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## Introduction

Mediation has been acknowledged for many years within legal discourse as an effective means of alternative dispute resolution (ADR) in various areas, such as family law, medical law, commercial law (hereafter referred to as traditional mediation). However, recently - especially since the end of the Cold War - mediation has also been employed in an attempt to resolve armed conflicts and international crises<sup>1</sup> (hereafter referred to as international peace mediation). It is the aim of this paper to set forward the theoretical underpinnings of international peace mediation in order to more fully understand this conflict resolution technique, and thus understand how it can be more successfully employed in the future.

While traditional mediation, as a form of ADR, has been comprehensively examined and critiqued and has been situated in a concrete legal framework, international peace mediation has emerged in the absence of such in-depth analysis and structure. Currently, international peace mediation is being employed by numerous organisations, States and individuals but this is happening in the absence of a uniform and coherent conception of the meaning of international peace mediation.<sup>2</sup> Worryingly, '[c]ontemporary peace mediation is a crowded and increasingly competitive field currently lacking established accountability mechanisms' and coherence.<sup>3</sup> This article proposes that with such a lack of standardization and certainty, the potential of international peace mediation as a conflict resolution technique cannot be fully harnessed. It is also proposed that the extant legal framework of traditional mediation should be applied to international peace mediation to create a more successful conflict resolution tool.

Section 1 of this study focuses on how international peace mediation has been described and analysed in the literature of peace studies and amongst some international peace mediation practitioners. It highlights the lack of uniformity with regard to the theoretical underpinnings of international peace mediation. Section 2 sets out the current framework that exists within legal discourse and practice concerning the different categories of mediation. The third section consists of a case study of

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<sup>1</sup> The Human Security Brief 2007 states that a growing number of conflicts are ending in 'negotiated settlements' rather than fought out until one side prevails militarily and provides statistics on this trend - see *Human Security Brief 2007*, Human Security Report Project, Simon Fraser University, Canada, 2007. 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 - See <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, pp. 4 - 5.

<sup>2</sup> See Herrberg, A. (2008) 'Perceptions of International Peace Mediation in the EU.' Crisis Management Initiative, p. 8.

<sup>3</sup> Lanz, D., Wählisch, M., Kirchhoff, L. & Siegfried, M. (2008) 'Evaluating Peace Mediation', Initiative for Peacebuilding.

peace mediation in practice in the region of Aceh in Indonesia. Section 4 then analyses the type of mediation which was employed in Aceh and sets this within the framework of traditional mediation. The article concludes with a discussion of why and how international peace mediation should be categorised as 'evaluative' mediation under the traditional mediation framework and how this categorisation can imbue international peace mediation with more certainty and structure and can perhaps lead to more successful employment of international peace mediation in the future.

## **Literature and Data Analysis**

Information for this paper was collected from a review of relevant legal, conflict resolution and peace studies literature and through semi-structured interviews undertaken with professionals involved in peace mediation in two organisations involved in international peace mediation. This literature and interview data was then applied to a case-study of international peace mediation in practice in Aceh.

### Literature

There exists a body of literature within peace studies that examines the use of mediation in conflict resolution. Authors such as Touval, Zartman, Galtung, Bercovitch, Anagnoson, Wille, Beardsley and Horowitz all discuss different styles of mediation and consider the different roles of mediators in the conflict resolution process. However, despite the existence of such material, there is a lack of coherence and clarity in the definitions put forward by each of these authors, in terms of their perceptions and understanding of international peace mediation. This results in a lack of commonality among peace studies theorists, and renders it much more difficult to categorise the different types of mediation used. (These differences are considered in more depth below.) Academics within peace studies use interchangeable terminology to identify mediation styles that have been utilised for conflict resolution. Closer examination of the definitions provided demonstrates a very close degree of similarity in the type of mediation being deployed although this is not evident at first sight because different tags are attached to these styles. It is also apparent that the types of mediation being described would fit within the three specific styles of mediation that have been identified and are well established within the legal framework of traditional mediation. For these reasons, the case is put forward that the literature available within the area of law and alternative dispute resolution should be taken into account and applied to any discussion on the use of mediation for conflict resolution within the context of international peace mediation.

