circumstances.⁷⁷

B. THE RECUSAL STANDARD FOR BIAS MANAGEMENT IN THE US JUDICIARY

The US Supreme Court has long held that a fair trial must be conducted by an independent and impartial judge free from actual bias to satisfy substantive due process under the Fifth and Fourteenth Amendments of the US Constitution. Traditionally, the US judiciary and other common law courts have recognized only financial interest as the basis for recusal: Blackstone “expressly rejected all possible reasons for recusal save a direct economic interest.”⁷⁸ Modern jurisprudence and judicial regulatory statutes have expanded the potential basis for bias to include a variety of circumstances, including relationship bias, which “may exist if the judge is related to, or is friends with, someone involved in the lawsuit,” and personal bias “if the judge personally favors someone involved in the lawsuit.”⁷⁹ Indeed, in the United States, a judge’s belief “that she is not biased is not conclusive” or even strictly relevant.⁸⁰

⁷⁷ For a comparative study of domestic conflict of interest procedures, see Organisation for Economic Co-operation & Development, *Conflict-of-Interest Policies and Practices in Nine EU Member States: A Comparative Review*, GOV/SIGMA/2006/1/REV1 (June 18, 2007), available at [http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=gov/sigma\(2006\)1/REV1..](http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=gov/sigma(2006)1/REV1..)

⁷⁸ Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 663 (2005) (citing John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 43–44 n.3 (1970)).

⁷⁹ *Id.* at 661.

⁸⁰ *Id.* at 670 (citing RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 5.6.2, at 157 (1996)).

C. RECUSAL STANDARDS IN JUDICIAL CODES OF CONDUCT

Recently, recusal standards in the US have shifted from an emphasis on the presence of actual bias to the appearance of bias. The Code of Conduct for US Judges and the American Bar Association's (ABA) Model Code of Judicial Conduct adopted broad standards for judicial recusal to encourage public confidence in the judiciary. As a note, the ABA Model Code of Judicial Conduct has been widely adopted, at least in part, by almost all states and serves as a solid foundation for the discussion of state judicial disqualification standards.⁸¹ The Preamble of the ABA Model Code opens with the statement that an "independent, fair and impartial judiciary is indispensable to our system of justice."⁸² Immediately thereafter, Canon 1 instructs that a judge "shall uphold and promote the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."⁸³ The ABA Model Code only consists of 4 Canons, each of which includes instructions that a judge should minimize the impact of bias. Canon 2 and 4 of the ABA Model Code each respectively admonish that a judge should act impartially, and Canon 3 emphasizes the minimization of conflicts. Similarly, Canon 2 of the Code for US Judges cautions that integrity and independence are critical for the judiciary, and underscores the need to manage public perception of impropriety.⁸⁴

To regulate the impact of bias in the US judiciary these codes of judicial conduct serve alongside constitutional due process and the federal judicial disqualification statutes, codified in §47, §144, and §455 of Title 28 of the US Code. Briefly, §47 "prohibits judges from hearing on appeal any cases in which they served as the trial judge."⁸⁵ Additionally, §144 provides that "whenever a party to any proceeding in

⁸¹ Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 189 (2011) (citing Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality 'Might Reasonably be Questioned'*, 14 GEO. J. LEGAL ETHICS 55, 55 (2000) ("stating that forty-nine states have adopted some form of the ABA Model Code of Judicial Conduct")).

⁸² MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2010).

⁸³ *Id.*

⁸⁴ CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1, 2 (2011), available at <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx> (last visited June 2, 2011).

⁸⁵ Bassett & Perschbacher, *supra* note 80, at 189 (citing 28 U.S.C. § 47 (2006) ("No judge shall hear or determine on appeal from the decision of a case or issue tried by him.")).

a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.” Finally, §455 includes the judge-oriented standard used in Canada, the United Kingdom, Australia, and South Africa and provides a laundry list of circumstances in which a judge must recuse themselves, including personal bias (§455(b)(1)), if the judge previously heard the case in controversy (§455(b)(2)), if the judge served in a governmental capacity which had a direct effect on the dispute (§455(b)(3)), financial bias (§455(b)(4)), and relationship bias (§455(b)(5)).⁸⁶

More importantly, at least for this analysis, §455(a) states that a judge “shall disqualify himself in any proceeding in which his impartiality *might reasonably be questioned*” (emphasis added).⁸⁷ The placement of this objective standard above the list of mandatory circumstances emphasizes Congress’s intent that the control of bias is intended largely to control the public perception of bias and the independence and impartiality of the judiciary.

D. CONSTITUTIONAL DUE PROCESS AND THE EVOLUTION OF THE US RECUSAL STANDARD

In 1927, the US Supreme Court decided the first American landmark case to address the presence of actual judicial bias in the context of due process considerations. *Tumey v. Ohio* examined an Ohio statute that empowered the mayor of a village to act as the judge in cases involving alleged violation of the state’s prohibition law.⁸⁸ The Ohio statute provided that the fine levied against a guilty party would be divided between the state and the village, and that the mayor would personally receive fees and costs only in the case of a conviction. The statute created a substantial financial interest in the mayor to convict the accused rather than acquit.⁸⁹ The Ohio Supreme Court declined to review the judgment of the state court of appeals, and the US Supreme Court held “to subject a defendant to trial in a criminal case involving his

⁸⁶ 28 U.S.C. § 455(b)(1)–(5) (2011).

