

Mediating International Crises

Kristina Roepstorff

Global interactions increasingly rely on law to govern them. Today, numerous rules dominate the interactions between states and non-state parties. International courts and dispute settlement mechanisms are in place to ensure compliance with commonly agreed norms.

International Law, however, is complex and often lacks universal acceptance. Worse, its influence is disproportionately strong on the poorest countries and countries in crisis. It is in situations of poverty and conflict where international law has the most impact - for better or worse. International legal structures can provide security, stability and access to economic support, but they can just as easily prevent timely and adequate assistance. Development and humanitarian actors must increasingly be aware of their potential as well as their pitfalls.

Good Governance is easily prescribed, but must become a mindset of all involved to make the system work. Less and least developed countries are often governed by constitutions that are complex and inaccessible for their citizens. Without acceptance by their subjects, they weaken and cease to safeguard the nation state against failure. Development assistance must provide more than just models and institutions to move these countries forward.

Papers in the lawanddevelopment.org series aim to contribute to the understanding of the importance of these linkages and strive to support a better concept of how law can aid development. All papers are original works and are solely published on lawanddevelopment.org

For queries write to:

The Editor

lawanddevelopment.org

P.O.Box 1106

Nairobi 00502

Kenya

info@lawanddevelopment.org

www.lawanddevelopment.org

Contents

1. Introduction.....	2
2. Mediation.....	3
2.1. The Nature of Mediation.....	4
2.2. The Role of the Mediator.....	5
2.3. The Mediation Process.....	7
2.4. The Nature of Disputes.....	8
3. International Dispute Settlement.....	9
3.1. Mediation in International Relations.....	10
3.2. Good Offices and Mediation.....	13
3.3. Functions and Limits	14
4. Mediating International Crises.....	17
4.1. International Conflicts and International crises.....	17
4.2. Facilitative or Manipulative Mediation?.....	19
4.3. Mediation of Civil Wars.....	20
5. Conclusion.....	22

Bibliography

1. Introduction

The Charter of the United Nations states in Article 33, paragraph 1:

“ The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

The principle of peaceful settlement of international disputes has therefore been included in various international declarations, resolutions and conventions¹.

In this essay I want to look at mediation as one specific form of pacific settlement of international disputes, especially in the context of international crises. Mediation in international crises as a third-party intervention seeks to prevent the escalation of conflicts.

The aim of mediation is to find a compromise between the parties involved in the conflict and to end it by peaceful means and prevent violent consequences.

But how does mediation in international conflicts work? What are the differences between this specific form of dispute settlement and other forms like negotiation, arbitration? When is the use of mediation appropriate, what are the conditions? In order to discuss these questions, I will first analyse the theory and practice of mediation and differentiate it from other forms of dispute settlement. After having defined mediation in general, I will outline the form mediation takes in international disputes. I will distinguish between disputes and conflicts, as this is important for the understanding of how mediation works in a particular situation, like international crises. I will then in a next step look at the conditions for the application of mediation in international crises. As an example for international crises, I will focus on mediation of civil wars. This will then lead to the central question of my essay: to what

¹ For example: the Hague Conventions for the Pacific Settlement of International Disputes, the Manila Declaration on the Peaceful Settlement of International Disputes.

extend can it be said that mediation is a successful mean to the peaceful settlement of international crises, in particular of civil wars?

1. Mediation

Mediation has always been a form of dispute settlement in a variety of cultures.² The field research of social anthropologist has revealed the importance of mediation in different cultures. What is being expected from mediation and how the role of the mediator is determined depends on the cultural setting and the particular understanding of social structures and relationships. Mediation may be an integral part of the cultural handling of disputes and conflicts.³

With the emergence of the nation state and the following dominance of state sponsored adjudication, and litigation became the predominant form of dealing with disputes. The dissatisfaction with adjudication and the recognition of the deficits of legal institutions led to the American ADR movement in the mid 1970s⁴ with the emphasis on alternative and complementary forms of dispute resolution to the largely criticised adjudication. It was a due to the ADR movement that mediation was institutionalisation in many common law countries.⁵

Today the recourse to mediation is mainly in the fields of international, labour, family and community disputes.

² Gulliver analyses negotiation and mediation in “Disputes and Negotiation” in the context of culture.

³ As for example in China mediation is a common way of dispute settlement.

Palmer, Roberts: Dispute Processes, pp. 110-116

⁴ *ibid.*, Chapter 2

⁵ Palmer, Roberts: Dispute Processes, pp. 44-48

1.1. The Nature of Mediation

Mediation⁶ as a method for the peaceful settlement of disputes has to be understood as a supporting mechanism for negotiation⁷ through third-party intervention.⁸ Therefore, mediation can be defined as “ [...] a process of facilitated negotiation among two or more parties, assisted by a third-party neutral, to resolve disputes, manage conflict, plan future transactions or reconcile interpersonal relations and improve communications.”⁹

