Conceptualising International Peace Mediation - Bring Back the Law

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Abstract: Mediation has been acknowledged and utilised for a number of decades as an effective method of alternative dispute resolution in a variety of areas of law, including family law, commercial law and medical law. A uniform, standardised framework exists within legal discourse which clearly identifies and categorises three main styles of mediation as facilitative, evaluative and transformative mediation. In the post-Cold War period, mediation has also emerged as an important resolution tool in armed conflict situations,[2] and this type of mediation has become known as international peace mediation. However, there is significant discord within international peace mediation discourse regarding its conceptualisation and categorisation.[3]
This paper considers whether the extant legal framework of traditional mediation is readily applicable to international peace mediation. The paper proposes to explain how the legal framework of traditional mediation can influence the development of international peace mediation as a more effective and successful, conflict resolution tool. The first part of this paper examines the mediation framework which has been firmly established in legal studies, and analyses the different categories of mediation identified within legal discourse. The paper then discusses the conceptualisation of international peace mediation underlining the lack of consensus that exists in the literature.

Introduction

Mediation has a long and successful history as an alternative dispute resolution tools many areas of law, such as medical law and family law. However, mediation has also been recognised as a valuable tool in the resolution of armed conflicts[4] over the last

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[2] Lanz, D., Wahlisch, M., Kirchoff, L. & Siegfried, M. (2008). *Evaluating Peace Mediation.* Initiative for Peacebuilding; Beardsley, K., Quinn, D., Biswas, B. & Wilkenfeld, J. (2006). 'Mediation Style and Crisis Outcomes.' *Journal of Conflict Resolution* 50: 58-86; The Human Security Brief 2007 states that a growing number of conflicts are ending in 'negotiated settlements' rather than fought out until one sides prevails militarily and provides statistics on this trend - see *Human Security Brief 2007.* (2007) Human Security Report Project. Canada: Simon Fraser University. The International Crisis Behavior project states that mediation was employed in 131 of the 447 crises which occurred around the world between 1918 and 2005 – available at http://www.cidcm.umd.edu/icb. The definition of 'crisis' used by this project has two elements: '(1) a change in type and / or an increase in intensity of disruptive (i.e., hostile verbal or physical) interactions between two or more states, with a heightened probability of military hostilities that, in turn, (2) destabilizes their relationship and challenges the structure of an international system - global, dominant, or subsystem' - Brecher, M. & Wilkenfeld, J. (2000). *A Study of Crisis.* 2nd ed. Ann Arbor: University of Michigan Press, 4 - 5.

[3] Lanz, D., Wahlisch, M., Kirchoff, L. & Siegfried, M. (2008). *Supra* note 2.

[4] In relation to the history of mediation, see Bolger, S., Daly, B. & Higgins, N. (2010). 'International Peace Mediators and Codes of Conduct: An Analysis.' Available at: http://jha.ac/2010/08/04/international-peace-mediators-and-codes-of-conduct-an-analysis/ [15 September 2010].

few decades, especially since the end of the Cold War.[5] Since then, mediation has been employed to resolve armed conflicts in various places around the world, such as Aceh, Cyprus and Northern Ireland. Some of these mediation attempts have resulted in the resolution of armed conflict and the signing of a peace deal, e.g. the *Memorandum of Understanding*, signed in 2005 by the armed group, the GAM and the government of Indonesia, which restored peace to an area which had been ravaged by violence for 25 years. Mediation efforts are currently being undertaken by States, regional organisations, the UN, the EU and non-governmental organisations in numerous conflict areas, including the Philippines, the Central African Republic and the Sudan.

This type of mediation is generally referred to as international peace mediation, as opposed to the 'traditional' form of mediation employed in medical law etc. Herrberg defines this type of mediation as:

> 'a voluntary and confidential method of a structured process, where one or more impartial third parties assist conflict parties to reach a mutually satisfactory solution. The mediator provides a framework, but makes no substantial suggestions or decisions in the case.'[6]

While international peace mediation has become an increasingly popular choice as a conflict resolution tool, it has evolved and developed in the absence of a uniform and coherent framework, which impacts negatively on its potential to resolve conflicts peacefully. Indeed, '[c]ontemporary peace mediation is a crowded and increasingly competitive field currently lacking established accountability mechanisms'[7] and coherence.[8]

The concept, theory and practice of international peace mediation have been examined from various perspectives in different disciplines. There is particular divergence in the understanding of international peace mediation in legal studies and peace studies. This article sets out the divergence of conceptions in these two fields of study in order to offer a complete and critical analysis of the theoretical underpinnings of international peace mediation and suggests that the accepted legal framework of mediation should be utilised to analyse and support the theory and practice of international peace mediation.

