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MEDIATION IN INTERNATIONAL LAW: MAPPING ITS SPECIFICS FOR COMPARISON

by Christian Djeffal[1]

1 INTRODUCTION

Research Question and Abstract

Mediation is a one form of dispute resolution that can be found on different levels such as national and international law, in different jurisdictions such as for example Brazil, Paraguay or Argentina and in different areas of the law such as criminal or commercial law. While the general definition of mediation might be the same across levels, jurisdictions and areas of the law, the context in which mediation differs to a great extent. The present article aims at highlighting the specifics of mediation in international law in order to make them accessible and comparable with mediation in other contexts. It looks at mediation from a legal perspective.[2] Achieving this aim goes clearly beyond the limits of the present article. The body of international law has grown significantly in substance but also regarding international institutions. The inquiry, therefore, has to be confined to the aim of a general framework helping to understand the specifics of mediation in international law. The first important step in this inquiry is to understand in what respects international law is particular.

Working Definition of Mediation

Before entering into the details of mediation in international law, it is essential to provide for a working definition of mediation and to delimit mediation from other means of dispute resolution. Mediation could be

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[2] For a good overview over other perspectives on mediation see Claude H Mayer and Dominic Busch, 'Einleitung: Mediation erforschen? Fragen - Forschungsmethoden - Ziele' in Claude H Mayer and Dominic Busch (eds), *Mediation erforschen: Fragen - Forschungsmethoden - Ziele* (VS Verlag für Sozialwissenschaften 2012) 19.

defined as means of resolving disputes through negotiations between the affected parties with the help and the active engagement of a third party. The first important feature is that there is a third party, meaning a party not directly participating in the dispute. The second *specificum* of mediation is that it is a non-obligatory way of resolving international disputes. As opposed to adjudication in courts, the mediator renders no binding decision. While the mediator actively engages in the process of negotiations, the parties can only solve their dispute through an agreement resulting from their negotiations.

2 GENERAL ENVIRONMENT OF INTERNATIONAL MEDIATION

From Classical to Modern International Law

To understand what the specifics of mediation in international law are, it is necessary to provide a general overview of the current state of international law as it is generally conceived. As the international legal order is constantly under development, it is necessary to picture the law against the background that will be called 'classical international law'.[3] While there are many concepts that aim to replace or reconceptualise international law, such as international public law, transnational law or global law, it is for the present endeavour only necessary to focus on a few observations.[4]

Of States and other actors

The central characteristic of the international legal system are its subjects. Traditionally, states have been the exclusive subjects in international law. The influential textbook of Henry Wheaton, to mention just one influential example among many opens its second chapter with the following words: 'The subjects of international law are separate political societies of men living independently of each other, and especially those

[3] Wolfgang Vitzthum, 'Begriff, Geschichte und Rechtsquellen des Völkerrechts' in Wolfgang Graf Vitzthum (ed), *Völkerrecht* (5th edn. de Gruyter 2010) 7 para 5; Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens 1964) 5.

[4] For a brief overview over new ways of capturing international law see Christian Djeffal, 'Neue Akteure und das Völkerrecht: eine begriffsgeschichtliche Reflexion' in Thomas Bernhard, Ralph Nikol and Nina Schniederjahn (eds), *Transnationale Unternehmen und Nichtregierungsorganisationen im Völkerrecht* (Nomos 2013) 25.

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called Sovereign States.'[5] While he later introduced the distinction between sovereign states and those with limited sovereignty, this definition clearly shows that states have been at the centre of international law for him. To be a subject of international law means on the one hand the competence of actors to create international legal norms, on the other hand the possibility to be bound by international law. This means that the traditional view was that only states can have rights and duties under international law.

With the passing of time, some exceptions were added to this rule: firstly, there were special cases of sovereign states losing their territory like the Holy See for some time or their quality as state such as the Sovereign Military Order of Malta. Another significant development was the rise of international organisations, sometimes explicitly endowed with international legal personality.[6] The UN-Charter has made reference to human rights in its preamble, in Art. 1 (3), Art. 13 (1) (b) as well as in other provisions. This foreshadowed the recognition of the individual of subject of international law. Firstly, the rights of human beings were acknowledged in human rights treaties, while international criminal law later has shown that there are also duties for individuals in international law. International investment law protects foreign investments and shows that it is also possible to convey rights upon legal persons that are established by domestic law. There is also an increasing role of Non-governmental organisations in international law.[7]

All in all, it is fair to say that states are still the central actors in international law. States are the actors generally competent to create international legal norms. Yet, international law has gone far beyond regulating only the behaviour of states: there is a plurality of legal actors, including human being, legal persons established by national law, international organisations and non-governmental organisations that are all subject to international law. This is significant as one would also adapt the notion of an international dispute accordingly. Whereas such disputes would previously exist only between states, one could now also think of a dispute between an individual and an international organisation

[5] Henry Wheaton, A. C Boyd and W. B Lawrence, *Elements of international law* (vol 2, Stevens 1836) 51.

[6] Bardo Fassbender, 'Die Völkerrechtssubjektivität Internationaler Organisationen' (1986) 37 Österreichische Zeitschrift für öffentliches Recht 17.

[7] Anna-Karin Lindblom, *Non-governmental organisations in international law* (Cambridge University Press 2005).

or a company and a state. This also means that the potential relations in mediation proceedings have become more multifaceted.

On the other hand, states still play a decisive and special role in international law. They are the only actors that can create legal norms, furthermore most international norms are addressed to states.

Between Horizontal and Vertical

To picture the relations between subjects in a legal system in an ideal-typical way, we sometimes speak of horizontal and vertical systems.[8] In a horizontal legal system, the participants are all equal and generally free to enter into legal relations with each other. For example the classical codifications of private law aimed at creating a system enabling individuals to enter into contractual relations with each other on an equal basis irrespective of nobility or class. As opposed to this, in public law, there is generally a hierarchical and, therefore, vertical relation between the state and the individual. There is a monopoly on the exercise of force while the exercise of force of individuals is limited to very few exceptions.