Thus, mediation is a process of social interaction of high complexity and diversity. The specific form mediation takes in a particular situation is influenced by the environment, in which it has to take place, the perceptions and expectations of all people involved in the process and various other conditions.¹⁰ Mediation as an alternative form of dispute resolution is a context-driven process. The context of the mediation influences the behaviour of the mediator who will adapt his strategy accordingly. Thus, when analysing the mediation process and the role of the mediator, one must take all the other conditions of the context into account in order to achieve a consistent picture of the whole mediation process. This includes the understanding of key factors such as the parties' internal and external sources of power, influence and support.¹¹ Where significant power-imbalances exist between the parties, mediation may be considered as inappropriate¹², as the weaker party may be disadvantaged by a negotiated settlement of the dispute. However, the mediator's role may include the task of “balancing” power by either weakening the stronger party or empowering the weaker party in

⁶ Although conciliation is often referred to as mediation, there is a central distinction: whereas conciliation implies reconciliation as the outcome, in mediation this is not a necessity. The third-party intervenes not in order to reconcile the parties, but in order to achieve a consensual outcome.

⁷ Palmer, Roberts: *Dispute Processes*, p. 101

⁸ Gulliver: *Dispute and Negotiation*, p. 213

Gulliver states that the intervention of the mediator turns the dyadic structure of a dispute between two parties into a triadic interaction.

⁹ Menkel-Meadow: *Mediation*, Introduction, p.XIII

This is a functionalist definition of mediation, emphasising the function of mediation in society.

¹⁰ Bercovitch, Houston: *Why Do They Do It Like This?* p. 174

¹¹ *ibid.* p. 198

¹² Palmer, Roberts: *Dispute Processes*; p. 132

the dispute.¹³ But this active involvement of the mediator into the dispute can be regarded as not compatible with the principle of impartiality. Therefore the question of the extent to which the mediator should intervene in the whole negotiation process must be raised. How much power should the mediator have to shape the negotiation and influence the mediation process?

1.2. The Role of the Mediator

This definition of mediation emphasises the neutral role of the mediator in the mediation process – the mediator as not being aligned to any of the parties involved in the dispute.¹⁴ The ideal attribute of the mediator is therefore his impartiality. This guarantees that he will perform his function without bias and thus gains the trust of both parties.

The mediator assists disputing parties in resolving their conflict through negotiation and facilitating joint decision-making. The exchange of information is the essence of negotiation and the primary role of the mediator is to facilitate the communication between the parties.

When the parties are in communication, the aim of the mediator is to assist them in the transition of one negotiation stage to the next.¹⁵ Communication can take place either directly between the parties or indirectly through the mediator. Whether direct or indirect communication is applied has implications for the whole negotiation process: the quality of the communication between the parties can vary accordingly, as well as the extent to which the mediator takes over control in the negotiation process.¹⁶ In any case, the confidentiality of

¹³ Palmer, Roberts: *Dispute Processes*; p. 134

¹⁴ *ibid.*, p. 101

¹⁵ There is not one single conceptualisation of the stages of the negotiation process. One possible conceptualisation is the one supposed by Gulliver and has been followed by Palmer and Roberts. This model of the negotiation process understands the developmental process and the cyclical process as interconnected. Palmer, Roberts,; *Dispute Processes*, p. 72

¹⁶ *ibid.*, p. 117

the information is a precondition for a successful mediation, as the misuse of information may result in the loss of trust and parties may not be willing to continue with the negotiations.¹⁷

So far I have described the role of the mediator as facilitative. But the mediator can also play a more evaluative role in the negotiation process. By evaluating the positions of the parties, the mediator directs the parties as to the strengths and weaknesses of their positions and proposes solutions.¹⁸ The evaluative role of the mediator presupposes a previous knowledge of the laws applicable in the specific dispute and therefore is mainly employed by lawyer mediators. Thus, the mediator's role is to advise the parties. This role is more actively than the role of the facilitative mediator, who will not give his opinion on the likely outcome at trial, but sees his main task in enhancing communication between the parties. But even when the mediator acts more passively, it will still influence the negotiation process itself. The way the mediator perceives the dispute will have an impact on the strategies he will choose in order to achieve the settlement of the dispute. Thus, by analysing the dispute and clarifying the issues at stake, the mediator may influence the dispute settlement.

In general, the mediator's behaviour depends on the perceived role and the resources and techniques available to him, as well as on the specific context of the dispute. The strategy the mediator will follow, thus, depends a lot on his analysis of the particular situation.

One can differentiate between communication-facilitation strategies, procedural strategies and directive strategies, ranging from passive to active involvement into the negotiation process.¹⁹

The communication-facilitation strategy concurs with the facilitative role of the mediator where he remains quite passive. The procedural strategy refers to a more formal control the mediator has over the process of the mediation, but only concerning the general environment

¹⁷ Palmer, Roberts: *Dispute Processes*, p. 141

¹⁸ *ibid.*, p. 126

¹⁹ Bercovitch: *Why Do They Do It Like It?* p. 175

in which it takes place. Lastly, the directive strategy is the most powerful form of mediating, since the mediator has the power to influence the content and substance of the process.²⁰