Mediation (traditional mediation) is a long and well established alternative form of dispute resolution to litigation. Key advocates of mediation such as Fuller, Moore, Riskin, Folger, Bush, Della Noce, Grillo and Abel, have all evaluated the usefulness of mediation and also the impact of the mediator on the success or otherwise of the mediation process. Examination of this literature allows the researchers to explore whether the categorisation of mediation styles within the legal framework of traditional mediation is readily applicable to international peace mediation. Application of this material is of benefit to the researchers as a tacit agreement exists among mediation theorists within

area of law and alternative dispute resolution about the distinctive styles of mediation. To draw upon this particular framework would be useful for anyone working within the field of international peace mediation, particularly as this is an evolving area which is of interest to both academics and practitioners.

### Interviews

Part of the research methodology undertaken was data collection by way of semi-structured interviews. Interviews were conducted with personnel from two non-governmental organisations, the Centre for Humanitarian Dialogue (CHD) and the Crisis Management Initiative (CMI). Both of these organisations were involved in the mediation process in Aceh. CHD were the first organisation to attempt to mediate the Aceh conflict but were unsuccessful in their efforts. CMI became involved as a consequence of Martti Ahtisaari's engagement with this process. Ahtisaari was invited by the Indonesian Government to become involved in the negotiations between the Indonesian Government and the GAM. CMI was set up in 2000 by Ahtisaari. Personnel from both NGOs were selected on the basis of their position within each respective organisation and also because of their involvement as mediators within the field of conflict resolution and international peace mediation. A semi-structured interview was undertaken with each of the interviewees.<sup>4</sup>

### **Section 1: Construction of mediation within peace studies**

Before any discussion of the type of mediation that has been identified within the legal and ADR literature, it is necessary to discuss how mediation is understood within the context of peace studies. What is evident is that there lacks a clear conceptual framework within peace studies of what international peace mediation is, and there is discord among theorists regarding the styles of mediation that are used in international peace mediation. (Notably there has been some acknowledgement within peace studies of the extant legal framework of traditional mediation and that this ought to be taken into consideration.)<sup>5</sup>

Bercovitch and DeRouen provide three categories of mediation strategies, or styles.<sup>6</sup> According to Bercovitch and DeRouen, each different mediation strategy informs the particular behavioural tactics of the mediators. The first style is that of 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.<sup>7</sup> (The description provided of this strategy mirrors that of facilitative mediation as it is understood within the legal

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<sup>4</sup> See appendices attached for the list of interview questions used

<sup>5</sup> See footnote #2 in Beardsley, K., Quinn, D., Biswas, B., Wilkenfeld, J. (2006) "Mediation Style and Crisis Outcomes." *Journal of Conflict Resolution*, Vol.50 (1), pp.58-86 at p.62.

<sup>6</sup> Bercovitch, J. & DeRouen, K. (2004) "Mediation in Internationalized Ethnic Conflicts: Assessing the Determinants of a Successful Process." *Armed Forces and Society*, Vol.30 (2) pp.147-170.

<sup>7</sup> Ibid. p.156-157

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 typology 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'.<sup>8</sup> 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.

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.<sup>9</sup> Beardsley et al identify three different 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 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".<sup>10</sup> The alternative is that the mediator acts as a communicator, a style identified by peace studies theorists such as Touval and Zartman. The function of the mediator as a communicator is to encourage the disputing parties to communicate with each other.<sup>11</sup> 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.<sup>12</sup> 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

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<sup>8</sup> Ibid. p.157

<sup>9</sup> Beardsley, K., Quinn, D., Biswas, B., Wilkenfeld, J. (2006) "Mediation Style and Crisis Outcomes." *Journal of Conflict Resolution*. Vol.50 (1), pp.58-86.

<sup>10</sup> Ibid. p.63

<sup>11</sup> Ibid.

<sup>12</sup> See below for further discussion on the role of the facilitative mediator within the legal literature.

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”.<sup>13</sup> 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”.<sup>14</sup> This style is similar to the “directive mediation” approach identified by Horowitz below, 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.<sup>15</sup>

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 Kressel, Bercovitch and Horowitz.<sup>16</sup> The lack of coherence in the description of mediation styles in international peace mediation simply serves to further confuse an understanding of the 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.<sup>17</sup> 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”.<sup>18</sup> 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”.<sup>19</sup> 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,

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<sup>13</sup> Beardsley et al (2006) p.63

<sup>14</sup> Beardsley et al (2006) p.63

<sup>15</sup> See Riskin, L. (1994) ‘Mediator Orientations, Strategies and Techniques.’ *Alternatives to High Cost Litigation*, Vol. 12 (9), p.111.