As previously mentioned, in the classical international legal system, states were considered to be the only actors, from the quotation above, it can also be derived that states were considered to be sovereign and equal. They accepted no authority above them and dealt with other states on an equal footing. It is significant that international law was conceived as horizontal law between states.[9] As states were considered to be sovereign, there was no authority granting their rights in relation to other states. This resulted in the view held especially in the 19th century that war was an ordinary means of states to resolve disputes and enforce their sovereign rights. While there was no legal restriction, many initiatives developed aiming at curtailing the right to go to war.[10] Some treaties prescribed a procedural requirement to resort to mediation before it was legal to go to war. Arts. 12 and 15 of the Covenant of the League of Nations is possibly the best known example for

[8] Vitzthum (n 3) 23; Bin Cheng, 'Introduction to the Subjects of International Law' in Mohammed Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff 1991) 35.

[9] So, international legal principles were famously derived from private law analogies by Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: with special reference to international arbitration* (Lawbook Exchange 1927).

[10] For a general overview see Mary E O'Connell, 'War and Peace' in Bardo Fassbender and others (eds), *The Oxford handbook of the history of international law* (Oxford Univ. Press 2013).

such a clause. Under this provision, the parties had to submit a dispute to settlement or the council of the League of Nations and wait for three months before going to war. Yet, these provisions did not outlaw war as such.

It was the Charter of the United Nations that has again significantly altered this general view on international law. Firstly, the use of force is outlawed by Art. 2 (4) UN Charter. One general element of vertical authority is the competence of the Security Council to authorise forceful measures when there is a threat or breach of international peace and security. As the Security Council is composed of only 15 members, five of which have a permanent seat and the power to veto any resolution, the Council can effectively exercise it authority irrespective of the consent of the affected state.[11] This is even more significant as the Security Council has used this competence to issue abstract and general rules through resolutions in order to restore peace and security.[12] This is of course a major shift as it is now legally required to solve all international disputes peacefully.

All in all, it is fair to say that international law is still based on the equality of states, yet, vertical structures are developing. Especially regarding the United Nations there are such structures that in fact influence the peaceful settlement of disputes.

The International Judicial System

In most countries of the world, there is a system of courts with rather automatic jurisdictions over whatever disputes may arise. This has not always been the case but is rather a development resulting in the automatic jurisdiction of courts in all circumstances. Within certain countries, branches of courts have developed that specialise on certain legal areas. The German Constitution specifies for example 5 judicial branches in Article 95 Section one: the ordinary courts – having jurisdiction civil as well as criminal matters – administrative courts, financial courts – dealing mainly with tax cases –, social courts –dealing with social security – and labour courts. In the domestic setting, the availability of judicial review of any kind of action is either taken for granted or at least generally required. This is

[11] For more research on whether structures of public authority have evolved in international law see Armin von Bogdandy and others, *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2009).

[12] Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL 175.

best exemplified by the fact that the term 'alternative dispute resolution' ought to be understood as alternative to judicial dispute resolution.[13]

The international judicial system looks different. It has evolved substantially, too. Yet, it has not resulted in a judicial system in which one could presume that any dispute can potentially be solved by courts. In the classical era of international law in the Westphalian system there were no judicial institutions.[14] This changed, when the United Kingdom and the United States solved a dispute concerning an incident with the help of an arbitral tribunal based on the Jay Treaty of 1794.[15] From then on, arbitration was increasingly used and the 1899/1907 Conventions for the pacific settlement of disputes (Hague Conventions on Dispute Settlement)[16] established the Permanent Court of Arbitration which is not an arbitral tribunal *strictu sensu*, but an institution facilitating the establishment of an arbitral tribunal significantly. Looking at the means of dispute settlement, it can be seen that there was a constant trend towards a judicial solution: originally, states were conceived to be free to go to war or to try any dispute resolution mechanism of their choice. The Hague Conventions on Dispute Settlement were the result of a conference with a wide representation of states. While states could agree to further arbitration, the main means of dispute settlement that was touched upon in the treaties were mediation and good offices. The Act of the Pacific Settlement of Disputes of 1928 went one step further in envisaging a system mainly focussing on conciliation. In parallel to this development, the Covenant of the League of Nations also established the first court in international law with general jurisdiction, the Permanent Court of International Justice. Yet it had no automatic jurisdiction, states had to opt in and could still make reservations to their acceptance of the general jurisdiction. The same is true for its successor in the System of the United Nations, the International Court of Justice

[13] See only Simon Roberts, 'Mediation' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press 2008).

[14] Jackson H Ralston, *International Arbitration: From Athens to Locarno* (Stanford University Press 1929) 174–189.

[15] For a detailed treatment see Thomas W Balch, *The Alabama Arbitration* (Allen, Lane & Scott 1900).

[16] The Hague Convention for the Pacific Settlement of International Disputes signed on 29 July 1899 and The Hague Convention for the Pacific Settlement of International Disputes signed on 18 October 1907. Both conventions are attainable on <www.pca-cpa.org> (accessed 10 November 2014) and reprinted in James Brown Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (Oxford University Press 1915).

in the Hague. While it is possible for states to accept the jurisdiction of the court in a general manner, only 70 states have done so many of which have also included reservations limiting the jurisdiction of the court. Yet, after the end of the Second World War, other courts were established, most prominently in the regional human rights systems such as the American Convention on Human Rights and the European Convention on Human Rights. The latter Convention had an optional automatic jurisdiction which was made mandatory for all members of the Convention with the 11th additional protocol amending the Convention which entered into force on 1 November 1998. This came at a time when the number of international courts and tribunals has risen substantially: with the end of the cold war, there was an increasing amount of courts and tribunals in international law. Today, there are more than 125 judicial mechanisms, 25 of which could be considered as courts.[17] Some of them have jurisdiction over a specific treaty such as the European Court of Human Rights, other courts are specialised on specific areas of the law such as the International Tribunal for the Law of the Sea. This 'proliferation' of courts and tribunals has been recognised as significant development of international law having positive but also problematic effects.[18] Yet, it leads as a process also to a structural changes in the way in which international law operates.[19]

In sum, there is an increasing number of courts and tribunals in international law that are available for judicial settlement of disputes. Unlike in the domestic legal system, there is no clear hierarchy between those courts and the international legal system is also far from having an all-encompassing as well as automatic jurisdiction.

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[17] For an overview over existing mechanisms see <www.pict-pcti.org> (accessed on 10 November 2014).

[18] Roger P Alford, 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance' (2000) 94 ASIL PROC 160; Thomas Buergenthal, 'Proliferation of International Courts and Tribunals: Is it Good or Bad?' (2001) 14 LJIL 267; August Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration' in Isabelle Buffard and Gerhard Hafner (eds), *International law between universalism and fragmentation: Festschrift in honour of Gerhard Hafner* (Martinus Nijhoff Publishers 2008).