⁸⁷ See *id.* § 455(a).

⁸⁸ *Tumey v. Ohio*, 273 U.S. 510, 520 (1927).

⁸⁹ *Id.* at 520, 531.

liberty or property before a judge having a direct, personal, substantial interest in convicting him is a denial of Due Process of law” under the Fourteenth Amendment.⁹⁰ Thus, the presence of actual financial bias was established by *Tumey* as the floor of constitutional due process.

Actual financial bias remained the only trigger for due process judicial disqualification throughout the mid-twentieth century until it was revisited and slightly revised in *In re Murchison*.⁹¹ In *Murchison*, the US Supreme Court examined a Michigan statute that authorized any state judge to act both as a one-man grand jury in which the judge could “compel witnesses to appear. . . to testify about suspected crimes,” and subsequently try a recalcitrant witness for contempt.⁹² *Murchison* and his co-petitioner White were Detroit policemen who were each independently called before a judge acting as a one-man grand jury. After their testimony, the judge was convinced that both *Murchison* and White had perjured and ordered them to appear and show cause for why they should not be punished for criminal contempt.⁹³ The policemen argued that “trial before a judge who was at the same time the complainant, indicter and prosecutor constituted a denial of the fair and impartial trial required by the Due Process Clause of the Fourteenth Amendment.”⁹⁴ The US Supreme Court agreed with the policemen. While the Court did address the appearance of bias (“justice must satisfy the appearance of justice”),⁹⁵ the majority of the court’s reasoning rested upon the unlikelihood that a judge who had acted as grand jury would be able to free themselves from any influence or interest in the conviction or acquittal of those accused.⁹⁶ Thus, it was the actual personal bias of the Michigan judge which arose out of his interest in the acquittal or conviction of the policemen which invoked due process considerations.

The Supreme Court reaffirmed actual bias, whether financial or personal, as the floor of constitutional due process judicial disqualification in three later cases. In the 1971 case of *Mayberry v. Pennsylvania*, the petitioner and two codefendants were charged and convicted with prison breach and holding hostages in a penal

⁹⁰ *Id.* at 510.

⁹¹ See *In re Murchison*, 349 US 133 (1955).

⁹² *Id.* at 133–34.

⁹³ *Id.* at 134–35.

⁹⁴ *Id.* at 135.

⁹⁵ *Id.* at 136 (citing *Offutt v. United States*, 348 US 11, 14 (1954)).

⁹⁶ *Id.* at 137.

institution.⁹⁷ At the sentencing hearing, the judge who had presided over their criminal trial pronounced the three convicts guilty of criminal contempt based on their behavior during trial.⁹⁸ The Supreme Court reasoned that the actual personal bias of the judge arising from the insults given to him by the convicts during their trial rendered his decision a violation of due process. Similarly, *Ward v. Village of Monroe* reinforced and expanded the earlier holding of *Tumey*. The *Ward* decision held that the interest of a mayor in raising funds for their village created an actual financial bias toward conviction which was a violation of due process.⁹⁹

Finally, in *Aetna Life Insurance Co. v. Lavoie*, the US Supreme Court examined a case in which a judge sitting on the Alabama Supreme Court had a “direct, personal, substantial, [and] pecuniary” interest in the outcome of the appeal on which he was ruling.¹⁰⁰ Aetna “refused to pay the full amount of a hospital bill incurred by appellees” who brought suit seeking “payment of the full amount and punitive damages.”¹⁰¹ The jury awarded \$3.5 million in punitive damages, which the Alabama Supreme Court affirmed despite the fact that Justice Embry, one of the sitting justices, had filed two suits against Alabama insurance companies alleging the same claims as appellants.

The Supreme Court examined the bounds of due process requirements, and held that allegations of Justice Embry’s bias and prejudice against insurance companies in general “were insufficient to establish any constitutional violation.”¹⁰² However, the outcome of the *Aetna* suit would have had a direct impact on whether Justice Embry “would have to establish that he was entitled to a directed verdict on the underlying claims” in his concurrent suits.¹⁰³ This “enhanced both the legal status and settlement value of his own case” and therefore created an actual financial bias which implicated due process considerations.¹⁰⁴ Once again, as the Court had previously done in *Murchison*, the issue of the perception of bias was addressed and discarded. It is important to note that the difference between actual bias, which implicates due

⁹⁷ *Mayberry v. Pennsylvania*, 400 US 455, 455 (1971).

⁹⁸ *Id.*

⁹⁹ *Ward v. Village of Monroe*, 409 US 57, 60 (1972).

¹⁰⁰ *Aetna Life Ins. Co. v. Lavoie*, 475 US 813, 814 (1986).

¹⁰¹ *Id.* at 816.

¹⁰² *Id.* at 821.

¹⁰³ *Id.* at 823.

¹⁰⁴ *Id.* at 824.

process, and the perception of bias, which only invokes codes of judicial conduct, is the difference between the possible reversal and remand of a case in the former and the possible reprimand of a judge in the latter.