<sup>16</sup> Beardsley et al (2006) p.63

<sup>17</sup> Horowitz, S. (2007) “Mediation.” in Webel, C. & Galtung, J. (eds) *Handbook of Peace and Conflict Studies*. Oxon: Routledge.

<sup>18</sup> Horowitz, S. (2007) p.57

<sup>19</sup> Horowitz, S. (2007) p.58

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."<sup>20</sup> 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.

## **Section 2: Current Legal Framework on Mediation**

From the discussion in Section 1 it is clear that the differing analyses of international peace mediation lacks consensus. Authors employ varying terminology to describe the same types of mediation style, leading to confusion and a lack of certainty. However, within legal discourse on traditional mediation a uniform, standardised framework exists. This has proven to be successful in the resolution of various types of family law, commercial law, medical law etc. disputes. It is therefore recommended that this type of framework should also be adopted within the international peace mediation discourse to inform its use and practice in conflict resolution.

Mediation is traditionally perceived as a voluntary, consensual process whereby an independent third party assists the disputing parties to reach a mutually acceptable settlement.<sup>21</sup> Fuller provides what has since been called the 'deepest and most "classic" statement of what mediation is'.<sup>22</sup> According to Fuller, mediation is:

'...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.'<sup>23</sup>

In its traditional format, mediation allows the disputing parties to have a certain degree of control over the process.<sup>24</sup> Voluntary mediation

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<sup>20</sup> Horowitz, S. (2007) p.58

<sup>21</sup> Meschievitz, C. (1991) 'Mediation and Medical Malpractice: Problems with Definition and Implementation.' *Law and Contemporary Problems*, pp.195-215 at p.198; MacFarlane, J. (1999) 'The Mediation Alternative.' pp.1-21 in MacFarlane, J. (1999) (ed.) *Rethinking Disputes: The Mediation Alternative*. London: Cavendish Publishing.

<sup>22</sup> Menkel-Meadow, C. (2000) 'Mother and Fathers of Invention: The Intellectual Founders of ADR.' *Ohio State Journal on Dispute Resolution*, Vol. 16 (1), pp.1-37 at p.18.

<sup>23</sup> Fuller, L. (1971) 'Mediation – Its Forms and Functions.' *Southern California Law Review*, Vol. 44, pp.305-339 at p.308.

<sup>24</sup> Moore, C. (1991) *The Mediation Process: Practical Strategies for Resolving Conflict*. San Francisco: Jossey-Bass, p.277; Johnson, S. (2000) 'The Case for Medical

provides the parties with the opportunity to determine the parameters within which they must negotiate. As the parties are not subject to the rules that are applicable in the legal process, mediation can allow them to reach an outcome that is acceptable to both.<sup>25</sup> Mediation provides the disputing parties with a forum whereby they can consider their individual needs and how best to accommodate these.<sup>26</sup> The commonly held view of mediation is that it is both flexible and informal, and as such, lends itself to more adequately resolving the issues between the disputing parties.<sup>27</sup> The outcomes can be creative and designed specifically to deal with the particular needs and interests of the parties concerned.<sup>28</sup> Ultimately, it is the parties who have control over the outcome of the mediation.<sup>29</sup>

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.’<sup>30</sup>

There exist a number of mediation styles within the legal framework of traditional mediation. These include facilitative mediation, evaluative mediation and transformative mediation.

#### Facilitative mediation

Facilitative mediation is the original and first identified mediation style. This mediation style provides a structure to ensure that parties reach a mutually acceptable settlement. The role of the mediator as an impartial third party is to assist the parties in reaching this agreement. The mediator does not suggest a suitable outcome to the parties. Facilitative mediation is what is commonly understood to be mediation. The

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Malpractice Mediation.’ *Journal of Medicine and Law*, Vol.5, pp.21-31 at pp.24-25.

<sup>25</sup> Meschivitz, C. (1991) p.198

<sup>26</sup> Meschivitz, C. (1991) p.198; Folberg, J. and Taylor, A. (1984) *Mediation*. San Francisco: Jossey-Bass, p.10.

<sup>27</sup> Meschivitz, C. (1991) p.197; Dauer, E. and Marcus, L. (1997) ‘Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement.’ *Law and Contemporary Problems*, pp.185-218 at p.200; Bush, B. in 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*, Vol.9 (2), pp.307-332 at p.309; Delgado, R. (1997) ‘Alternative Dispute Resolution – Conflict as Pathology: An Essay for Trina Grillo.’ *Minnesota Law Review*, Vol. 81, pp.1391-1411 at p.1404; Johnson, S. (2000) pp.26-27.