[19] For a general discussion see Benedict Kingsbury, 'International Courts: uneven judicialisation in global order' in James Crawford and Martti Koskenniemi (eds), *International Law* (Cambridge University Press 2012).

Growth and Expansion of the International Legal System

Together with the growth of international institutions came the growth of substantive norms of international law. Thomas Friedman has captured this development with his often quoted phrase of the development from law of co-existence to the law of cooperation.[20] While international law previously laid out only the rules necessary for the coexistence of states such as rules on diplomatic intercourse, state immunity and the like, international law later had also the function to allow cooperation between states. Several authors have observed that international law has even moved beyond cooperation and have made suggestions how to update Friedmann's famous formula. What is important is that international law now regulates many subjects that were either in the domestic domain or have not even existed before in many jurisdictions. Especially in the field of human rights, international law became a motor for the development of rights in many jurisdictions. World trade law on the other hand is something that is genuinely international and cannot be achieved on the national level alone as it regulates international trade barriers. Furthermore, international health law, international environmental law and international investment law are expanding areas of international regulation.[21]

Within these areas of international law, there are sometimes specific rules that differ from the general rules in international law. This is evident when it comes to dispute settlement. While some treaties such as the WTO-treaties establish an exclusive system of dispute resolution, others like the United Nations Convention on the Law of the Sea establish non-obligatory ways of dispute resolution while other international legal norms have no specific rules for dispute settlement. This development is again important as one has to be careful to look at the general rules but also at rather specific rules applicable in certain areas.

[20] Wolfgang Friedmann, 'The Changing Dimensions of International Law' (1962) 62 ColLRev 1147; Friedmann, *The Changing Structure of International Law* (n 3).

[21] An important recent discussion concerned the question whether the new areas of international law became independent to such a degree that they ought to be considered as 'subsystems' or entities of their own. This was then called fragmentation of international law. See for example Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483.

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3 LEGAL FRAMEWORK

General International Law

Legal Norms

As previously mentioned, states agreed on the Hague Convention of 1899 and 1907. Those rules are still in force, but the system of dispute settlement they envisaged has changed subsequently. The relevance of the rules for meditation today is that they represent the agreement of states on some basic features of mediation which are still relevant today. This is particularly true for Art. 3 which stipulates that states can and 'should' offer their services as mediators even if they were not asked by the parties. As Art. 3 (2) & (3) specify, states have a right to initiate a mediation and an offer of mediation can never be regarded as an unfriendly act. This is a remarkable feature of international law which might be due to the limited number of actors. In any case, it is still the custom today that mediators may take an initiative themselves which does not have to be accepted but in turn will not be seen as an intervention or an unfriendly act.

As previously noted, the Charter of the United Nations is based upon the prohibition of force as provided for in Art. 2 (4), which is a prohibition upon all states. As a corollary, Art. 2 (3) UN Charter obliges all states to solve all disputes peacefully. It reads as follows: 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.' While Art. 2 (4) UN Charter functions as a prohibition outlawing a certain form of conduct, Art. 2 (3) UN Charter provides for the flip side of the coin, namely a positive obligation to actively resolve international disputes. It is even claimed that Art. 2 (3) UN Charter has attained the status of a *ius cogens* norm that is not derogable.[22]

The second part of the sentence of Art. 2 (3) UN Charter is most significant and deserves special mention: states are not only obliged to settle their disputes but to settle them in a sustainable manner in order not to endanger peace and security and justice. The inclusion of justice was advocated by smaller states at the Dumbarton Oaks conference as

[22] See Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (Duncker & Humblot 1984) paras 94ff. For further opinions see Meinhard Schröder, 'Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung und Sanktion' in Wolfgang Graf Vitzthum (ed), *Völkerrecht* (5th edn. de Gruyter 2010) 614 n 244.

they feared that powerful states might use their power to arrive at unjust solutions.[23]

This general obligation, which has the status of a principle of the United Nations organisation, is developed in greater detail in Chapter VI on the Pacific Settlement of Disputes. The first provision in this chapter, Art. 33 UN Charter, which reads as follows:

'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.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.'

This provision contains several important insights concerning mediation in international law. The first is that there is neither a hierarchical or logical structure nor an exhaustive number of means of settling disputes. The list contained in Art. 33 UN Charter follows a certain logics. It starts off with negotiations between the disputing parties and then enumerates several means of third party involvement with an ascending competence of the third party.

Definition of Mediation

General Features

Art. 33 UN Charter that has just been discussed serves well as a guide for the definition of mediation in international law as the other forms of dispute resolution can serve as guides on how to distinguish mediation from other forms of dispute resolution.[24] Other than negotiations, a mediation

[23] See Draft Amendment by Bolivia, UNCIO III, 580, 582 and the acceptance, UNCIO VI, 446, 458, 333. See Christian Tomuschat, 'Art. 2 (3)' in Bruno Simma and others (eds), *The Charter of the United Nations - Commentary* (3rd edn. Oxford Univ. Press 2012) 198 (n 72, 73). Tomuschat rightly points out that the requirement of justice cannot be understood as qualifying decisions of international courts and tribunals. From this as well as from the negotiating history follows, however, that the requirement of justice applies where parties reach a settlement through negotiation.

[24] Art. 6 of the Hague Convention on Dispute Settlement of 1907 stipulates that mediation has 'exclusively the character of advice, and never have binding force'.

also entails third parties that are not themselves parties to the dispute. Those actors have not the authority to adjudicate the dispute independently such as courts or arbitral tribunals. The closest form comparable to mediation is conciliation, which results in a suggestion of the mediator on how to resolve a certain issue whereas a mediator would not make such a final suggestion. All in all, mediation in international law has the following specific features: it happens in the context of negotiations of the disputants and it involves a third party which takes part in the negotiations without issuing a binding judgment or even making a final suggestion.

Internal Categorisation

Especially in international relations literature, there have been attempts to define different kinds of mediation.[25] Cases in which the mediator actively tries to influence the disputants[26] have been labelled as 'power mediation'. In these circumstances the mediator actively offers rewards or issues threats in order to facilitate agreement between parties.[27] On the other side of the spectrum is the so called 'consultation' or 'problem solving'. This is defined as involving…

'… the intervention of a skilled and knowledgeable third party (usually a team) who attempts to facilitate creative problem solving through communication and analysis using social-scientific understanding of conflict etiology and processes. An attempt is made to confront the opposing perceptions and attitudes and to reveal the underlying affective and relationship issues.'[28]

As opposed to 'power mediation', the process of consultation is conceived as more neutral and objective. Here, the mediator is rather acting as a counsellor, developing ideas and making suggestions without trying to influence the parties. The distinguishing feature is, therefore, the way in which the mediator influences the process. At the extremes are power in the form of legal threats and incentives, on the other end

[25] For a case study concerning the function of mediation see Cindy Daase, 'The Law of the Peacemaker: The Role of Mediators in Peace Negotiations and Lawmaking' (2012) 1 Cambridge Journal of International and Comparative Law 107.