It was not until 2009 that the US Supreme Court raised the due process floor to include the appearance of bias, even where there may be no actual direct, personal, substantial, or pecuniary bias on the part of the judge. Admittedly, the case of *Caperton v. A.T. Massey Coal Co.* was founded on extreme factual circumstances. However, *Caperton* created essential precedent in the US judicial system for the control of bias, and provided an indispensable example of the modern trend toward procedural recognition of the perception of bias and its impact on the fairness, independence, and impartiality of decision makers.

E. CAPERTON AND THE CREATION OF AN OBJECTIVE STANDARD

Caperton stemmed out of a case in which a West Virginia jury rendered a verdict of fifty million dollars in compensatory and punitive damages against A.T. Massey Coal Company for the destruction of Caperton's business in 2002. West Virginia held its 2004 judicial elections after the verdict was rendered, but before the appeal was filed. Don Blankenship, Massey's chairman, CEO, and president, chose to support Brent Benjamin, an attorney who sought to replace the incumbent Justice McGraw in the election. Blankenship contributed the one thousand dollars statutory maximum directly to Benjamin's campaign, and in addition donated "almost \$2.5 million to 'And For The Sake Of the Kids,' a political organization formed under 26 U.S.C. §527" which opposed McGraw and supported Benjamin.¹⁰⁵ Blankenship also independently spent over five hundred thousand dollars on "direct mailings and letters soliciting donations as well as television and newspaper advertisements – "to support. . . Brent Benjamin."¹⁰⁶ In total Blankenship contributed over three million dollars to Benjamin's campaign, and after all the votes were tallied Benjamin had won.

In October 2005, Caperton filed a motion to disqualify the now-Justice Benjamin, which Justice Benjamin denied in April of 2006.¹⁰⁷ Later, in November of 2007 the West Virginia Supreme Court of Appeals reviewed the 2002 jury verdict and reversed the lower court

¹⁰⁵ Caperton, *supra* note 67, at 873-74.

¹⁰⁶ *Id.* (quoting Blankenship's state campaign financial disclosure filings).

¹⁰⁷ *Id.* at 873-74.

decision. Caperton filed for a rehearing and for the disqualification of Justice Maynard, who had vacationed with Blankenship while the case was pending, and Justice Starcher, who had publically criticized “Blankenship’s role in the 2004 elections,” alongside Justice Benjamin for the aforementioned reasons.¹⁰⁸ The rehearing was granted, and both Justice Maynard and Justice Starcher recused themselves from the proceedings but Justice Benjamin refused to grant the motion; he claimed that he was not biased by the 2004 campaign donations and that he could act independently and impartially.¹⁰⁹ In April of 2008, the 2002 verdict was once again overturned, and, while the Supreme Court was considering the petition for writ of certiorari, Justice Benjamin issued a concurring opinion in which he argued that he “had no ‘direct, personal, substantial, pecuniary interest’ in th[e] case.”¹¹⁰ And that a “standard merely of ‘appearances’ False seems little more than an invitation to subject West Virginia’s justice system to the vagaries of the day – a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.”¹¹¹

After granting certiorari, the US Supreme Court examined Justice Benjamin’s arguments and found them lacking. Instead, the Court examined modern developments which were not present during the early formulation of the common law and during the time of *Tumey* and *Aetna* which gave rise to “circumstances in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.”¹¹² The first such consideration arises from circumstances in which interests “tempt adjudicators to disregard neutrality.”¹¹³ Quoting *Aetna* (and many of the other cases we have examined), the Supreme Court reasoned that the “proper constitutional inquiry is ‘whether sitting on the case then before the [Court] ‘would offer a possible temptation to the average. . . judge to. . . lead him to not hold the balance nice, clear and true.’”¹¹⁴ The second circumstance, which the Court claimed arose from circumstances such as

¹⁰⁸ *Id.* at 874–75.

¹⁰⁹ *Id.* at 875.

¹¹⁰ *Id.* at 875–76 (citing *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 300, 301 (W. Va. 2008) (Benjamin, C.J., concurring).

¹¹¹ *Id.* at 875–76 (citing *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 306 (W. Va. 2008) (Benjamin, C.J., concurring).

¹¹² *Id.* at 877 (citing *Withrow et al. v. Larkin*, 421 U.S. 35, 47 (1975)).

¹¹³ *Id.* at 878.

¹¹⁴ *Id.* at 879.

the ones we previously examined in *Murchison* and *Mayberry*, is one in which the Court asks “not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”¹¹⁵

In the case of Justice Benjamin, the Supreme Court reviewed the allegations of temptations to disregard neutrality and the likelihood of neutrality and found that the arguments Justice Benjamin made in his 2008 concurring opinion were sufficient to support his “subjective findings of impartiality and propriety.”¹¹⁶ However, the Court argued that “in lieu of exclusive reliance on. . . personal inquiry, or on appellate review of the judge’s determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.”¹¹⁷ While Justice Benjamin may not have developed an actual bias based on Blankenship’s campaign contribution, the risk “is sufficiently substantial that it must be forbidden if the guarantee of Due Process is to be adequately implemented.”¹¹⁸

The Court significantly expanded its earlier case law and held that “objective standards may also require recusal whether or not actual bias exists or can be proved.”¹¹⁹ In this case, the Supreme Court held, that “on these extreme facts the probability of actual bias rises to an unconstitutional level” and Justice Benjamin should have recused himself from the proceedings based not upon the presence of actual bias, but instead because of the likelihood of the perception of bias.¹²⁰

The holding in *Caperton* raised the Constitutional Due Process floor. For the US judiciary, the appearance of bias was sufficient to require recusal even if there is no actual bias. The US model, as adapted in *Caperton*, provides valuable insight into the management of bias in all forms of dispute resolution. Modern concerns, such as improved communication technology and a more informed populace, have elevated the appearance of bias to roughly equal levels as the presence of actual bias.