<sup>28</sup> Dauer, E. and Marcus, L. (1997) pp.207-209; MacFarlane, J. (1999) p.16; Menkel-Meadow, C. (2000) p.36.

<sup>29</sup> Palmer, M. and Roberts, S. (1998) *Dispute Processes: ADR and Primary Forms of Decision Making*. London: Butterworths, p.104; Conneely, S. (2001) *Family Mediation in Ireland*. Dartmouth: Ashgate, p.9.

<sup>30</sup> Eileen Carroll, Deputy Chief Executive, CEDR, (November 2004) ‘Redefining Mediation.’ Available at: [http://www.cedr.co.uk/index.php?location=/library/articles/Redefining\\_mediation.htm](http://www.cedr.co.uk/index.php?location=/library/articles/Redefining_mediation.htm).

significant features of facilitative mediation therefore are that it is consensual and voluntary. As MacFarlane explains, the aim of this particular style of mediation is to:

‘...facilitate the development of consensual solutions by the disputing parties...’<sup>31</sup>

Facilitative mediation can foster communication between the disputing parties.<sup>32</sup> Palmer and Roberts explain that facilitative mediators have a minimal role in the mediation process.<sup>33</sup> The role of the facilitative mediator is seen as encouraging, and improving, communication between the disputing parties to help them reach an acceptable settlement.<sup>34</sup> 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.<sup>35</sup> The parties can then collaborate to solve the problem in a manner that will address their needs and interests.<sup>36</sup> 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.<sup>37</sup>

#### Evaluative mediation

This style of mediation was first identified by Riskin. Riskin acknowledges that with evaluative mediation the mediator has a much greater level of participation, and interaction, in the process to ensure that the disputing parties reach a settlement. Unlike facilitative mediation, where the mediator acts as an impartial third party whose role, in theory at least, is not to influence the mediation process or outcome in any way, evaluative mediation sees the mediator being more involved with the process and the outcome. 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.<sup>38</sup> Palmer and Roberts explain that the mediator will evaluate the merits of the respective parties’ position.<sup>39</sup> The main strategy of the evaluative mediator is to help the parties appreciate the relative strengths and weaknesses of their

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<sup>31</sup> MacFarlane, J. (1999) p.2

<sup>32</sup> Johnson, S. (2000) p.27; Conneely, S. (2002) p.21

<sup>33</sup> Palmer, M. and Roberts, S. (1998) p.126

<sup>34</sup> Palmer, M. and Roberts, S. (1998) p.125; Riskin, L. (1994) p.111

<sup>35</sup> Riskin, L. (1994) p.111

<sup>36</sup> Burger, W. (1982) ‘Isn’t There a Better Way?’ *American Bar Association Journal*, Vol.68, pp.274-277; Galanter, M. (1985) ‘...A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States.’ *Journal of Law and Society*, Vol.12, pp.1-18.

<sup>37</sup> Folger, J. and Bush, R. (1994) p.16

<sup>38</sup> Riskin, L. (1994) ‘Mediator Orientations, Strategies and Techniques.’ *Alternatives to High Cost Litigation*, Vol. 12 (9), p.111; 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 Mediation, and What it Means for the ADR Field.’ *Pepperdine Dispute Resolution Law Journal*, Vol.3, p.113.

<sup>39</sup> Palmer, M. and Roberts, S. (1998) p.126

respective positions.<sup>40</sup> On this basis, the mediator will then put forward suggestions as to how the dispute can be resolved. This may include details of a settlement.<sup>41</sup> Riskin lists some of the other techniques deployed by the evaluative mediator. These include persuading the parties to accept a settlement proposal, proposing 'position-based compromise agreements', and trying to persuade the parties to accept the mediator's assessment of the merits of each party's claim.<sup>42</sup> Emphasis will be placed upon full participation of all relevant parties during the mediation process. Opportunities will be available for parties to discuss settlements.<sup>43</sup> Evaluative mediators will ask the parties about their 'situations, plans, needs and interests'.<sup>44</sup> That the mediator focuses on the *underlying* interests as the goal of mediation distinguishes evaluative mediation from facilitative mediation. The mediator may, using evaluative techniques, suggest settlement options other than compensation. Riskin claims that the evaluative mediator will provide the parties with 'predictions, assessments and recommendations', with emphasis on those 'options that address underlying interests'.<sup>45</sup> 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.<sup>46</sup>