[26] Loraleigh Keashly and Ronald J Fisher, 'A Contingency Perspective on Conflict Interventions: Theoretical and Practical Considerations' in Jacob Bercovitch (ed), *Resolving international conflicts: The theory and practice of mediation* (Lynne Rienner Publishers 1996) 241.

[27] ibid.

[28]

general ideas and suggestions such as helping the parties to draft a peace treaty or the like.

Another way to categorise mediation is to look at the actual effect the mediator seeks. Bercovitch distinguishes between three categories:[29] 'communication-facilitation strategies', through which the mediator enables the communication between the parties. In the international legal context, such a mediation that is limited to technical services is also called good offices.[30] Secondly, there are 'procedural strategies' in which 'a mediator may determine structural aspects of the meetings, control constituency influences, media publicity, the distribution of information, and the situation powers of the parties' resources and communication processes'.[31] Thirdly, 'directive strategies' in which the mediator 'affects the content and substance of the bargaining'.[32]

Actors: Cultures of Communication

Today, there is a variety of actors in the international arena.[33] This means that there are different actors responsible to be mediators but also different actors which are parties to disputes. Mediation is a process of negotiations between parties with the help of third parties. This means that communication is at the centre of the processes of mediation and negotiation. So when introducing the actors, something will also be said as to their communicative culture.

States

The main actors in international law are states. They are the only actors genuinely competent to create international law, the obligation to settle disputes peacefully is mainly addressed to states as they are generally conceived as capable of going to war. States are the international actors capable of using force. States are often parties to disputes in which mediation is necessary but states also often act as mediators. As mediators, they can

[29] Jacob Bercovitch, 'Mediation and Conflict Resolution' in Jacob Bercovitch, Victor Kremenyuk and William Zartman I (eds), *The Sage Handbook of conflict resolution* (SAGE 2007) 347.

[30]

[31] ibid.

[32] ibid.

[33] See the summary at …

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play different roles: Norway and Switzerland are often regarded as neutral mediators, while the United States often play a proactive role in processes of mediation. States can give incentives such for example of a financial nature but also threat with sanctions.

As regarding their communicative culture, it is often the representatives of states that lead processes of mediations as mediators due to their power but also their integrity and trust among the other parties. They are assisted by diplomats, who have as a profession the most experience and skill when it comes to the craft of mediation. The phrase to be diplomatic has attained a proverbial status when one wishes to express that somebody is skilled in negotiating or mediating disputes.

International Organisations

International organisations play a significant role when it comes to mediation. As regarding threats to the peace, it is mainly the United Nations as well as the respective regional organisation fulfilling that task. Specialised organisations can act as mediators in their domain.[34] The ways in which international organisations are involved in processes of mediation are manifold and can be best explained using the example of the United Nations.

Some of the main organs can engage in the role as mediator or at least provide the forum for mediation. This competence lies mostly with the Security Council. According to Art. 34, the Council is competent to investigate any dispute, according to Art. 35, Members of the United Nations may also bring disputes to the attention of the Council. Art. 36 gives the Council the competence to make a recommendation on how to solve the dispute. This could be regarded as a form of meta-mediation as the Security Council recommends to parties that cannot agree on how to solve their dispute a certain means of dispute settlement. Subjects to the general precedence taken by the Security Council according to Arts. 11 and 12, the General Assembly of the United Nations can act similarly according to Art. 35 (3) UN Charter. The Security Council and even more so the General Assembly are collective organs composed of different states which

[34] So for example, in the UN context mention is made of the World Food programme, the High Commissioner for Refugees, the UN Fund for Children see Cornelius J Peck, 'United Nations Mediation Experience: Practical Lessons for Conflict Resolution' in Jacob Bercovitch, Victor Kremenyuk and William Zartman I (eds), *The Sage Handbook of conflict resolution* (SAGE 2007) 414.

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makes it hard for them to act effectively as mediators. This might have triggered the fact that the Secretary General has been the main organ of the United Nations that has been mostly engaged in mediating disputes.[35] The Secretary General either acts in person or appoints representatives or special envoys. In the department of Political Affairs a Mediation Support Unit has been established in 2006. This development was explicitly welcomed in a presidential statement in the Security Council in which it was also encouraged 'further use of this mechanism in the settlement of disputes'.[36]

The United Nations has also taken great efforts to strengthen the peaceful settlement of dispute through different means. The means of dispute settlement including mediation and the general obligation enshrined in Art. 2 (3) have been repeated in many important instruments such as the Friendly Relations Declaration, even though neither of the instruments has significantly added to the content already enshrined in the Charter.[37] Yet, there are also studies like further understanding of mediation such as the handbook on the peaceful settlement of disputes between states.[38]

A significant initiative is the informal 'Group of Friends of Mediation', which was founded on 24 September 2010 and consists of 40 Member States of the United Nations[39] as well as 7 regional organisations[40] and other international organisations.[41] This group was initiated by Finland and Turkey in order to promote and strengthen mediation on different levels. This group also managed to put the topic of mediation on the agenda of the General Assembly. In the 65th session the group proposed a resolution that was agreed on by the general assembly that recommended several measures to strengthen mediation.[42] A 'United Nations Guidance for Effective

[35] Daase (n 25) 122ff.

[36] Statement by the President of the Security Council, 23 September 2008, S/PRST/2008/36

[37] Tomuschat (n 23) 81 para 9.

[38] Office of Legal Affairs - Codification Division, *Handbook on the peaceful settlement of disputes between states* (United Nations 1992).

[39] Algeria, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Colombia, Costa Rica, Denmark, Germany, Indonesia, Iraq, Ireland, Italy, Japan, Kenya, Liechtenstein, Lithuania, Malaysia, Mexico, Montenegro, Morocco, Nepal, Netherlands, Norway, Panama, Philippines, Qatar, Romania, Slovenia, South Africa, Spain, Sweden, Switzerland, Tanzania (United Republic of), Uganda, United States of America.