The first part of this article sets out the legal understanding of traditional mediation and analyses this in the context of international peace mediation. The second part discusses the conceptions of international peace mediation within peace studies. It examines the definitions and labels used to describe different approaches to mediation, and the lack of uniformity between these definitions and labels. The article concludes that the traditional legal framework on mediation, which has been successfully employed for many years in medical and other areas of law, is also a valid and useful framework for international peace mediation.

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[5] *Human Security Brief 2007.* (2007) Human Security Report Project. Canada: Simon Fraser University; Brecher, M. & Wilkenfeld, J. (2000). *Supra* note 2.

[6] Herrberg, A. (2008). *Perceptions of International Peace Mediation in the EU.* Initiative for Peacebuilding. p.9. Available at: http://www.initiativeforpeacebuilding.eu/pdf/Needs_analysis.pdf [15 September 2010].

[7] Lanz, D., Wahlisch, M., Kirchoff, L. & Siegfried, M. (2008). *Supra* note 2.

[8] *Ibid.*

The Concept of Traditional Mediation in Law

A standardised framework on traditional mediation exists with the law. This has been successfully employed to resolve disparate types of family law, commercial law, medical law disputes etc. Mediation is traditionally perceived as a voluntary, consensual process whereby an independent third party assists the disputing parties to reach a mutually acceptable settlement.[9] Fuller describes mediation as being:

> '…always…directed toward bringing about a more harmonious relationship between the parties, whether this can be achieved through explicit agreement, through a reciprocal acceptance of the "social norms" relevant to their relationship, or simply because the parties have been helped to a new or more perceptive understanding of one another's problems.'[10]

Similarly, the Centre for Effective Dispute Resolution (CEDR) defines mediation as 'a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of the resolution.'[11]

As can be seen from these definitions, within law, mediation provides for the disputing parties to have a certain degree of control over the mediation process,[12] whereby they have the opportunity to determine the parameters within which they discuss and negotiate an agreement and reach an outcome that is acceptable to both.[13] Mediation provides the disputing parties with a forum whereby they can consider their individual needs and how best to accommodate these.[14] The flexibility provided by the mediation process, as well as its informal nature,[15] allow the parties to be creative in finding solutions to their problems and in addressing all of their particular needs.[16]

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[9] Meschievitz, C. (1991). 'Mediation and Medical Malpractice: Problems with Definition and Implementation.' *Law and Contemporary Problems* 54(1): 195-215 at 198; MacFarlane, J. (1999). 'The Mediation Alternative.' In: MacFarlane, J. (ed.) *Rethinking Disputes: The Mediation Alternative,* 1-21. London: Cavendish Publishing.

[10] Fuller, L. (1971). 'Mediation – Its Forms and Functions.' *Southern California Law Review*. 44: 305-339 at 308.

[11] Carroll, E. (2004). 'Redefining Mediation.' Available at: http://www.cedr.co.uk/index.php?location=/library/articles/Redefining_mediation.htm. [November 2004].

[12] Moore, C. (1991). *The Mediation Process: Practical Strategies for Resolving Conflict*. San Francisco: Jossey-Bass. p.277; Johnson, S. (2000). 'The Case for Medical Malpractice Mediation.' *Journal of Law and Medicine* 5: 21-31 at 24-25.

[13] Meschievitz, C. (1991). *Supra* note 9, at 198.

[14] Meschievitz, C. (1991). *Supra* note 9, at 198; Folberg. J. & Taylor, A. (1984). *Mediation.* San Francisco: Jossey-Bass. p.10.