As the emphasis is on the underlying interests and needs of parties, this type of mediation style can deliver options that will accommodate these.<sup>47</sup>

#### Transformative mediation

Bush and Folger developed this concept of transformative mediation in the early 1990s. Menkel-Meadow, Folger and Bush are advocates of the transformative purpose of mediation.<sup>48</sup> According to Bush and Folger, mediation can be better understood by taking into account the particular ideological commitments of mediators.<sup>49</sup>

Folger and Bush believe that this particular style of mediation can transform both individuals and society because it is not focused on the outcome.<sup>50</sup> Transformative mediation focuses on empowerment and personal responsibility.<sup>51</sup> This differs from evaluative and facilitative mediation where the focus is directed on achieving a specific outcome. Folger and Bush contend that when the empowerment and recognition

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<sup>40</sup> Riskin, L. (1994) p.111

<sup>41</sup> Palmer, M. and Roberts, S. (1998) p.126

<sup>42</sup> Riskin, L. (1994) p.111

<sup>43</sup> Ibid. p.112

<sup>44</sup> Riskin, L. (1994) p.112

<sup>45</sup> Ibid.

<sup>46</sup> Folger, J. and Bush, R. (1994) p.12

<sup>47</sup> Riskin, L. (1994) p.112

<sup>48</sup> Menkel-Meadow, C. (2000); Folger, J. and Bush, R. (1994)

<sup>49</sup> Della Noce, D. (2004) 'From Practice to Theory: A Brief Retrospective on the Transformative Mediation Model.' *Ohio State Journal on Dispute Resolution*, Vol.19, pp.925-935 at p.926.

<sup>50</sup> Folger, J. and Bush, R. (1994)

<sup>51</sup> MacFarlane, J. (1999) p.13

effects of mediation are core to the process, that parties will use conflicts as ‘opportunities for moral growth’. This is a realisation of mediation’s transformative potential.<sup>52</sup> Folger and Bush provide definitions of empowerment and recognition:

‘...*empowerment* means the restoration to individual’s of a sense of their own value and strength and their own capacity to handle life’s problems. *Recognition* means the evocation in individuals of acknowledgement and empathy for the situation and problems of others.’<sup>53</sup>

Folger and Bush make it clear that transformative mediation does not mean that there is no opportunity for a suitable settlement, that settlement is possible even if the focus of transformative mediation is on empowerment and recognition.<sup>54</sup>

This style of mediation will mean that the mediator will have more involvement in the process, similar to the evaluative mediation process. However, the transformative mediator will not take the same directive approach as the evaluative mediator. Instead of suggesting how a resolution could be reached, the transformative mediator will try to foster the empowerment dimension of mediation. This type of mediation can mean that the mediator’s concern is the transformative potential rather than on the settlement.<sup>55</sup> According to Folger and Bush this involves the transformative mediators focusing on:

‘...empowering parties to define issues and decide settlement terms for themselves and on helping the parties to better understand one another’s perspectives.’<sup>56</sup>

As a consequence, Folger and Bush claim that this approach enables parties to find suitable solutions. Transformative mediation focuses more on the relationship between the parties. Essentially transformative mediation 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.<sup>57</sup> Folger and Bush contend that this particular dimension of mediation is of ‘primary and immense’ importance.<sup>58</sup> This contrasts with both facilitative and evaluative mediation that are outcome oriented. Folger and Bush identify this feature of mediation as allowing the parties to gain a better understanding and appreciation of the other’s needs and interests.<sup>59</sup> The benefit of transformative mediation is that it can lead to transformation at both an individual and societal level.<sup>60</sup> If the ultimate objective of

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<sup>52</sup> Folger, J. and Bush, R. (1994) p.2

<sup>53</sup> Ibid.

<sup>54</sup> Ibid. p.3

<sup>55</sup> MacFarlane, J. (1999) p.13

<sup>56</sup> Folger, J. and Bush, R. (1994) p.12

<sup>57</sup> MacFarlane, J. (1999) p.20

<sup>58</sup> Folger, J. and Bush, R. (1994) p.4

<sup>59</sup> Folger, J. and Bush, R. (1994) p.4

<sup>60</sup> Ibid. p.21 and p.29

international peace mediation is peace within a community, then it could certainly be said that transformative mediation is applicable.