[40] African Union, League of Arab States, Association of Southeast Asian Nations, European Union, Organization of American States, Organisation of Islamic Cooperation, Organization for Security and Co-operation in Europe

[41] <www.peacemaker.un.org/friendsofmediation> (accessed 13 October 2014).

[42] General Assembly, Resolution, 28 July 2011, A/Res/65/283.

Mediation'[43] was annexed to a resolution in the next session in which it was also decided to consider mediation biannually.[44] It remains to be seen how this new wave of reflection of mediation impacts upon the practice but it is interesting to observe the increasing focus on mediation with the United Nations.

NGOs

Non-governmental organisations are of increasing importance on the international plane. When it comes to mediation, the most prominent of which is the International Committee of the Red Cross which is not an International Organisation but an association under Swiss law. The ICRC is bound by strict impartiality and objectivity and has taken this as a reason to abstain from any kind of political mediation.[45] One instance in which the ICRC is competent to offer its services as mediator is the appointment of protecting powers according to Art. 5 (3) of the first additional protocol.[46] Yet, there are many more situations in which the ICRC mediates. The ICRC often directly engages in mediations concerning the humanitarian situation in armed conflict, but it also has to reach an agreement on questions whether the ICRC should be involved and what its terms of reference ought to be.[47]

Individuals

It must also be mentioned that individuals can play a significant role in the process of mediation. They can of course be mandated by the parties, but also by the United Nations.[48] This requires, of course, that those individuals do not represent any legal entity apart from themselves.[49] One

[43] Annex to General Assembly, Resolution, 25 June 2012, A/66/811.
[44] General Assembly, Resolution, 25 June 2012, A/66/811.
[45] Victor H Umbricht, *Multilateral Mediation: Practical Experiences and Lessons* (Martinus Nijhoff 1989) 235–238.
[46] Michael Bothe, Karl J Partsch and Waldemar A Solf (eds), *New rules for victims in conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (2nd edn, Brill 2013) 75.
[47] David P Forsythe, 'Humanitarian Mediation by the International Committee of the Red Cross' in Saadia Touval and William Zartman I (eds), *International Mediation in Theory and Practice* (Westview Press 1985) 237.
[48] For the latter see Report of the Secretary-General, 'An Agenda for Peace Preventive diplomacy, peacemaking and peace-keeping' A/47/277 - S/24111 17 June 1992 para 37
[49] Jacob Bercovitch, 'Introduction: Putting Mediation in Context' in Jacob Bercovitch (ed), *Studies in International Mediation: Essays in Honour of Jeffrey Z. Rubin* (Palgrave Macmillan 2002) 10.

well known class of mediators are elder stateswomen and statesmen who act as mediators even though they are no longer in office. The former president of the United States Jimmy Carter has acted as mediator several times and has even set up the Carter Center specialising also in mediation.[50]

3 THE SPECIFICS OF MEDIATION IN INTERNATIONAL LAW

After a general description of the normative framework regulating mediation in international law, it is now time to explain in what sense mediation in international law might be different from other fields of the law. This paper identifies three specifics of mediation in international law: these concern the aim of mediation, the ideal of a neutral mediator and the relationship between mediation and other forms of dispute settlement. Each of those topics is firstly discussed in a rather abstract fashion but then illuminated with an example of international mediation in practice.

The Aim of Mediation

Not endangering peace and security and justice

In domestic law, mediation is used as an alternative means of dispute resolution to reach settlements that satisfy the parties and sometimes go beyond what the law prescribes. The aim of processes like mediation is to find an apt solution that works for the parties and solves their dispute. In international law, in the Hague Conventions of 1899 and 1907 it was stipulated that 'the part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance'. While it is not surprising that a mediator should reconcile opposing claims, it is from our perspective today rather astonishing that mediators should appease the feelings between states. Such an obligation is understandable when most disputes arise between heads of states that are in power for a lifetime and that have close relationships, yet, modern definitions lay much less stress on making this psychological element explicit.

To discover the aim of mediation, we would today look at the principle of the peaceful settlement of disputes which is enshrined in Art. 2 (3) UN-

[50] See <www.cartercenter.org/peace/conflict-resolution> (accessed 10 October 2014).

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Charter which is today universally applicable as norm stemming from a treaty as well as from customary law. This norm is a principle, generally obliging all states. It also spells out the aim of mediation in international law. This aim is fourfold: to settle disputes, to do so in a peaceful manner and to do so in a manner preserving peace and security as well as justice. This can also be conceived as the aim of mediation.

The fact that the aim is to actually settle the disputes is most obvious. As was previously mentioned, the obligation to settle the disputes peacefully is the flipside of the prohibition of the use of force in international law.[51] Under the current state of international law and the universal regime of the UN Charter, it is clear that disputes ought to be settled peacefully without forceful means. What is more rarely mentioned is the interesting qualification contained in Art. 2 (3) UN Charter stipulating that the peaceful resolution of the dispute must neither endanger peace and security nor justice.

Looking at peace and security, it seems counterintuitive that the peaceful resolution of a dispute might endanger peace and security. This seeming obscurity is lessened by the observation that international disputes very often have wider implications. Other states might have legitimate economic or security interests that are at stake when a dispute arises. Political, religious and ethnic considerations can also play a role. This is why the peaceful resolution of a dispute of two states can endanger peace and security in relation to other states which are not directly party to the dispute.

As mentioned above, the criterion of justice was suggested by smaller states that feared the bigger bargaining power of bigger states. It has rightly been mentioned that the criterion of justice hardly every plays a role in judicial or arbitral proceedings.[52] This is not true, however, for non-judicial means of dispute resolution. Part of the requirement of justice are the prohibition to abuse rights and the general obligation to act in good faith. While any state is certainly right in pursuing its own interests and to try to have a good bargain, there are limits despite the agreements of states. This is particularly the case if the representatives of one state abandon its interest due to the intervention of another more powerful state. Justice will also be

[51] Tomuschat (n 23) 78 para 2.

[52] Christian Wolff, *Law of Nations Treated According to a Scientific Method: translation of the edition of 1764 [Jus Gentium Methodo Scientifica Pertractatum]* (Joseph H. Drake tr vol 2, Clarendon Press 1934) 523 para 1036.

in issue when the parties to a dispute agree on a point which goes manifestly against the law. There is a certain tension when legal disputes are settled in a process of negotiation and bargaining. To circumvent legal positions completely might undermine the law. While states are generally free to choose the means of dispute resolution they prefer, there is a preference for judicial means when it comes to legal questions. This preference can be found in Art. 36 (3) UN Charter, which obliges the Security Council when making a recommendation how to solve the dispute to 'take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice.'