[15] Meschievitz, C. (1991). *Supra* note 9, at 197; Dauer, E. & Marcus, L. (1997). 'Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement.' *Law and Contemporary Problems* 60 (1): 185-218 at 200; Alfini, J., Baraki, J., Bush, R., Hermann, M., Hyman, J., Kovach, K., Liebman, C., Press, S., and Riskin, L. (1994). 'What Happens When Mediation is Institutionalised?: To the Parties, Practitioners, and Host Institutions.' *Ohio State Journal of Dispute Resolution* 9(2): 307-332 at 309.; Delgado, R. (1997). 'Alternative Dispute Resolution, Conflict as Pathology: An Essay for Trina Grillo.' *Minnesota Law Review* 81: 1391-1411 at 1404; Johnson, S. (2000). S*upra* note 12, at 26-27.

[16] Dauer, E. & Marcus, L. (1997). *Supra* note 15, at 207-209; MacFarlane, J. (1999). *Supra* note 9, at 16; Menkel-Meadow, C. (2000). 'Mother and Fathers of Invention: The Intellectual Founders of ADR.' *Ohio State Journal on Dispute Resolution* 16 (1): 1-37.at 36.

While numerous generalities such as the above can be observed within the field of mediation, certain different styles and approaches exist, namely facilitative mediation, evaluative mediation and transformative mediation.

While an indepth analysis of case studies is impossible in this article due to space constraints, other work undertaken on mediation case studies illustrate that mediators deployed to help find a solution in armed conflict situations generally take an evaluative approach to mediation, allowing the parties some level of control over the process, while putting forward some suggestions for a lasting peace.[17] This can be seen in the cases of Aceh and Northern Ireland, for example, where the mediators, Martti Ahtisaari and George Mitchell, respectively, allowed the parties to have some flexibility and be creative within the mediation process, while retaining the power to suggest solutions and peace deals.

Facilitative Mediation

Facilitative mediation is the original style of mediation. The significant features of facilitative mediation are that it is consensual and voluntary. As MacFarlane explains, the aim of this particular style of mediation is to encourage the disputing parties to work out 'consensual solutions'.[18] This mediation style provides a structure to ensure that parties reach a mutually acceptable settlement and allows for a minimal role for the mediator. [19] While the mediator cannot suggest an outcome or solution to the parties, he or she assists the parties in reaching their agreement. The role of the facilitative mediator is seen as encouraging, and improving, communication between the disputing parties to help them reach an acceptable settlement.[20] With facilitative mediation the parties are deemed competent of negotiating and determining the dispute more effectively themselves. This is due to their unique insight into, and understanding of, the situation.[21] The parties can then collaborate to solve the problem in a manner that will address their needs and interests.[22] Thus, the parties can be creative in determining a suitable outcome that, as some commentators claim, allows for a 'win-win' solution to the dispute.[23]

Evaluative mediation

Riskin, who first identified this style of mediation, acknowledges that in this form of mediation the mediator has a much greater level of participation, in the process to ensure that the disputing parties reach a settlement, than in facilitative mediation. As Riskin explains, the assumption within evaluative mediation is that the parties are dependent upon the mediator to provide guidance regarding their circumstances and possible ways of resolving the dispute.[24] The main strategy of the evaluative mediator

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[17] See generally Higgins, N. & B. Daly (2010). 'Resolving Armed Conflict: The Acehnese Experience of Mediation.' *US-China Law Review* 7 (3): 1-14.

[18] MacFarlane, J. (1999). *Supra* note 9, at 2.

[19] Palmer, M, & Roberts, S. (1998). *Dispute Processes: ADR and the Primary Forms of Decision Making*. London: Butterworths. p.126.

[20] Palmer, M, & Roberts, S. (1998). *Supra* note 19 at 125; L. Riskin, *supra* note 14, at 111.

[21] Riskin, L. (1994). 'Mediator Orientations, Strategies and Techniques' *Alternatives to High Cost Litigation* 12 (9): 111.

[22] Burger, W. (1982). 'Isn't There a Better Way?' *American Bar Association Journal* 68: 274-277 at 274. Galanter, M. (1985). '…A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States.' *Journal of Law and Society* 12: 1-18.

[23] Folger, J. and R. Bush (1994). *The Promise of Mediation*. San Francisco: Jossey-Bass Publishers. p.16.