1.3. The Mediation Process

The mediation process is associated with terms such as neutrality, voluntary, concessions and impartiality.²¹ In addition, mediation has been defined as a third-party intervention into the dispute. It is therefore a response to a dispute that must be differentiated from negotiation where there is no external intervention. Yet, mediation involves negotiation either between the two parties directly or indirectly through the mediator. In the former case the mediator facilitates the negotiation process, in the latter the mediator is more actively involved in the negotiation as evaluator. So “[...] *any understanding of the mediator’s role is dependent on a primary understanding of negotiations.*”²² The mediator employs negotiation skills and techniques when mediating the dispute. The mediation process is therefore to some extent similar to the negotiation process. Like the negotiation, the phases in the process of dispute settlement are²³: firstly, to establish a secure arena, in which the parties can communicate either directly with each other or indirectly through the mediator; secondly, to set the ground rules for the negotiation and make sure, they are followed by the parties; thirdly, to determine the issues of the dispute and make sure that they are articulated clearly and heard by both sides; fourthly, to evaluate and identify the options as they parties see them; fifthly, to bargain; sixthly, to move the parties towards settlement; and finally, to formulate the agreement. Whereas general agreement of the role of the mediator at the first three stages of the negotiation process exists, this is not the case with the subsequent stages, where the mediator may play a more active role and has more power to influence the negotiation process

²⁰ Bercovitch: *Why Do They Do It Like It?* p. 175

²¹ *ibid.*

²² Palmer, Roberts: *Dispute Processes*, p. 101

²³ *ibid.*, pp. 117-119

and outcome. The former is what is usually referred to as the classical model of mediation, or facilitative mediation; the latter is the model of evaluative mediation. Thus, the extent to which the mediator is involved in transforming the negotiation process from one stage to the other largely depends on the basic assumption of how actively the mediator should be and how much power he should be given. The decision on the extent of involvement of the mediator may either be made by the mediator himself or the parties.

1.4. The Nature of Disputes

For lawyers, disputes arise from a particular rule breach. What is being sought for to end the dispute is to do justice. This is perceived as being best achieved through litigation.²⁴ But this does not give full account of the structure of disputes or the broader context in which they arise.

Disputes involve transformation from “naming”, to “blaming”, and “claiming”²⁵. An individual may be treated unfair or a right may be violated without being perceived so. Only when the individual actually perceives the experience as injurious, a transformation takes place by “naming” it. The next transformation step is “blaming”, where the individual attributes the injury to the fault of someone and thus the perceived injurious experience turns into grievance. When the individual utters the grievance to the perceived responsible entity (a person or institution) and asks for remedy, this transformation is called “claiming”. Finally, the claim is transformed into a dispute, when the alleged injury is being rejected in whole or in part.²⁶ The role of the lawyers is then to represent the parties and to transform the dispute into a legal dispute that can be solved by applying the law.²⁷ But not all grievances transform into disputes. If for example at an early stage the alleged wrongdoer does not reject the claim

²⁴ Palmer, Roberts: *Dispute Processes*, p. 7

²⁵ *ibid.*

²⁶ *ibid.*, p. 8 and 9

²⁷ *ibid.*

and excuses his or her misbehaviour, the victim might be satisfied and might not insist on a remedy.

This transformation model of disputes is useful for identifying social structures of disputing as it analyses the social stratification and social psychological of a given culture as a whole or of the individual's character in particular.²⁸ It becomes clear that in order to understand disputes, they have to be seen in the overall social context. Also, understanding them as discrete incidents without referring to the past, the future or the culture in general will not give an adequate account of what are the issues.²⁹

Thus, many disputes are polycentric, thus are many centred.³⁰ This feature is important as it supportive for bargaining and trade-offs in order to achieve settlement. What for one party is the most important issue of the conflict, might not be the one for the other party.

Compromises are therefore easier to be reached through trade-offs of interests.

The responses to disputes may vary and can be broadly categorised into: avoidance, negotiation, mediation, umpiring and self-help.

In this essay I want to discuss mediation as one response to international disputes, in particular to international conflicts or crises.

2. International Dispute Settlement

International dispute settlement is part of the international legal framework and existed before modern movements in psychological training for the prevention of or settlement of conflicts emerged. The American ADR movement is a modern movement, following developments in psychology and social sciences, combining the two approaches found in international relations and international legal research: the rules approach and the

²⁸ Palmer, Roberts, p. 9

²⁹ *ibid.*, p. 12

³⁰ Fuller: *The Forms and Limits of Adjudication*, p. 395

effectiveness approach.³¹ The analysis of alternative dispute resolution and the spreading popularity of these practices will have and is having influence on how the international community deals with international disputes and conflicts.

Usually, the study of dispute settlement in international relations has focused on conflict prevention or conflict resolution. Thus, the concern is rather the effectiveness of differing conflict resolution mechanisms than the question of whether the parties are obliged to comply with the outcome or whether a specific conduct is required by procedural rules.³² However, apart from this differing approach to the research on international dispute settlement, there still have been overlapping interests.