The Papal Peace Initiative of 1917

While Pope Benedict the XV. remained neutral in the first years of the First World War,[53] he tried to initiate peace talks between the belligerents from 1916 on. He appointed Eugenio Pacelli, who later became Pope Pius the XII., as Nuntius in Munich in Germany and entrusted him with the negotiations of a peace initiative.[54] The pope aimed at initiating negotiations between the belligrents that would end the war. The pope had no mandate by the parties, yet, the general strategy was to reach an agreement with Germany that would give the opposing parties an incentive to enter into negotiations. The negotiations with Germany circled around a 7 point plan which included the guaranteed freedom of the seas, mutual disarmament and a mandatory judicial mechanism for the resolution of disputes.[55] The negotiations with Germany were very complex as they had to involve a variety of actors, but Pope Benedict decided to speed up the process by a statement that was also aimed to prepare the other parties to the future suggestion.[56] The statement opened with the following lines:

[53] Hubert Wolf, 'Der Papst als Mediator?: Die Friedensinitiative Benedikts XV. von 1917 und Nuntius Pacelli' in Gerd Althoff (ed), *Frieden stiften: Vermittlung und Konfliktlösung vom Mittelalter bis heute* (Wissenschaftliche Buchgesellschaft 2011) 171.

[54] For the possible motivation for the peace initiative see Charles J Herber, 'Eugenio Pacelli's Mission to Germany and the Papal Peace Proposal of 1917' (1979) 65 The Catholic Historical Review 20, 20.

[55] See summaries by Wolf (n 48) 177; Herber (n 49) 29.

[56] 'Peace Proposal of Pope Benedict XV: August 1, 1917' in James Brown Scott (ed), *Official Statements of War Aims and Peace Proposals, December 1916 to November 1918* (Carnegie Institution of Washington 1921).

'TO THE RULERS OF THE BELLIGERENT PEOPLES: From the beginning of our Pontificate, in the midst of the horror of the awful war let loose on Europe, we have had of all things three in mind: To maintain perfect impartiality toward all the belligerents, as becomes him who is the common father and loves all his children with equal affection; continually to endeavor to do them all as much good as possible, without exception of person, without distinction of nationality or religion as is dictated to us by the universal law of charity as well as by the supreme spiritual charge with which we have been entrusted by Christ; finally, as also required by our mission of peace, to omit nothing, as far as it lay in our power that could contribute to expedite the end of these calamities by endeavoring to bring the people and their rulers to more moderate resolution, to the serene deliberation of peace, of a "just and lasting" peace.'[57]

The first two main points relate to the impartiality of the pope and the equal treatment of all parties. As to the second point, it is most interesting that the pope went on to qualify the peace he envisaged as 'just and lasting'. We see here a parallel to the formula in Art. 2 (3) UN Charter. Yet, it became apparent that the other belligerents questioned whether the peace plan was really just as it would lead back to the *status quo ante* before the war. This was clearly expressed by the President of the United States, Woodrow Wilson, who issued a statement through the Secretary of State Robert Lansing.[58] From this speech it clearly appeared that there was a different notion of what a just peace would mean. In the end, the German government did not accept the Papal proposal especially regarding the independence of Belgium and the other belligerents either rejected the peace proposal or did not even answer it.[59] The efforts by all parties show that they were generally ready to conclude peace, yet the question whether the terms of peace were just.

[57] ibid.

[58] Robert Lansing, 'Reply of President Wilson to the Peace appeal of the Pope: August 27, 1917' in James Brown Scott (ed), *Official Statements of War Aims and Peace Proposals, December 1916 to November 1918* (Carnegie Institution of Washington 1921).

[59] Wolf (n 48) 185.

Objective and Subjective Mediators

The Ideal Mediator

One important features of mediation in the domestic setting is that the mediator is conceived as a neutral person that is not in any way engaged in the dispute.[60] The mediator then makes suggestions that are conceived objective statements of an idle observer. In the words of the philosopher and classical author Christian Wolff one could also say that 'a mediator pleads the cause of either party'.[61] The present inquiry suggests that things might be different in international law. There is of course the possibility of having rather unaffected observers such as neutral states, international organisations or individuals of a high reputation. Yet, this is not the only way in which mediation works and it should be mentioned that it is also not the way in which mediation in international law ought to work. The neutrality of the mediator is not an aim of the process, it is just a means to reach the aims of mediation, i.e. a peaceful and sustainable settlement of the dispute. It is submitted that those aims can in many situations be better reached with a mediator acting out of his own interest and with a clear position. This becomes most evident in peace talks in which opposing powers are involved which are not directly parties to the dispute. But it had an active interest to broker the peace and to mediate between the parties and succeeded in that aim as the parties to the dispute were also willing to reach an agreement. Another advantage of voluntarily including mediators that are not neutral in the narrow sense of the term is to make agreements more sustainable. In many situations, actors which are not directly involved in the dispute pursue certain interests that might lead them to even actively support one party or the other. They are not directly parties to the dispute, yet, they are involved. If they then act as mediators, they are fully informed and also able to have an influence on the process. Especially in cases in which there is more than one party mediating, this can have the effect of negotiation among the mediators. Their involvement can produce solutions that are more durable and sustainable as the mediators also have a voice in the process. This is again in line with the general aim of not endangering international peace and security and justice. To include parties with an indirect interest as

[60] John W Cooley, *The Mediator's Handbook: Advanced Practice Guide for Civil Litigation* (2nd edn, South Bend 2006) 35–36.

[61] Lansing (n 55).

mediators gives them voice and might help to produce a solution that also fits into the international context. The obvious danger is of course that this complicates the matter further. In any case, it is obvious that the picture of a neutral and objective mediator is not the only viable idea in international law. Which mediator to choose will depend very much on the context.