[24] Riskin, L. (1994). *Supra* note 21; Riskin was the first to identify the features of evaluative mediation. See also Bush, R. (2002). 'Substituting Mediation for Arbitration: The Growing Market for Evaluative

is to help the parties appreciate the relative strengths and weaknesses of their respective positions.[25] Evaluative mediators will ask the parties about their 'situations, plans, needs and interests'.[26] Riskin claims that the evaluative mediator will provide the parties with 'predictions, assessments and recommendations', with emphasis on those 'options that address underlying interests', which this particular style of mediation can accommodate.[27] The mediator can put forward suggestions as to how the dispute can be resolved, which may even include details of a settlement.[28] Folger and Bush identify this type of mediation as the '*problem-solving approach*', whereby the mediator has a very involved role in directing the parties towards settlement.[29]

Transformative mediation

Bush and Folger developed the concept of transformative mediation in the early 1990s,[30] highlighting that this particular style of mediation can transform both individuals and society because it is not focused on the outcome. Transformative mediation focuses on the relationship between the parties and essentially allows the disputing parties to reach a resolution based upon their interests, and in addition to this, enables them to develop a sense of compassion for the other party.[31]

In contrast to facilitative and evaluative mediation, transformative mediation focuses on empowerment and personal responsibility.[32] Bush and Folger contend that when the empowerment and recognition effects of mediation are core to the process, that parties will use conflicts as 'opportunities for moral growth' and opportunities for transformation.[33]

This style of mediation allows the mediator to have more involvement in the mediation process, similar to the evaluative mediation. However, the transformative mediator will not take the same directive approach as the evaluative mediator. Instead, the transformative mediator will attempt to foster the empowerment dimension of mediation and empower 'parties to define issues and decide settlement terms for themselves and on helping the parties to better understand one another's perspectives.'[34]

The benefit of transformative mediation is that it can lead to transformation at both an individual and societal level.[35]

The Concept of International Peace Mediation in Peace Studies Literature

While there has been some acknowledgement within peace studies of the extant legal framework of traditional mediation,[36] it has generally been sidelined in favour of

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Mediation, and What It Means for the ADR Field.' *Pepperdine Dispute Resolution Law Journal* 3 (1): 111-131 at 113.
[25] Riskin, L. (1994). *Supra* note 21.
[26] *Ibid.*
[27] *Ibid.*
[28] Palmer, M, & Roberts, S. (1998). *Supra* note 19, at 126.
[29] Folger, J. and R. Bush (1994). *Supra* note 23, at 12.
[30] Folger, J. and R. Bush (1994). *Supra* note 23.
[31] Riskin, L. (1994). *Supra* note 21.
[32] Meschievitz, C. (1991). *Supra* note 9, at 13.
[33] Folger, J. and R. Bush (1994). *Supra* note 23, at 2.
[34] Folger, J. and R. Bush (1994). *Supra* note 23, at 12
[35] *Ibid*. at 21 and 29.

reassessment of the concept of mediation and a reinvention and reanalysis of mediation labels and styles. However, from an analysis of peace studies literature, it seems that a clear conceptual framework on international peace mediation is lacking and there exists discord and among theorists regarding the styles of mediation.

Bercovitch and DeRouen discuss three categories / styles of mediation [37] The first style they identify is communication-facilitation mediation. The mediator adhering to this style will have an impartial role, essentially acting as a facilitator to promote communication between the disputing parties. Such a mediator exerts no control or influence over the mediation process, acting only to ensure that the lines of communication are open between the parties, and to facilitate the supply of any necessary information.[38] The description provided of this strategy mirrors that of facilitative mediation, as it is understood within the legal framework of traditional mediation.

The second style defined by Bercovitch and DeRouen is that of procedural-formulative mediation strategy. The mediator who subscribes to this approach to mediation will have a more involved role in the mediation process, and will exert more formal control over the process. The purpose of this style of mediation is to create a favourable environment for conducting mediation. The third style of mediation to be found within the context of international peace mediation according to Bercovitch and DeRouen is that of directive mediation. With this style of mediation, the mediator goes beyond organising the environment. Instead the mediator who takes a directive approach will 'affect the content and substance of the bargaining process by providing incentives for the parties and changing their motivational calculus'.[39] Bercovitch and DeRouen submit that this type of mediator will actively seek to influence the parties' expectations and behaviour, using a 'carrot and stick' approach to encourage parties to reach a settlement. The descriptions of the second style of mediation, that of procedural-formulative mediation, and the third style of mediation, directive mediation, are again very similar to a type of mediation commonly understood as evaluative mediation within the legal framework of traditional mediation.