2.1. Mediation in International Relations

International relations are understood in terms of the conceptual framework of international law. It is in international law that the concepts of the state and its sovereignty, nationality, citizenship, war and peace, are determined as legal concepts, applicable in the international arena. They find expression in contracts and treaties between national representatives. Law can therefore be seen as fundamental for understanding the contemporary world and the relations between the states. International law uses not only substantive rules to settle international disputes, but also procedures to do so. Where the aim of national law is to prevent interpersonal violence, the aim of international law is to prevent interstate violence.³³ However, when a situation of dispute or conflict arises, law is chosen only in the contexts where the legal framework of the international community seems most suitable for resolving the issue at stake. Thus, using the legal mechanism for resolving conflicts or disputes is optional. Most cases, both at the national and the international level,

³¹ M. E. O'Connell: International Dispute Settlement, p. xx

³² *ibid.*

³³ *ibid.*, p. xiv

are settled before legal procedures become employed.³⁴ When the conflict or dispute is not being resolved by other means and the legal mechanisms come into play, this is signalled by the use of legal languages; claims and contra-claims are being expressed in legal terms.³⁵ The recourse to the legal framework at the national level can be done by either party without the consent of the other party in the dispute. This is different at the international level, where the consent of both parties is a prerequisite for the settlement of the dispute.³⁶ This doesn't mean that consent has to be sought on a case- to-case basis – many of the international instruments require the signatory states to agree to some form of compulsory settlement of future disputes. Therefore, the consent may be given when ratifying a multilateral convention.³⁷

When a dispute is actually being adjudicated at the international level, often the judgment seems to be only one further stage in the whole dispute settlement process. Frequently the dispute is finally settled through follow-up negotiations.³⁸ However, at the international level most disputes are settled through other means than the strict application of the law.³⁹ And the settlement of international (and national) disputes by legal means is not the only available mechanism of resolving them. Negotiation and mediation as alternative dispute resolution mechanism play a central role when dealing with international disputes or conflicts. Hence, several international instruments provide provisions for the peaceful settlement of disputes between States by listing the most important mechanism. The Charter of the United Nations says that the aim of the United Nations⁴⁰ is to maintain international peace and security.

³⁴ J. Collier, V. Lowe: *The Settlement of disputes in International Law*, p. 4

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ M. E. O'Connell: *International Dispute Settlement*, p. xiv

As international law is a dynamic and developing field where dispute settlements are frequently used, new principles are emerging constantly from which one of the most important one to mention is the principle of good faith. This principle, which is for example to find in the Vienna Convention on the Law of Treaties, stresses the importance of honesty, fairness and reasonableness in international interactions. If the dispute settlement should function, the participating parties have to act in good faith.

³⁸ *ibid.*, p. 5

³⁹ *ibid.*

⁴⁰ United Nations Charter, Chapter I, Article 1, paragraph 1

Threats to the peace and the security of the international community should be encountered by peaceful means (Article 1, paragraph 1) and the member States should settle their disputes by peaceful means (Article 2, paragraph 3). Chapter VI, which deals expressly with the peaceful settlement of disputes, lists the following ways of peaceful dispute settlement: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement and the resort to regional agencies or arrangements or any other peaceful means (Article 33, paragraph 1). These mechanisms can be divided into diplomatic or non-binding methods and legal or binding methods. Diplomatic methods are: negotiation, mediation, inquiry and conciliation; legal methods are: arbitration and adjudication.⁴¹

The principle of the peaceful settlement of disputes between States is thus fundamental to the United Nations and has been expressed in various Declarations and resolutions of the General Assembly.⁴² Thus, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States⁴³, the Manila Declaration on the Peaceful Settlement of International Disputes⁴⁴, the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this field⁴⁵, the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security⁴⁶ and recently in its Resolution regarding the Prevention of Armed Conflict⁴⁷ emphasises the importance of the settlement of disputes by peaceful means.⁴⁸

When looking at the international instruments, one can list a variety of mechanism for settling international disputes by peaceful means, ranging from negotiation, over mediation and

⁴¹ M. E. O'Connell: International Dispute Settlement, xiv

⁴² United Nations: Handbook on the Peaceful Settlement of Disputes between States, p. 3

⁴³ GA, Resolution 2625 (XXV)

⁴⁴ GA, Resolution 37/10, annex

⁴⁵ GA, Resolution 43/51, annex

⁴⁶ GA, Resolution 46/59, annex

⁴⁷ GA, Resolution 57/337

⁴⁸ But not only the United Nations System provides for the peaceful settlement of international disputes, but also NATO, OSCE and the OAU as well as the European system and many more international tribunals such as the arbitral tribunals of the United Nations Law of the Sea Convention or the WIPO.

conciliation to fact-finding inquiries, arbitration and the adjudication through courts.⁴⁹ The extent to which a third-party is getting involved in the settlement of the dispute or conflict increases with the extent to which the procedure becomes more formal. The parties to the dispute are able to choose from the variety of alternatives the most suitable mechanism for settlement.