#### Role of the mediator

The mediator has a pivotal role to play in the mediation process. The mediator can influence how the mediation progresses and is conducted: from determining when the parties can speak, to setting out possible solutions for settlement.<sup>61</sup> The style of mediation adopted used will significantly influence the role that the mediator has in the process. Della Noce, Bush and Folger stress that:

[a]s mediators interact with the parties during the course of the mediation process, they constantly draw upon their preferred theoretical frameworks... to interpret the unfolding interactions and to make choices about when and how to intervene based upon their interpretations.<sup>62</sup>

Above, descriptions have been provided of the differences between facilitative, evaluative and transformative mediation. Each of these mediation strategies will affect the methods deployed by the mediator, and the particular approach of the mediator towards settlement. Mediators possess different goals and values, and as such, these can have an affect on the mediation process and outcomes.<sup>63</sup> This will be significant in terms of the role of the mediator, and the impact the mediator will have upon the process. Mediators adopting a facilitative approach will have a minimal involvement in the process.<sup>64</sup> These mediators will not assess the merits of the respective parties' case or make recommendations regarding possible outcomes.<sup>65</sup> Riskin considers that the facilitative approach will see the mediator trying to help the disputing parties understand the other side's position better. The facilitative mediator will also assist the parties to 'define, understand and resolve' their specific problems and needs.<sup>66</sup> The evaluative mediator will have greater involvement in the process with the emphasis upon determining the underlying needs and interests of the parties. Transformative mediation, however, does not focus on the individuals; rather the transformative mediator will seek to achieve the goal that will be most beneficial for 'communal interests' rather than the needs of the parties.<sup>67</sup>

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<sup>61</sup> Grillo, T. (1991) p.1585; Silbey, S. and Merry, S. (1986) 'Mediator Settlement Strategies.' *Law and Policy*, Vol.8 (1), pp.7-32

<sup>62</sup> Della Noce, D., Bush, R., and Folger, J. (2002-2003) 'Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy.' *Pepperdine Dispute Resolution Law Journal*, Vol.3 (39), pp.39-65 at p.42.

<sup>63</sup> Della Noce, D., Bush, R. and Folger, J. (2002-2003) p.46; Silbey, S. and Merry, S. (1986) pp.7-32

<sup>64</sup> Palmer, M. and Roberts, S. (1998) p.126

<sup>65</sup> Palmer, M. and Roberts, S. (1998) p.126; Newman, P. (1995) 'Alternative Dispute Resolution (ADR) - Tomorrow's Reality or a Flash in the Pan?' *The Litigator*, p.152.

<sup>66</sup> Riskin, L. (1994) p.113

<sup>67</sup> Palmer, M. and Roberts, S. (1998) p.110

Grillo states that the mediators ‘orient the parties toward reasonableness and compromise, rather than moral vindication’.<sup>68</sup> Della Noce, Bush and Folger submit that mediators do not remain neutral, and do influence the mediation process. They claim that the mediators do act ‘coercively’ during the mediation session to ensure that parties accept a settlement.<sup>69</sup> This is certainly the case when dealing with international peace mediation, for example within the manipulative mediation style outlined by Beardsley et al, the mediator will adopt a so-called ‘carrot and stick’ approach to either incentivise disputing parties to reach a resolution by offering the parties some sort of compensation agreement, or imposing economic or diplomatic sanctions to dissuade parties from non-agreement.<sup>70</sup>

Mediators have a significant level of power that is often overlooked. The mediator’s influence is very often covert. Grillo acknowledges that:

[m]ediators...exert a great deal of power. When two people are in conflict, having a third, purportedly neutral person take the viewpoint of one or the other results in a palpable shift of power to the party with whom the mediator agrees. The mediator can also set the rules regarding who talks, when they may speak, and what may be said. The power of the mediator is not always openly acknowledged but is hidden beneath protestations that the process belongs to the parties. This can make the parties feel less, not more, in control of the process and its consequences for their lives. There is much room for, but little acknowledgement of, the possibility of the mediator’s exhibiting partiality or imposing a hidden agenda on the parties.<sup>71</sup>

Mediators have inherent biases that can affect their impartiality when presiding over the mediation process.<sup>72</sup>