The Congress of Berlin of 1878

When the Ottoman Empire fought independence movements in the Balkans in the 1870ies a situation arose that could have led to a European war.[62] Russia intervened and went to war against the Ottoman Empire with the result that almost all parts of the Ottoman Empire in Europe gained their independence. The Austrian-Hungarian Empire and England perceived this as threat to their interests on the Balkans and issued a threat of war to Russia.[63] Yet, all parties to the conflict had an interest to negotiate, after attempts to negotiate directly failed they asked the Chancellor of the German Empire Bismarck to host a congress in Berlin.[64] The congress was held from 13 June to 13 July during 20 plenary sessions which lasted from two to three hours.[65] Six states were represented at the congress, namely the Austrian-Hungarian empire, England, France, Germany, Italy and Russia. Each state sent 3 delegates except for the Italian delegation which consisted of two members so that the plenary was generally composed of 20 delegates.[66] When dealing with specific questions, delegates from Greece, Rumania and Persia were also admitted.

This congress is in many respects a typical act of congress diplomacy as it was common in the 19th century. What stands out is that the actors made interesting remarks about the function and the personal qualities of mediators. This started with Chancellor Bismarck's speech to the Reichstag in which he had to explain and answer to Parliament his summoning of the congress in Berlin. In this context he said:

[62] Serge Maiwald, *Der Berliner Kongress 1878 und das Völkerrecht* (Wissenschaftliche Buchgesellschaft 1948) 16–18.

[63] Imanuel Geiss, 'Einleitung' in Imanuel Geiss (ed), *Der Berliner Kongreß 1878: Protokolle und Materialien* (Harald Boldt Verlag 1978) XVI.

[64] Heinz Wolter, *Bismarck's Außenpolitik 1871-1881: Außenpolitische Grundlinien von der Reichsgründung bis zum Dreikaiserbündnis* (Akademie-Verlag 1983) 253–254.

[65] Geiss, 'Einleitung' (n 57) XVII.

[66] Geiss, 'Einleitung' (n 57) XVII.

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'I do not consider the mediation of peace in a way that we act as an arbiter for diverging views and say: this is how it should be, this is what the power of the German Empire guarantees, but I think more modest … more like an honest broker who really tries to make the deal happen.'[67]

The phrase of an honest broker is still often quoted and signifies that a mediator acts in the interest of the parties of a deal without exaggerating his own interest. Yet, the metaphor of a broker also shows that an arbitrator does not act without any interest. Another aspect deriving from this quote is that a mediator is not acting judgmental or assessing the situation in his own authority but rather looking for the greatest possible overlap between the interests of the parties. Bismarck also stated in another context that he would not 'assume the role as judge over Europe'.

The fact that the congress is rather well documented allows some insights into how a mediator can influence the proceedings. Before the congress was summoned, Bismarck contacted the parties in secrecy to get a clearer picture of their interests.[68] While it was common at that time to conduct diplomatic intercourse in French, the English Prime Minister Earl of Beaconsfield (Benjamin Disraeli) was not capable of speaking French while the Russian Foreign minister Gortschakow did not speak English.[69] It was for the other participants at the conference speaking both languages to compensate this lack of understanding. His strategy for the congress was to negotiate swiftly and speedily and to try not to discuss contentious, complex and controversial questions in the plenary but to defer them to commissions and ad-hoc sub-commissions.[70]

There was another instance in which it transpired how Bismarck saw his office as mediator. The foreign minister Gortschakow tried to include a clause into the draft treaty that would include a collective guarantee obliging all parties to the treaty to enforce it if necessary by force.[71] He provided for several arguments against such a collective guarantee as he found that it would not only prevent war but also give rise to further

[67] Translation by the author. Aus der Rede des Fürsten Bismarck über die orientalische Frage, 9 (1878) Volksblatt. Eine Wochenzeitschrift mit Bildern 66-68.

[68] Otto von Bismarck, *Bismarck - the Man & the Statesman: Being the Reflections and Reminiscences of Otto von Bismarck* (A. J. Butler tr, Harper & Brothers Publishers 1899) 238.

[69] ibid XIX.

[70] Geiss, 'Einleitung' (n 57) XX.

[71] Imanuel Geiss (ed), *Der Berliner Kongreß 1878: Protokolle und Materialien* (Harald Boldt Verlag 1978) 148.

disputes.[72] What is significant, however, is that he explicitly stepped outside of his role as mediator and assumed the role of a representative of Germany. The proceedings record 'The count of Bismarck does not wish to comment on this as the president of the whole congress, he can only speak as representative of Germany'.[73] A collective guarantee would have meant a direct obligation for all parties to enforce the treaty, this would have made Germany a direct party to the dispute. As a consequence, Bismarck had to step out of the role as a mediator and communicate as an affected party which he did. All in all, this reinforces the general idea we can take away from this section, namely that there is a fine line between mediation and direct involvement. Mediators will often act out of a broader interest in the dispute. In the face of such interests, it is very hard to hold on to the ideal of the absolutely neutral and objective mediator. It would be a better approach to recognise the existing interests of potential mediators and see whether they could fit into the process of negotiations.

Integrative Dispute Resolution

Beyond Alternative Dispute Resolution

Mediation is widely regarded as a means of alternative dispute resolution. This is particularly true for the domestic setting. In most domestic jurisdictions there was an almost complete process of what international relations theorists have framed judicialisation.[74] In this process, the exercise of power has almost completely become subject to judicial review the result of which was termed as rule of law. This basically means that judges as neutral and objective arbitrators – in the non-technical sense of the word – have the last say in every dispute and can decide due to preconceived general and abstract rules which lead their way. In this setting, in which parties went to court when their bilateral talks failed, alternative means of dispute resolution were 'reinvented'. The term alternative signifies an alternative to judicial proceedings. The proponents of alternative dispute resolution rely on the great advantages such a form of dispute resolution can have in

[72] ibid 149.

[73] 'Le Prince de Bismarck dit qu'il n'a pas mandat d'exprimer, á cet ègard, comme Président, le seafiment du Congrès: il ne peut donner son opinion comme représentant d'Allemagne.' ibid 130.

[74] Kingsbury (n 19).

specific circumstances.[75] On the contrary, it is also clear that such an alternative to the ordinary judicial proceedings can have the effect to undermine them and can ultimately result in a circumvention of the rule of law.[76]

As the general sketch about the development of international law has shown, the notion of mediation as alternative means of dispute resolution cannot be generalised. Looking at the historical relationship between mediation and judicial and quasi-judicial means of dispute resolution, the story is quite different indeed. Mediation has always been part of the picture. There has been mediation between antique nations very early in history, there has been mediation in the middle ages as well as afterwards. Mediation is a constant throughout history. In contrast, the judicial settlement of disputes is a rather recent phenomenon, even though it gains ground. If one were to isolate the development of international, it would be fair to say that judicial settlements and arbitrations are at present alternative means of dispute settlement while negotiations and mediation are the standard means.