Mediation is one of the mechanisms and therefore integral part of the international instruments regulating international relations. Mediation is usually categorised as a diplomatic mechanism of settling international disputes. Diplomatic mechanisms are distinguished from legal mechanism, which does not imply that diplomatic mechanisms are lawless or without rules and regulations. Every party is at least bound by the principle of good faith and by international legal norms in general⁵⁰. Rather, diplomatic mechanisms are opposed to legal mechanisms in their non-binding nature of the outcomes.⁵¹

2.2. Good Offices and Mediation

When a dispute between two or more States arises, the position of the parties may not allow mere negotiation to resolve it. In that case, the parties of the dispute may recourse to mediation and a state or international organisation may step in as a third-party neutral. The help of a state or an international organisation can take the form of either good office or mediation. Good offices differ from mediation in the extent to which the third-party gets actively involved into the settlement of the dispute. The good offices have a limited role in the whole negotiation process: its aims are to get the parties together and to initiate negotiations, but not to participate in the negotiations, nor evaluate the facts of the dispute or to propose an agreement. The role of the good offices is therefore limited when compared to the role of the

⁴⁹ Here it is important to note that although the International Court of Justice adjudicates international disputes, it does so only when domestic remedies are exhausted.

⁵⁰ The agreements reached in a mediated dispute must not be in violation of jus cogens norms.

⁵¹ M. E. O'Connell: International Dispute Settlement, p. xv

mediator. The mediator participates more actively in the negotiations and proposes ways of settlement of the dispute. In terms of general mediation theory, one could say that good offices serve in facilitating mediation while the mediator applies evaluative mediation. Like facilitative and evaluative mediation, good offices and mediation share some common features. Both ways of third-party involvement are characterised by informality and flexibility and can only begin, when the disputing states agree to it. Also, in order to settle the dispute successfully, both the good offices and the mediator have to know the facts of the specific dispute. Thus, fact-finding is a crucial element of their work. But whereas the mediator is expected to initiate negotiations by submitting a proposal, good offices do not play an active role in the negotiations. Therefore, the mediator's fact-finding is likely to be more exhaustive. In general, good offices are understood as encouraging the disputing states to settle their conflict through peaceful means. The main aim is to facilitate communication between the parties and to prepare the basis for negotiations to start. The mediator's scope is wider in that he plays an active role even after negotiations have started.

Whether good offices or mediation are the mechanism employed, essential is the requirement of consent and co-operation of the parties of the dispute if it is to be settled. And it is not only the case because of the general need of consent when settling a dispute at the international level, but also because it is an important pre-condition for a successful mediation. Also a more active evaluative mediation where the third-party provides proposals requires the consent of the parties, as they are not binding in it self and the mediator has no power of enforcement.

2.3. Functions and Limits

The function of mediation therefore is to settle disputes arising at the international level. Disputes which have to be mediated have normally reached the stage where contact between the party is restricted or open communication is not an option. As soon as the parties are

communicating again, the mediator can help loosening the tensions and creating the adequate environment for further negotiations by applying general negotiation procedures.

But not always is mediation suitable for resolving international disputes. Thus, there are limitations for the use of mediation at the international level. As mediation requires the agreement of both parties to the third-party intervention, mediation is not possible to apply when one of the parties or both are not willing to let a third-party (often a state) meddling with their interstate affairs. At an early stage of the dispute, the parties tend to prefer settling the dispute under their own control, convinced that this will lead to an outcome in their interest. When the parties to the dispute are governments, it is likely that they will have to justify their position publicly which can easily lead to hardening positions because of the fear of loosing their face. Thus, the public opinion and the pressure coming from it, plays an important role in the likeliness of the recourse to mediation in an international dispute.

Therefore, to offer or propose mediation is a question of the correct timing.⁵² If the offer is made at an early stage the parties of the dispute may still be too confident in being able to settle the dispute on their own and according their interests. But the mediation offer can be made to late as well.⁵³ Then the parties' positions may not reconcilable anymore and the dispute has to be settled by either the use of force or a legal decision in favour of one party's claim.

The success of any mediation depends also on the skills and qualifications of the mediator. This becomes even more important at the international level where the involvement of a third-party is a very sensitive political issue. The required neutrality of the mediator is an important issue⁵⁴, since mediation by an ally of the opposition party to the dispute is likely to give rise to further animosities. Hence, the mediator must be sensitive to the parties' perceptions of the dispute and his involvement. This requires experience and commitment. In this context the

⁵² Greig: Moments of Opportunity

⁵³ Northedge, Donelan: International Disputes: The Political Aspects, p. 307

⁵⁴ Brilmayer: America: The World's Mediator?

question can be raised whether mediation should be made a full-time profession or should remain at an ad-hoc basis.⁵⁵

From the perspective of the mediator, many countries do not feel comfortable in the role of the mediator and are therefore reluctant to offer their services. It is not only a time consuming and troubling activity, but also may lead to an undesirable involvement in the political issues of the parties' dispute.