¹¹⁵ *Id.* at 881.

¹¹⁶ *Id.* at 882.

¹¹⁷ *Id.* at 883.

¹¹⁸ *Id.* at 883–884, 885 (citing *Withrow et al. v. Larkin*, 421 U.S. 35, 47 (1975)).

¹¹⁹ *Id.* at 886.

¹²⁰ *Id.* at 886–87.

F. THE LESSON FROM CAPERTON FOR INTERNATIONAL CIVIL WAR MEDIATION

These key developments in the perception and management of bias in the US highlight a number of critical factors. First, historically, recusal standards to address conflict of interest and bias have proceeded along an evolutionary path. National judiciaries have recently begun to place increasing weight on the problem and have provided stronger incentives to redress issues of bias over time. Second, the United States, like most other democracies, began this evolutionary process with an elemental, but narrowly delineated, prohibition of bias – focused on judges who had fiduciary interests in conflict outcomes. Third, the range of factors considered as contributing to bias expanded beyond financial to include first a variety of other resources and second, and more generally, a stake in the case and outcome at hand. Fourth, the default mechanism for addressing any conflict of interest, whether actual or perceived, is recusal. Finally, the most critical developments for the purpose of this assessment are the recent changes in judicial management of bias that have redefined the critical level of bias to include not only the presence of actual bias, but also the perception of bias. The goal of current conflict of interest management standards is to eliminate the appearance of bias – both to those within and outside of the contested dispute.

IV. MITIGATING BIAS IN REGIONAL GOVERNMENTAL ORGANIZATIONS

Conflict management strategies such as arbitration, adjudication, and mediation operate differently in an international versus domestic context.¹²¹ There are however some key similarities. Mediation, whether regarding a commercial transaction or a civil war, is a completely voluntary process which produces non-binding resolutions that in turn rely heavily on the confidence of the parties in the process to achieve a successful durable solution. In mediation, independence and impartiality “instills trust, enables the parties to collaborate and share information

¹²¹ Stephen E. Gent, *The Politics of International Arbitration and Adjudication*, 2 PENN STATE J.L.I.A. 66, 68 (2013).

with the mediator and other parties, protects mediation agreements from subsequent challenges, . . . helps prevent abuse of the process,” and most importantly, inspires the parties and the public to have confidence in the process and the agreement.¹²² However, unlike in national judiciaries which depend on perceptions of independence and impartiality for their legitimacy, RGOs - when they assume the mantle of civil war mediators - should publically recognize the conflicts of interest that arise from the bias inherent in the close interconnected relationships between their member states.

A. THE CHALLENGE OF BIAS AND BIAS MITIGATION

RGO mediation of civil wars reflects a common structure. RGOs include the incumbent government under attack – which makes the insurgents reluctant to trust the organization. While at the same time, for a civil war to be sufficiently threatening for a government to be interested in mediation, the insurgents have likely received support from a neighboring state that has a stake in the outcome.¹²³ Thus, the incumbent government is wary of trusting the RGO because it likely includes the insurgents’ benefactors while the insurgents are wary of trusting the RGO because it includes the incumbent government the insurgency is attempting to overthrow. This unabated bias makes RGOs unattractive to both governments and insurgents.

Given the mutual concern about potential bias, disputants agree to employ RGOs to mediate only when a conflict’s costs are high, both sides view rapid victory as unlikely, and there are few alternative options for resolution. That is, RGOs tend to mediate decidedly deadly and intractable disputes, where mediation failure and fragile agreements are likely.¹²⁴ As a result, the effectiveness in mediation of RGOs traits (i.e. shared identities and long-term interest) are difficult to see in the challenging civil wars they mediate.¹²⁵

We propose an institutional mechanism to help mitigate this negative bias and improve the observable effectiveness of RGO civil war mediation. Instead of disposing of bias, RGOs should embrace bias as

¹²² Michelle D. Gaines, *A Proposed Conflict of Interest Rule for Attorney-Mediators*, 73 WASH. L. REV. 699, 702–03 (1998).

¹²³ See SALEHYAN, *supra* note 26.

¹²⁴ Scott Sigmund Gartner, *Deceptive Results: Why Mediation Appears to Fail but Actually Succeeds*, 2 PENN STATE J.L.I.A. 27, 34 (2013).