It is clear that Bercovitch's and DeRouen's categorisation finds echoes and similarities in the legal framework, but uses different names or labels. However, the labels used by Bercovitch and DeRouen are not uniformly employed across the field of peace studies. Various other labels are employed for the same / similar descriptions of mediation attempts and indeed, sometimes there is even divergence between the understandings of the approaches to mediation of different authors.

The lack of uniformity within the peace studies literature regarding the meaning of mediation is certainly evidenced within Beardsley *et al*'s article on mediation styles deployed in conflict resolution.[40] Beardsley *et al* identify three styles of mediation, namely, facilitation, formulation and manipulation. In defining the facilitation style of mediation, Beardsley *et al* make a distinction between the mediator as a facilitator and the mediator as a communicator. There is no sense of any overlap between these two approaches. Instead Beardsley *et al* prefer to adopt Bercovitch's definition of

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[36] See footnote #2 in Beardsley, K., D. Quinn, B. Biswas, and J. Wilkenfeld (2006). 'Mediation Style and Crisis Outcomes' *Journal of Conflict Resolution* 50(1): 58-86 at 62.

[37] Bercovitch, J. & DeRouen, K. (2004). 'Mediation in Internationalized Ethnic Conflicts: Assessing the Determinants of a Successful Process.' *Armed Forces and Society* 30 (2): 147-170.

[38] *Ibid*. at 156-157.

[39] *Ibid*. at 157.

[40] Beardsley, K., Quinn, D., Biswas, B. & Wilkenfeld, J. (2006). *Supra* note 2, at 58-86.

facilitation, as they believe it better encapsulates the functions of the mediator in trying to encourage communication between the parties, ultimately allowing the parties to determine 'mutually acceptable alternatives to violent conflict'.[41]   The alternative is that the mediator acts as a communicator, a style identified by peace studies theorists such as Touval and Zartman.[42]

The function of the mediator as a communicator is to encourage the disputing parties to communicate with each other.[43] Beardsley *et al*'s description of the mediator as a facilitator, or the mediator as a communicator, certainly fit within the traditional understanding of facilitative mediation within the legal framework.[44]   Rather than distinguishing between the functions of the mediator as a facilitator or as a communicator, it would be better to draw upon the definition of facilitative mediation outlined within the legal literature to ensure a sense of uniformity, clarity and certainty of the mediator's role and functions when this typology of facilitative mediation is deployed. Beardsley *et al* also claim that facilitation should be included within any understanding of mediation within the context of international peace mediation. Such a claim completely fails to take into account that mediation within the legal literature identifies facilitation as the original and traditional type of mediation.

The second style of mediation discussed by Beardsley *et al* is that of 'mediation as formulation'.[45] According to this style of mediation, the mediator will actively contribute to negotiations between the disputing parties, putting forward possible solutions to the parties. The mediator who adopts this particular style will intervene when a stalemate occurs between the parties, 'redefining the issues at hand and/or proposing specific alternatives'.[46] This style is similar to the 'directive mediation' approach identified by Horowitz below,[47] and also is very similar to the role of the evaluative mediator within the framework of traditional mediation. The evaluative mediator actively engages in the mediation process suggesting possible solutions to the disputing parties.[48]

Beardsley *et al*, describe a third style of mediation, manipulative mediation. According to Beardsley et al, the mediator uses his, or her, power and influence in the mediation process. The manipulative mediator is very much involved in the negotiation process between the disputing parties, with concerted efforts being made to encourage the parties to reach a resolution, either by deploying a so-called "carrot and stick" approach. Beardsley *et al*'s 'manipulative mediation' also fits within the evaluative mediation style that exists within the legal framework of traditional mediation. Even Beardsley *et al* acknowledge that what they call 'manipulative mediation' is also called 'directive mediation' by the likes of Bercovitch and Horowitz.[49]   The lack of coherence in the description of mediation styles in international peace mediation simply serves to further confuse an understanding of the

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[41] *Ibid.* at 63.