If mediation is actually an option, the question of which mediation mechanisms should be used arises. Mediation may be more likely to be effective if the mediator has some power to induce the parties to settle their dispute. This sometimes may involve providing enough resources for the mediator. A backing of the mediator by international organisations can strengthen the mediator's bargaining position in providing resources.⁵⁶

As in domestic alternative dispute resolution one could argue, that the best way of dealing with disputes may be in applying mixed processes or hybrid forms of dispute settlement mechanisms. In fact, this seems to reflect the reality as it is. Sometimes mediation will only bring along a partly solution. When important interests are at stake, a provisional solution is often easier to negotiate than the achievement of a final settlement of the dispute. This can be the case if the dispute has already escalated into violence. Then the negotiation of a ceasefire may be only a partly solution, but is already an achievement. When the agreement provides for further steps for final settlement, it is necessary to supervise the implementation of the conditions for it. That is a crucial point, since the failure to comply with the agreement can lead to even more hostility between the parties of the dispute.⁵⁷ It is therefore important to

⁵⁵Northedge, Donelan: *International Disputes: The Political Aspects*, p. 312

⁵⁶ The resources can be used to assure help in the case of an armed attack if that state accepts mediation or the mediation outcome. Another way of making use of the resources of the international community is through the technical assistance programmes of the United Nations, so that the states will see themselves not worse off when agreeing to mediation than they would be when enforcing their interests without compromise. The possibility of threatening a state that refuses mediation with sanctions is controversial. It may seem effective since more parties would agree to mediation to prevent sanctions. But it is disputable if that would not go against the very idea of mediation, where the free consent to take recourse to mediation as an alternative form of dispute resolution can be argued to be a prerequisite.

⁵⁷ J.G. Merrills: *International Dispute Settlement*, p. 36

consider the extended role of the mediator as supervising the parties' compliance with their obligations under the negotiated agreement. The presence of the third-party can help to maintain the commitment of the parties' to the agreement.⁵⁸

The mediation process and conditions are diverse and every situation requires specific consideration. The mediator should therefore be flexible in his approach. But it might be still possible to give a general analysis of effectiveness of particular forms of and approaches in mediation in a specific category of dispute – namely, in the case of international conflicts and crises and genuinely in the case of a civil war.

3. Mediating International Crises

Mediation is one mechanism employed to prevent the escalation of a conflict and to prevent or at least minimise an international crises. Mediation of international disputes means dealing with a particular dispute between two states. A third party - often a third state – functions as the mediator. But since the conditions of a dispute differ from the conditions of a crisis or conflict, the question arises, whether the forms of mediation must differ accordingly. Are the same skills and characteristics of the mediator needed? Does the situation require special considerations? What are the conditions for mediating international crises? What are the stages of the mediation process and how, when at all, do they differ from the ordinary mediation process employed in dispute settlement?

4.1. International Conflicts and International Crises

International disputes can be settled through mediation. But disputes have to be

⁵⁸ J.G. Merrills: International Dispute Settlement, p. 37

distinguished from conflicts and crises. A dispute usually refers to a situation of a disagreement of specific nature. Questions of rights and interests are raised by way of claims and counter-claims. A situation of conflict arises where there exists a general state of hostility between the parties. Disputes in the context of a general conflict are as much the cause as the result of it. Thus, the settlement of a particular dispute within a conflict rarely ends the general state of hostility and leaves the conflict unresolved. A crisis describes an unstable situation of extreme danger or difficulty. Often the consequence of an unresolved conflict may lead to a crisis with the possibility of violent escalation. If this situation is threatening the stability of a whole region one can speak of an international crisis.⁵⁹

International crises can be identified when:

- a) a change in the type and/or an increase in the intensity of hostile interactions between states, with a heightened probability of military hostility.
- b) these changes destabilise the states' relationship and threaten the structure of the international system.⁶⁰

In answering to crises, the goals of conflict resolution and crisis management have to be distinguished. Generally, conflict resolution focuses on seeking long-term remedies that address the roots of the conflict and all underlying issues. The primary goal of crisis management is to terminate the immediate situation of hostility before it escalates or spreads. This is sought through interventions in the crisis.⁶¹ However, conflict resolution and crisis management are related and they only differ in their primary pursuit.⁶² Whereas the role of mediation in international relations and international conflict has been analysed, the role of mediation in international crises has not been researched on extensively.⁶³ Considering the

⁵⁹ J. Wilkenfeld, K. Young, V. Asal, D. Quinn: *Mediating International Crises*, p. 281

⁶⁰ *ibid.*

The authors follow the definition given by the International Crises Behavior (ICB) Project

⁶¹ *ibid.*, p. 282

Whereas a ceasefire could be considered as a successful crises management, it is not always considered as being a successful conflict resolution outcome.

⁶² *ibid.*, p. 282

⁶³ *ibid.*

differences of the circumstances of a conflict and a crisis, the separate analysis of mediation in international crisis is necessary.⁶⁴

4.2. Facilitative or Manipulative Mediation?

The mediator can function as facilitator and as such serves as channel of communication between the disputing parties. This type of mediation has also called third-party consultation, good offices⁶⁵, or process facilitation⁶⁶. In this role the mediator doesn't contribute substantively to the negotiation process, but ensures the continuing dialogue between the parties. When mediating international crises, the mediator can either take the approach of a facilitative or can play a more active role in using manipulative, or evaluative, mediation techniques. As already discussed, in the terminology of international relations, these two functions of the mediator can be differentiated as good offices and mediation. The service the mediator provides, as a mere facilitator, is a good office service, whereas the evaluative or manipulative approach would be regarded as mediation.