¹²⁵ See Gartner, *supra* note 55.

the foundation that gives them a unique ability to act as successful civil war mediators. RGO mediators are insiders, “which can provide important advantages in peace processes.”¹²⁶ If the organization and the member states that compose it publically recognize their bias, it could potentially shift public perception so that the disputants no longer view the mediator as a biased outsider working to impose a peace settlement on them. Properly managed and publicized bias (and the conflicts of interest it creates) could shift public perception to make the disputants feel that the RGO shares their concerns, ideals, and interests and would therefore be better at assisting them in creating a durable peace accord than an outside body.¹²⁷

The challenge then is to retain RGO’s insider status, which violates standard notions of neutrality in domestic mediation, while creating the perception for the disputants that the RGO mediation process will be fair and procedurally just.¹²⁸ Distinguishing between a system that is biased and just versus biased and unjust requires a mechanism for eliminating the influence of those actors who have such strong conflicts of interest as to guarantee a prejudiced process and outcome and thus make a dispute resolution process unattractive. Unlike domestic conflict resolution, where standard procedures address issues of integrity and neutrality, international conflict mediation by RGOs universally lack a formalized mechanism for mediator disqualification or recusal in the presence of a conflict of interest. Mediation, whether domestic or international, is a voluntary process where the presence of unwanted bias can be insurmountable without proper attention. Disputants have a limited pool of potential mediators within the RGO from which they can construct a mediation team. Thus, traditional conflict mitigation tools can be ineffective.

Mandatory disqualification is inappropriate for situations where all of the potential mediators have an interest in the outcome of the case. Similarly, voluntary recusal is impractical for RGOs because of the potential political cost (which might include domestic, regional, and global political costs) to any state willing to admit direct or indirect involvement in the conflict. Furthermore, it is unrealistic to create a screening wall around a member’s representative mediator and to expect

¹²⁶ Svensson, *supra* note 18, at 24.

¹²⁷ See, e.g., Alastair Smith & Allan Stam, *Mediation and Peacekeeping in a Random Walk Model of Civil and Interstate War*, 5 INT’L STUD. REV. 115, 120 (2003).

¹²⁸ See Svensson, *supra* note 18.

that barrier to prevent the spread of confidential information. It is reasonable to expect that a mediator in an RGO will act in the best interests of their country, and that any person selected to serve as a member's representative would not require constant communication with their government to do so. Nevertheless, RGOs possess the potential to be extremely effective conflict mediators if the parties possess the proper tools to combat the inherent lack of impartiality and independence during the selection of the mediation team and the creation of the mediation mandate.

RGOs have, to date, not directly addressed bias in civil war mediation in their establishment documents or subsequent amendments, bylaws, and publications. We examined charters and bylaws of many of the most important regional governmental organizations available in English.¹²⁹ The legal arrangements of these regional governmental organizations contrast sharply with standard domestic mediation and arbitration organization protocols. However, the lack of a formalized bias

¹²⁹ *Sirte Declaration* (1999): established the African Union. *OAU Charter* (1963): established the Organization of African Unity, was abrogated and replaced by the Constitutive Act of 2000. *COMESA Treaty* (1992): established the Common Market for Eastern and Southern Africa (COMESA). *Treaty Establishing the East African Community* (1999): established the East African Community. *ECOWAS Treaty* (1975): established the Economic Community of West African States. *Protocol Between the Countries of Origin Certificate of the Arab Maghreb Union* (1989): established the Arab Maghreb Union. *Cartagena Agreement* (1969): established the Andean Community of Nations. *Ottawa Declaration* (1996): established the Arctic Council. *1980 Treaty of Montevideo* (1980): established the Association Latino Americana de Integracion (ALADI). *Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy* (2001): established the Caribbean Community (CARICOM). *The Charter of the Organization of American States* (1967): established the Organization of American States (OAS). *The Charter of the Arab League* (1945): establishing the League of Arab States, also known as the Arab League. *Convention of the Asian Productivity Organization* (1961): established the Asian Productivity Organization. *Bangkok Declaration* (1967): established the Association of South East Asian Nations (ASEAN). *Treaty of Amity and Cooperation in Southeast Asia* (1976): established to "promote peace, everlasting amity and cooperation among their peoples which would contribute to their strength, solidarity and closer relationship." Article 1. *The IOR-ARC Charter* (1995): established the Indian Ocean Rim Association for Regional Cooperation (IOR-ARC), initially known as the Indian Ocean Rim Initiative. *1995 Mekong Agreement* (1995): established the Mekong River Commission (MRC). *SAARC Charter* (1985): established the South Asian Association for Regional Cooperation (SAARC). *SAARC Charter of Democracy (not adopted, 2012)*: drafted to reaffirm SAARC Members' commitment towards democracy, currently not adopted. *Statute of the Council of Europe* (1949): establishing the Council of Europe. *Treaty of the European Union* (1992): established the European Union (EU). *Treaty of Lisbon* (2007): amended the Treaty on European Union and the Treaty establishing the European Community. *The Modified Brussels Treaty* (1954): amended the Brussels Treaty, which established the Western European Union (WEU). *Canberra Agreement of 1947* (1947): established the Secretariat of the Pacific Community (SPC). *Charter of the Organisation of the Islamic Conference* (1969): established the Organisation of Islamic Cooperation (OIC).

mitigation process has not prevented the African Union from recognizing bias in civil war mediation, and taking steps to minimize it. The report on African Peace and Security Architecture, commissioned by the African Union's Peace and Security Department in 2010, noted, critically, that "one principle that the PSC (Peace and Security Council) appears to have consistently enforced is the one that bars its members from participating in decision-making situation where they have a direct involvement."¹³⁰ No RGO charter contains express provisions for bias in civil war mediation. We recommend that all RGOs, including the African Union, expressly adopt these procedural standards and integrate them into their governing documents to minimize the appearance of negative bias and foster confidence in RGO mediated peace agreements.