[42] Zartman, I. (2005). *Escalation and Negotiation in International Conflicts*. Cambridge: Cambridge University Press; Touval, S. (1982) *The Peace Brokers: Mediators in the Arab-Israeli Conflict*. (New Jersey: Princeton University Press.

[43] Beardsley, K., Quinn, D., Biswas, B. & Wilkenfeld, J. (2006). *Supra* note 2, at 58-86.

[44] See below for further discussion on the role of the facilitative mediator within the legal literature.

[45] Beardsley, K., Quinn, D., Biswas, B. & Wilkenfeld, J. (2006). *Supra* note 2, at 63.

[46] *Ibid.*

[47] Horowitz, S. (2007). 'Mediation'. In: Webel, C. & Galtung, J.(eds.) *Handbook of Peace and Conflict Studies*. Oxon: Routledge. 51-63.

[48] Riskin, L. (1994). *Supra* note 21.

[49] Beardsley, K., Quinn, D., Biswas, B. & Wilkenfeld, J. (2006). *Supra* note 2, at 63.

particular role and function that a mediator can have depending on the style of mediation adapted, and also the differences in impact that each style can have.

The lack of commonality with the varying analyses of international peace mediation is evidenced within Horowitz's categorisation of mediation in conflict resolution processes.[50] The first style of mediation that she identifies focuses on the mediation process with the mediator adapting the role of a facilitator. The second style deals with the 'resolution of problems'.[51] Horowitz submits that the mediator uses his, or her, position to influence the parties, effectively putting pressure on the parties to reach a resolution. This style of mediation is described as being 'directive mediation'.[52] Horowitz refers to a third style of mediation, which is a well-established style of mediation within traditional mediation. The third style that she discusses is transformative mediation, specifically the style of mediation identified by Bush and Folger in 1994. Horowitz deems Bush and Folger's transformative mediation to be 'a bridge between traditional mediation and Johan Galtung's transcendent transformative mediation.'[53] Horowitz focuses on the idea that there are two specific trends in international peace mediation, one is a less directive, facilitative approach, the other is a directive approach whereby the mediator guides and directs the parties. The first bears more than a resemblance to the style of mediation commonly referred to as 'facilitative' mediation within the constructs of traditional mediation. The second style, which Horowitz describes as 'directive mediation' is also notably similar to the definitions of evaluative mediation within the context of traditional mediation.

It is clear therefore, that all of the different categories of mediation identified within peace studies can find a counterpart in the traditional legal framework. Despite the different labels applied to mediation approaches in peace studies, all of the categories identified, are covered by the traditional definitions of facilitative, evaluative and transformative mediation within law.

Bring Back the Law: Applying the Legal Framework to International Peace Mediation

From the above discussion it can be seen that a concrete framework of mediation has existed and been successfully employed for many years in traditional mediation within legal discourse. However, it seems to be the case that scholars engaged in analysing international peace mediation have, to a large extent, ignored the extant legal structure and have attempted to 'reinvent the wheel' outside the legal framework, creating new terms to describe different approaches in mediation in a conflict resolution context. This move away from law has not improved the understanding or conceptualisation of international peace mediation to any degree. Indeed, it can be said that the sidelining of law has in fact hampered the study and analysis of this conflict resolution technique as multifarious definitions and conceptions of international peace mediation have been proffered, making it impossible to create a coherent framework. Reference to the legal framework of traditional mediation would benefit the development of international peace mediation by providing a clear conceptual framework. Furthermore, the categorisation of mediation styles would clarify the particular role that a mediator can have, and it

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[50] Horowitz, S. (2007). 'Mediation'. In: Webel, C. & Galtung, J.(eds.) *Handbook of Peace and Conflict Studies.* 51-63. Oxon: Routledge.

[51] *Ibid.* at 57.

[52] *Ibid.* at 58.

[53] *Ibid.*

would enhance understanding of the skills set essential for facilitative, evaluative or transformative mediation. It is therefore recommended that the legal framework of traditional mediation be employed in future analyses of international peace mediation. In this way, the effectiveness of international peace mediation can be assessed in a more comprehensive and efficient manner, against an established and coherent framework. It is hoped that such an analysis would inform the development of best practice of international peace mediation on the ground and ensure that international peace mediation is a more successful conflict resolution tool.

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