Both mediation techniques are able to generate agreements between the conflicting parties. But when analysing the actual mediated crises⁶⁷, it seems that manipulative mediation has a positive effect on the level of benefits associated with crisis termination and on the duration of the crisis.⁶⁸ Facilitative mediation can lower the average benefits which can have impact on the recurrent of the crisis, since one or both of the parties' may be discontent with the outcome of the mediation. In contrast, manipulative mediation often leads to a faster

⁶⁴ Thus, in their article on mediation of international crises, the authors state: "*Despite the likelihood that mediation will take place during international crises, both the mediation literature and the crisis literature have failed to offer systematic analyses of crises mediation.*"

J. Wilkenfeld, K. Young, V. Asal, D. Quinn: *Mediating International Crises*, p. 282

⁶⁵ See 3.2. of this essay

⁶⁶ *ibid.*, p. 283

⁶⁷ *ibid.*

419 cases coded as international crises in the ICB data set for the period from 1918 to 1996 have been evaluated.

⁶⁸ *ibid.*, p. 297

agreement between the parties. This is crucial, since prolonged crises negotiations tend to heighten the likelihood of escalation of the crises, leading to violence or war.⁶⁹

Thus, in analysing the effectiveness of facilitative in comparison to manipulative mediation of international crises, the latter one seems to be the more effective mean in crises management than the former.⁷⁰

Thus, the analysis of the effectiveness of different forms of mediation is based on the distinction drawn between facilitative and manipulative mediation. From this two mediation techniques, manipulative mediation leads to more satisfying results. But that should not prejudice the effectiveness of other mediation techniques falling between the two extreme styles of facilitative and manipulative mediation.⁷¹ But although manipulative is more likely to lead to a settlement of the dispute, this active form of mediation bears problems. The powerful role of the mediator to propose (and somehow impose) a solution to the parties may result in feelings of alienation and resentment.⁷² In the case of mediating civil wars, a sensitive approach towards mediation is necessary and the role and the power of the mediator has to be carefully determined.

4.3. Mediation of Civil Wars

Mediation can be and is being used as a method of resolving civil wars.⁷³ Mediating a civil war means that the conflict is already at progressive stage where violence is used and the positions of the parties are likely to be hardened. So the question is whether mediation at that stage is a suitable mechanism for settling the conflict. How successful can mediation be in resolving civil wars?

⁶⁹ J. Wilkenfeld, K. Young, V. Asal, D. Quinn: *Mediating International Crises*, p. 297

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ Assefa discusses the use of mediation in the case of Sudan, de Rossanet in the case of Yugoslavia.

Using mediation in the context of civil wars faces the government involved with some dilemmas.⁷⁴ If the government agrees to negotiate with the other party - which is claimed to be the party of rebels – could give the impression, that the cause for rebellion is legitimate and that the government recognises them officially. Internally this could lead to a strengthening of the rebels; externally this could give them an international status. Thus, other states could help the rebels more openly, since they are recognised as an official party to the conflict. Also, it could create a precedent and encourage future rebels to use violence.

Mediation as a mechanism of dispute settlement means the involvement of a third party. But in allowing a third party to intervene the government fears to allow an infringement of its sovereignty. So governments tend to use force rather than mediation to resolve the conflict. These dilemmas the government is being faced with, underlines the special circumstances and conditions of mediation of civil wars and the sensitive issue that the mediator should not be alleged to meddle in the internal affairs of the government and infringe its sovereignty. In mediating civil wars, these difficulties have to be kept in mind in order to resolve the conflict. But this is not the only condition for a successful mediation. Other conditions can be divided into three general groups, concerning the characteristics of⁷⁵:

1. The conflict parties:

- the conflicting parties are clearly identifiable and internally united
- the personality conflict among the leaders is of low intensity
- the parties are dependent on external sources for aid

2. The conflict itself

- existence of stalemate and the parties must perceive the cost of non-settlement as high and rising
- the nature of the issue should not be essentially zero-sum
- the issues for the negotiation should be multiple to allow trade-offs⁷⁶

⁷⁴ Assefa: Mediation of Civil Wars, pp. 3-31

⁷⁵ *ibid.*

3. The mediator

- the mediator must have specific skills and characteristics
- the mediator should have leverage over the conflicting parties
- the mediator should be a representative of a non-political, nongovernmental international body or the support of one

The claim is, that if these conditions are provided, the settlement of a civil war through mediation is more likely to be successful. This does not mean that all the conditions are equally important or that mediation can only be successful, if all conditions exist. Thus a group of conditions, which can be considered as being both necessary and sufficient may be defined⁷⁷. This group of conditions includes the situation of stalemate, the involvement by a qualified mediator with sufficient resources and powers, and the nature of the disputed issue must be non-zero-sum and multiply. However, the mediator is not completely dependent on the pre-existence of these conditions. To some extent the mediator can also influence the conditions, if he has the necessary power and influence for doing so.