Conflict mediation by an RGO relies on a certain degree of lack of independence and impartiality to support the positive bias that should make them effective mediators for civil wars in their region.¹³¹ The challenge is to create a method through which the disputants can minimize the negative bias and increase the likelihood that a specific conflict will be brought to the RGO for mediation, and maximize the positive bias created by the shared cultural, political, economic, and social interests of the members.¹³² Any steps which can be taken to maximize the potential of the peace process work in favor of the disputants.

B. DISPUTE SYSTEM DESIGN

Dispute resolution exists in a specific political, legal, and historical setting that structures its process and potential outcome.¹³³ "A conflict, issue, dispute, or case submitted to any institution for managing conflict (including one labeled ADR) exists in the context of a system of rules, processes, steps, and forums."¹³⁴ In terms of RGO mediation of civil wars, that context includes the organization's capacity, interest, and

¹³⁰ African Peace and Security Architecture (APSA), *2010 Assessment Study* 27 (Nov. 2010), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/RO%20African%20Peace%20and%20Security%20Architecture.pdf>

¹³¹ Elgström et al., *supra* note 9, at 17.

¹³² See Gartner, *supra* note 6, at 388.

¹³³ Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 73, 91 (2013).

¹³⁴ Lisa Blomgren Bingham, *Reflections on Designing Governance to Produce the Rule of Law*, 1 J. DISP. RESOL., 67, 74 (2011).

history for dispute resolution, the actual or apparent bias of the organization's membership, the organization's dispute resolution and operational rules and procedures, the nature of the civil war and the relationships between its participants, the duration, costs and issues of the conflict, and the disputants' seriousness in pursuing peace. Bias is present and operates to the detriment of the RGOs, the mediators, and most importantly the disputants. We recommend the creation of a tool that allows the RGO and the disputants to identify bias and differentiate between negative bias and positive bias, and if necessary mandatorily symmetrically disqualify biased member states from participation in the conflict resolution process.

One key to observing more successful RGO civil war mediation efforts is to develop greater confidence among the disputants that the process is just. Given the wide-range of interlocking network ties between the disputants, procedural safeguards for dispute resolution will emerge not from mediators who have no ties to the disputants,¹³⁵ but by providing disputants a voice in who does and does not participate in the mediation process:

Perceptions of procedural justice will depend upon how [emphasis in original] their participation is managed. Such perceptions will matter because they will influence stakeholders' perceptions regarding the substantive justice of the treaty's dispute resolution clause and prescription of particular procedures, the likelihood of the stakeholders' compliance with the treaty provisions and their respect [for] the legitimacy of the states engaged in making the treaty.¹³⁶

The goal of Dispute System Design ("DSD") is to "build a structure that will direct disputes along a low-cost path to resolution."¹³⁷ In designing or revising a dispute resolution system, one wants to take into account the context that the dispute resolution occurs and our understanding of the factors that positively and negatively influence the achievement of peaceful outcomes. "DSD is based on an amalgam of conflict theory, theories of organizational development, and an understanding of both 'traditional' and 'alternative' dispute resolution."¹³⁸

¹³⁵ See Svensson, *supra* note 18, at 24.

¹³⁶ Welsh, *supra* note 133, at 103.

¹³⁷ See William L. Ury, Jeanne M. Brett, & Stephen B. Goldberg. *Designing an Effective Dispute Resolution System*, 4 NEGOT. J. 413 (1998).

¹³⁸ Welsh, *supra* note 133, at 91.

Specifically, our DSD goal is to make a clear, simple, and easily adaptable policy recommendation that retains the positive attributes RGOs possess for civil war mediation, such as shared identities and a stake in the outcome, while lowering the unattractiveness of their involvement due to concerns about conflicts of interest driven by the intersecting dynamics of internationalized civil war and their regional makeup.

C. RECOMMENDATION

RGOs should adopt institutional procedures that give civil war disputants a single peremptory mandatory disqualification. Each disputant can require a state-member of the third-party RGO to recuse itself from the entire mediation process. This entirely subjective process will allow both disputants to identify a state that they perceive to represent a negative bias in the dispute and mandatorily recuse that state from the peacemaking process. The recusal process does not need to be open to encourage the disputants to have confidence in the mediated outcome; each side may choose a state without negotiation or justification. This policy would reduce the negative bias effects driving the poor mediation outcomes observed, and emphasize the positive proximity effects that initially brought the disputants to the regional governmental organization.