There is also another sense in which the notion of alternative dispute settlement does not really work well in international law. The 're-invention' of mediation as alternative means relies, as previously stated explicitly on its nature that is different from judicial procedures. Especially Art. 33 UN Charter acknowledges that there are different means of dispute settlement, there is no general hierarchy.[77] Based on this interpretation, one could say that all means of dispute resolution are alternatives in relation to each other. Yet, the ultimate goal is to resolve the dispute, to do so peacefully and sustainable by maintaining justice and peace and security. In international law, the means of settling disputes work many ways and it is not about which means to choose but more about their interplay. This is why the means of dispute resolution are best described as integrative dispute resolution. There are judgments of international courts finding that there is a duty to negotiate the dispute in an equitable manner while the courts cannot go any further in determining the issue. This was the result the ICJ reached in the famous Danube Damn case.[78] There are treaty clauses

[75] Cooley (n 57) 12.

[76] Katharina von Schlieffen, 'Mediation im Rechtsstaat - Chancen einer neuen Konfliktordnung' in Fritjof Haft and Katharina von Schlieffen (eds), *Handbuch Mediation* (C. H. Beck 2009).

[77] Yet, there is a general preference for judicial means as expressed by Art. 36 (3) UN Charter, see further at 16.

[78] *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia),* [1997] ICJ Rep (International Court of Justice) 7.

providing for a structured way of using the means of dispute resolution. Take for example Art. 22 of the Convention on Elimination of All Forms of Racial Discrimination which requires negations prior to filing a case before the international court of justice.[79] Yet, the history of settling the dispute between the United States and Iran shows how mediation can lay the ground for the other means of dispute resolution. It were the good offices of Algerian diplomats that established contacts between the parties and abled a mediation. The process of mediation resulted in a treaty that established a claims tribunal dealing with expropriation cases and thereby settling many international disputes. International disputes can be very complex, they are then not easily discharged of through one process. The success of the means of dispute resolution should not be measured in absolute terms looking at the final resolution. All means are successful when they bring the parties closer to the aim as defined above. One means of dispute resolution might result into the next. The condition is that progress is reached without threating peace, security and justice.

The Algerian Mediation in the dispute between the United States and Iran

The review of the US Iran hostage crisis reveals many of the complexities an international dispute can have. On 4 November 1979 in the course of the Iranian revolution, the US embassy in Tehran was overrun by Iranians which were not hindered by Iranian security forces.[80] The personnel in the embassy was taken hostage and this created a manifest dispute between the two states that had many issues to settle in the course of the regime change. Such were frozen assets of Iran in the United States, the belongings of the Shah, and dispossessions of American citizens. The failure of the Iranian authorities to protect the American embassy was a flagrant violation of diplomatic law and made it very difficult for the Americans to communicate with the new regime, these difficulties were even worsened by the fact that it was unclear with whom to negotiate. On the side of Iran, the new regime openly held anti-western believes having a religious dimension which favoured a complete breakdown of any relationship with Western

[79] Adopted on 21 December 1965, entry into force 4 January 1969, 660 UNTS 195ff..

[80] For a general historical account of the occurrences see David Farber, *Taken Hostage: The Iran Hostage Crisis and America's First Encounter with Radical Islam* (Princeton University Press 2006) 137ff; David P Houghton, *US Foreign Policy and the Iran Hostage Crisis* (Cambridge University Press 2001) 76ff.

countries. The hostage taking forced the United States to act, yet it was impossible to act. Several measures such as engaging mediators,[81] a military rescue operation or filing an interim order before the International Court of Justice failed. In this situation, Algerian diplomats managed to establish relationships between the governments of the United States and Iran. They were partly acting as messengers between states until Iran introduced a claim for a deposit for 24 million US $ which was perceived as exaggerated by the representatives of the US and Algeria.[82] After the mediation broke down, the Americans resumed negotiations and the Algerians took now a different stance: This was described by an insider on the Algerian side as 'catalysts' or active element, trying to make rigid positions more flexible.[83] When transmitting messages they also tried to explain them to the other parties, before transmitting a message they also 'gave "warnings", really in the form of advice, telling the Iranians, for example, that such and such would not be acceptable to the Americans'.[84] In the preparation of an agreement that would finally settle the dispute, they advised the Americans as to how they could avoid language in the treaty that would upset the other party while leaving the content intact. When Iran refused to be involved directly in signing a treaty, the representatives of Algeria issued a declaration to which the parties to the dispute acceded. The resulting treaty, the Algiers Accords, also established a tribunal dealing with expropriation cases, which is still in operation today. The successful mediation process which could only be sketched here showed how mediation can work on the international plane. It was an alternative dispute resolution, especially after Iran completely ignored the proceedings but also the judgment of the international court of justice. Yet, it was also an integrative form of dispute resolution, bringing a conflict back into the realm of law by settling the hostage situation and establishing another form, namely the claims tribunal to deal with remaining issues. It also shows that mediation is a process, as is the settlement of disputes. A success cannot only lie in the final settlement but also in the fact that the process of settling the dispute peacefully is held alive.

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[81] For a list of potential mediators see Gary Sick, 'The Partial Negotiator: Algeria and the U.S. Hostages in Iran' in Saadia Touval and William Zartman I (eds), *International Mediation in Theory and Practice* (Westview Press 1985) 22.

[82] Raymond Cohen, 'Cultural Aspects of International Mediation' in Jacob Bercovitch (ed), *Resolving international conflicts: The theory and practice of mediation* (Lynne Rienner Publishers 1996) 118.

[83] Marvine Howe, 'Wary Algeria edged into pivotal role' *New York Times* (26 January 1981)

[84] ibid.

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4 APPENDIX: 1907 HAGUE CONVENTION ON THE PEACEFUL SETTLEMENT OF DISPUTES

Article 2

In case of serious disagreement or dispute, before an appeal to arms, the Contracting Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Article 3

Independently of this recourse, the Contracting Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

Article 4

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

Article 5

The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

Article 6

Good offices and mediation undertaken either at the request of the parties in dispute or on the initiative of Powers strangers to the dispute have exclusively the character of advice, and never have binding force.

Article 7

The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If it takes place after the commencement of hostilities, the military operations in progress are not interrupted in the absence of an agreement to the contrary.

Article 8

The Contracting Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

In case of a serious difference endangering peace, the States at variance choose respectively a Power, to which they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

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