5. Conclusion

Mediation may be used for settling both disputes and conflicts, at the national as well as at the international level. But whereas disputes are about a specific violation of a right, conflicts are usually polycentric and are not about a particular right or wrong. They normally extend over time and sometimes it is difficult to identify the real issues from which the conflict originated. As polycentric disputes are a good basis for bargaining and trade-offs, a skilled

⁷⁶ This analysis is also backed by the findings in Wilkenfeld, Young, Asal and Quinn where the evaluation of mediated crises indicated that if the issues in a crisis increase, so does the chance that the crisis is going to be mediated. Territorial claims are the most likely to be mediated and so are ethnic conflicts.
See: *Mediating International Crises*, p. 285

⁷⁷ Assefa: *Mediation of Civil Wars*, p. 31

mediator is in a better position to guide the parties towards a compromise.⁷⁸ Conflicts are polycentric by nature and therefore suitable for mediation. But conflicts may escalate and result in a situation of international crisis.

International crises are dangerous and difficult situations – either violence is already used or a real threat exists that it will be used in the near future. In addition, the situation is unstable and likely to spread and other parties could be dragged into the conflict. The situation is often highly political and therefore much consideration must be given to the decision of who would be a suitable mediator in these difficult circumstances. Also, the role the mediator plays in the whole negotiation process and the level of power granted to him must be determined carefully as any mistrust in the mediator may not only prevent the settlement of the dispute, but may even worsen the situation.

I think, although the mediator may have experience in negotiating and thus may be in a better position to judge and evaluate the dispute, it should remain to the parties to accept or reject a more powerful role of the mediator. An imposed mediation will not lead to a settlement in good faith, which is a precondition for successful and final settlement of any dispute. In addition, both parties must accept the mediator. Only then will the parties trust him and perceive the mediation as a fair process. However, as has been indicated by the analysis of cases where mediation was employed at the international level, the mediator must have a certain amount of power and an evaluative approach to mediation seems to have better outcomes.

Overall, one must be aware of the sensitive situation of an international crisis and due consideration must be given to all aspects and circumstances.⁷⁹

⁷⁸ During the negotiation process the mediator will try to identify the issues of the conflict and this will help him guiding the parties in the bargaining situation towards a compromised outcome

⁷⁹ Such as state sovereignty, political impacts, cultural issues, etc.

A failure in mediating a dispute may result in further legal action. A failure of mediating international crises may result in a violent escalation. Mediation is a good mechanism for the peaceful settlement of conflicts. But it must be carefully applied.

Bibliography

- **Asal, V., Quinn, D., Wilkenfeld, J. and Young, K.:** *Mediating International Crises: Cross-National and experimental perspectives*, Journal of Conflict Resolution, Vol. 47, No. 3, 2003
- **Assefa, H.:** *Mediation in Civil Wars: Approaches and Strategies – The Sudan Conflict*, Westview Press, Boulder, 1987
- **Bercovitch, J. and Houston, A.:** *Why Do They Do It Like This? An analysis of the factors influencing behavior in international conflicts*, Journal of Conflict Resolution, Vol. 44, No. 2, 2000
- **Brilmayer, L.:** *1999 Daniel J. Meador Lecture: America: The World's Mediator*, Alabama Law Review, 51, 1999-2000
- **Collier, J. and Lowe, V.:** *The Settlement of Disputes in International Law: Institutions and Procedures*, Oxford University Press, New York, 1999
- **De Rossanet, B.:** *Peacemaking and Peacekeeping in Yugoslavia*, Kulwer Law International, 1996
- **De Rossanet, B.:** *War and Peace in the Former Yugoslavia*, Kulwer Law International, 1997
- **Fuller, L.L.:** *Mediation – Its Forms and Functions*, in: Menkel-Meadow, C.: *Mediation: Theory, Policy and Practice*, Ashgate/Dartmouth, 2001
- **Fuller, L.L.:** *The Forms and Limits of Adjudication*, 92 Harvard Law Review, 1978-1979
- **Greig, J.M.:** *Moments of Opportunity: Recognizing conditions of ripeness for international mediation between enduring rivals*, Journal of Conflict Resolution, Vol. 45, No. 6, 2001
- **Gulliver, P.H.:** *Disputes and Negotiations- A Cross-Cultural Perspective*;
- **Menkel-Meadow, C. (ed.):** *Mediation: Theory, Policy and Practice*, Introduction, Ashgate/Dartmouth, 2001
- **Merrills, J.G.:** *International Dispute Settlement*, Cambridge University Press, Cambridge, 1998
- **Northedge, F.S.:** *International Disputes: The Political Aspects*, Europa Publications, London, 1971
- **O'Connell, M. E. (ed.):** *International Dispute Settlement*, Introduction
- **Office of Legal Affairs, Codification Division:** *Handbook on the Peaceful Settlement of Disputes between States*, UN, New York, 1992
- **Palmer, M. and Roberts, S.:** *Dispute Processes: ADR and the Primary Forms of Decision Making*, Butterworths, London, 1998

- **Charter of the United Nations**
- **GA, Resolution 2625 (XXV)**
- **GA, Resolution 37/10, annex**
- **GA, Resolution 43/51, annex**
- **GA, Resolution 46/59, annex**
- **GA, Resolution 57/337**