The insurgents will likely disqualify the incumbent government from direct involvement; thus mitigating the perception of bias and ensuring that the beleaguered state is not a judge in its own cause. A recent study of European Court of Human Rights decisions found in national security cases “the tendency of former diplomats to favor their own governments was about twice as strong as their inclination to find in favor of the *raison d’état* more generally.”¹³⁹

Similarly, the incumbent government will likely disqualify the state who they believe to be the insurgent’s sponsor. All members of the RGO must understand that the initial mandatory disqualification process does not establish the existence of a conflict of interest and is not a condemnation of the state which the incumbent government believes to be the insurgent’s supporter; it is only an expression of the beliefs of the incumbent government. This procedural tool serves to remove the two

¹³⁹ Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 430 (2008).

member states which are most likely to introduce an appearance of negative bias. Removing this appearance of bias helps to create an environment in which both disputants can better trust the mediators and the mediation process, enabling greater collaboration and increasing the longevity of the mediated settlement.

RGOs should also adopt institutional procedures for additional negotiated and symmetrical disqualifications after the initial two mandatory disqualifications. It is integral that any additional disqualifications be negotiated and symmetrical; both sides must agree to an additional round of disqualifications. If the insurgents should determine that an additional disqualification is required, the incumbent government will be granted the ability to make an additional disqualification (and vice versa). This ensures that neither disputant gains the impression that the other is being given precedence.

To provide guidance to the disputants, RGOs should create a set of guidelines similar to those created by International Bar Association (IBA) to deal with conflicts of interest in international arbitration.¹⁴⁰ These recognized policies and procedures could provide foundation for RGOs to address conflicts of interest and make clear that, regardless of the reach of the dispute into the organization, as a mediator they remain unbiased and fair. RGOs should consider the creation of a similar three-tiered system to identify and examine the mediator's relationship and interest in the dispute and to guide the disputants' decision-making process.

The first tier would be a non-waivable red list and a waivable red list which indicates the presence of a bias which would violate *nemo judex in sua causa*, and cannot be cured.¹⁴¹ Any member state with a red-list violation should be recused from the peacemaking process. The second tier would be an orange-list of circumstances which "give rise to justifiable doubts" as to the mediator's independence or impartiality.¹⁴² Any member state with an orange-list circumstance should be examined in-depth by the disputants to determine whether their participation in the mediation would threaten the peacemaking process. The third tier is a green-list which "contains an enumeration of situations where no

¹⁴⁰ IBA GUIDELINES ON CONFLICTS OF INTEREST IN INT'L ARBITRATION (Int'l Bar Ass'n 2004), available at <http://www.ibanet.org/images/downloads/guidelines%20text.pdf>.

¹⁴¹ Ramon Mullerat, *Arbitrators' Conflicts of Interest Revisited: A Contribution to the Revision of the Excellent IBA Guidelines on Conflicts of Interest in International Arbitration*, 4 DISPUTE RESOL. INT'L 55, 56 (2010).

¹⁴² *Id.* at 56–57.

appearance of lack of independence or impartiality exists from the relevant objective point of view.”¹⁴³ The green-list would serve as a tool to guide the discretion of the disputants when deciding which member states should be allowed to participate in the peacemaking process. The presence of a green-list circumstance for a particular state that also has an orange-list circumstance could sway the disputants to allow them to remain despite the bias.

The three-tiered red, orange, and green approach would serve as a non-binding tool that disputants could use to guide their decision-making process as they negotiate any additional symmetrical disqualifications. Transparency should mitigate the negative effects of bias and emphasize the positive effects of proximity, and would address any perceptions of bias even if actual negative bias does not exist. If the guidelines are properly developed and applied, future disputants will likely be more willing to come to an RGO for conflict resolution and they will have greater confidence in the mediation process. Accordingly, the success and longevity of RGO mediated outcomes should improve.

V. CONCLUSION

It has long been thought that geographic proximity is the key to mediation effectiveness.¹⁴⁴ Geographical proximity, however, also creates favorable conditions for regional neighbors to support civil war sides thereby generating structural conflicts of interest.¹⁴⁵ As a result, neighboring states and their RGO have inherent qualities that make them simultaneously uniquely qualified and procedurally disqualified for acting as third-party mediators. Empirical efforts studying civil war mediation by RGOs have disentangled these conflicting dynamics and demonstrated their opposing, independent, and positive and negative influences on conflict resolution effectiveness.¹⁴⁶ The next step is for policy makers, especially those in charge of directing the future of RGOs, to recognize these inherent conflicts of interests. They need to take appropriate institutional steps to mitigate the tension between the characteristics that make RGOs simultaneously attractive and

¹⁴³ *Id.* at 57.

¹⁴⁴ Elgström et al., *supra* note 9, at 13.

¹⁴⁵ Idean Salehyan, *Transnational Rebels: Neighboring States as Sanctuary for Rebel Groups*, 59 *WORLD POL.* 217, 218–19 (2007).

¹⁴⁶ See Gartner, *supra* note 6.

unattractive civil war mediators. These steps can help to maximize the likelihood that RGO mediators can craft meaningful and durable civil war peace settlements.

A. EXAMPLE: SYRIA

In 2011 and 2012 Arab League peacemaking efforts in Syria, the incumbent government was excluded from the RGO's conflict management effort (in an ad-hoc way), but the rebels' main benefactor (Saudi Arabia) was not. Thus, not surprisingly, Syria categorically rejected the entire dispute resolution effort. The UN and Arab League mediator, Kofi Annan, "laid blame for the failure of mediation at the feet of both external powers as well as the warring sides themselves."¹⁴⁷

We contend the blame needs to extend to the Arab League. By excluding Syria and including Saudi Arabia, the Arab League made it clear to Syria that the peacemaking process was biased and unjust (a perspective furthered next by the League's sanctions against Syria). If, prior to the Arab League's development of a peace proposal, it excluded both Saudi Arabia and Syria, the Arab League would communicate more clearly to the two civil war disputants the notion of procedural fairness. These disqualifications would represent a first step in pursuing a fair regional conflict management system.

Employing recusal to mitigate perceived conflicts of interest in an international organization is not at all unrealistic. During this same Syrian civil war, the Organization for the Prohibition of Chemical Weapons deployed a team in Cyprus to conduct tests for the presence of chemical agents in Syria. Composition of the team excluded experts from countries in both the Middle East and Europe in order to appear unbiased. Recognizing the importance of appearing neutral, the UN Secretary General stated that "political sensibilities" required that there be no members of the inspection team from either the Security Council permanent members or the Middle East. We encourage RGOs to adopt similar "political sensibilities" when they conduct civil war mediation (and as we identified some organizations, such as the African Union, have begun to recognize the problem we identify). IOs, such as the United Nations, which have institutions that encourage fair domestic political procedures (e.g. the UN Electoral Assistance Unit), could

¹⁴⁷ J. Michael Greig, 2013. *Intractable Syria? Insights from The Scholarly Literature on the Failure of Mediation*, 2 PENN STATE J.L.I.A. 48, 49 (2013).

facilitate the adoption of mechanisms to mitigate conflicts of interest in regional governmental organizations.

B. FUTURE IMPACT

Mediators and their influence vary.¹⁴⁸ “mediation works differently across mediator types.”¹⁴⁹ RGOs, as insiders, have enormous assets and liabilities. RGOs will only be able to live up to their lauded potential as civil war mediators by establishing transparent and defined mechanisms for dealing with their inherent conflicts of interest. Mechanisms that reduce observable negative bias within an RGO make it more attractive as a possible intrastate conflict mediator. Efforts to minimize apparent conflicts of interest in regional organization mediation should lessen the factors that lead to the high incidence of conflict management failure and facilitate the emergence of positive mediator traits. As a result, civil war disputants should be more willing to employ RGOs to mediate in situations that are less severe than previously required when conflicts of interests were not addressed. Implementation of our recommendations should lead simultaneously to an increase in the number of civil wars mediated by RGOs, a decrease in the average intractability and severity of those disputes mediated by RGOs, and an increase in the longevity and durability of agreements resulting from the peace process.

C. FUTURE RESEARCH

We identify three areas for further research. First, we want to determine if there are conditions where disqualifications beyond the initial two should be required instead of voluntary. It is possible that limited, additional mandatory disqualifications could increase the disputants’ trust in the peacemaking process to the benefit of everyone in the region. There must be a limit to disqualifications; otherwise, it is possible that disputants could force the disqualification of all but a few members of an RGO, thus nullifying the advantages of RGO mediation.

¹⁴⁸ Svensson, *supra* note 18, at 20; see BEARDSLEY, *supra* note 5, at 17

See David E. Cunningham, *Who Should Be at the Table?: Veto Players and Peace Processes in Civil War*, 2 PENN ST. J.L. & INT’L AFF. 38 (2013).

¹⁴⁹ Molly M. Melin, *When States Mediate*, 2 PENN STATE J.L.I.A. 78, 79 (2013).

Second, research should be done to determine whether other members of the RGO not directly involved in the civil war should be able to be involved in the recusal process. That is, should RGO member states be able to identify states and state-representatives that need to be recused? If so, who and under what conditions? It is possible that the entire RGO could come together to select a single state or group of states to appoint impartial mediators, but it is also possible that the process could become excessively political and cumbersome. This could unnecessarily delay the peacemaking process or decrease disputants' trust in the process.

Unlike domestic mediation, in international dispute mediation the scope of the third-party's responsibilities is subjective and is determined by the "mandate."¹⁵⁰ We are also interested in examining further variation in the influence of conflicts of interest during the determination of the RGO's peacemaking mandate, the implementation of that mandate (the actual peacemaking), and peace agreement implementation (e.g. the makeup of peacekeeping forces) as these processes can vary.¹⁵¹ Despite these necessary areas of further research, RGOs should heed the institutional proposal denoted here to mitigate the bias resulting from inherent conflicts of interest and place them into effect to make them more attractive civil war mediators.

¹⁵⁰ ISAK SVENSSON & PETER WALLENSTEEN, *THE GO BETWEEN: JAN ELIASSON AND THE STYLES OF MEDIATION* (2010).

¹⁵¹ Dennis C. Jett, *Mediation-Its Potential and Its Limits: Developing an Effective Discourse on the Research and Practice of Peacemaking*, 2 PENN STATE J.L.I.A. 103, 114 (2013).