There is evidence in the literature that shows that mediators do have a significant influence upon settlement of disputes through mediation. In some instances, mediators challenge the solutions proposed by the parties, as they did not deem these to be the ‘optimal solutions’.<sup>73</sup> Mediators are willing to influence parties when they are attempting to reach a suitable settlement, and to suggest outcomes that the mediator believes to be the best option.<sup>74</sup> This is acceptable when the style of mediation engaged is that of evaluative mediation, whereby the parties expect the mediator to evaluate the parties respective positions and to put forward suggestions for suitable solutions. As mediation is a private and informal forum, mediators can, and do, garner a ‘broad strategic power’ over the conduct of the process.<sup>75</sup> Folger and Bush explain that

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<sup>68</sup> Grillo, T. (1991) p.1560

<sup>69</sup> Della Noce, D., Bush, R. and Folger, J. (2002-2003) p.43

<sup>70</sup> Beardsley et al (2006) p.64

<sup>71</sup> Grillo, T. (1991) pp.1585-1586

<sup>72</sup> Ibid. pp.1585-1586; Mulcahy, L. (2001) ‘The Possibilities and Desirability of Mediator Neutrality – Towards an Ethic of Partiality?’ *Social and Legal Studies*, Vol.10 (4), pp.505-527.

<sup>73</sup> Folger, J. and Bush, R. (1994) p.37

<sup>74</sup> Ibid. p.39

<sup>75</sup> Ibid. p.22

this allows mediators' biases to flourish. It is these biases that will have an effect on the process and also on the outcomes and settlement options.<sup>76</sup>

The mediator may have to take on a role that goes beyond that of an impartial third party.<sup>77</sup> Mediators have a highly influential part to play. Stulberg goes as far to claim that the job of the mediator is to 'persistently and relentlessly' ensure that the parties reach an agreement.<sup>78</sup>

### Section 3: Case Study - Aceh

Aceh (its full name is Nanggroe Aceh Darussalam) lies at the northern tip of the island of Sumatra, with a population of 4.01 million people.<sup>79</sup> The GAM, an armed separatist group representing the Acehnese people, was involved in a violent conflict with the Indonesian government for many years until 2005. The conflict, based primarily on a claim for self-determination and a demand for independence, raged for over a quarter. Aceh was the closest point of land to the epicentre of the tsunami which ravaged the western coast of Indonesia in December 2004. In the aftermath of the tsunami and with the aid of the Crisis Management Initiative (CMI), an international organisation dealing with peace mediation, headed by former Finnish leader Martti Ahtisaari, a peace deal was brokered in August 2005. This 'Memorandum of Understanding'<sup>80</sup> was signed by the government of Indonesia and the GAM. Previous peace deals in the region which had been brokered by a different international organisation, the Humanitarian Dialogue Centre (HDC) had all failed. However, upon signing the Memorandum of Understanding, the GAM conceded its demand for Acehnese independence and agreed to settle for limited autonomy. The peace deal has been slowly implemented in Aceh and the use of violence between the GAM and Indonesian government forces has now almost completely ceased. However, a level of demand for independence from Indonesia persists in some parts of Aceh, with a number of outbreaks of violence in 2007 and 2008<sup>81</sup> and it remains to be seen if the fragile peace which has been in place since 2005 will remain intact.

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<sup>76</sup> Ibid. p.23

<sup>77</sup> Silbey, S. and Merry, S. (1986) pp.14-18

<sup>78</sup> Stulberg, J. (1987) *Taking Charge/ Managing Conflict*. Massachusetts: D.C. Heath and Co, p.105.

<sup>79</sup> The last census of Indonesia that was carried out in 2000 put the total population of Aceh at 4,010,486. This information is available at: [http://www.unescap.org/Stat/cos12/cos12\\_indonesia.pdf](http://www.unescap.org/Stat/cos12/cos12_indonesia.pdf), last accessed 18/05/06.

<sup>80</sup> Memorandum of Understanding between the Government of Indonesia and the Free Aceh Movement, available on the website of the Crisis Management Initiative, at [http://www.who.int/hac/crises/international/asia\\_tsunami/sitrep/en/](http://www.who.int/hac/crises/international/asia_tsunami/sitrep/en/), last accessed 23/05/06.

<sup>81</sup> See World Bank / Decentralisation Support Facility, 'Aceh Conflict Monitoring Update 1 - 31 May 2007', available at: <http://www.conflictanddevelopment.org/data/doc/en/regCaseStudy/aceh/mon/Aceh%20Conflict%20Monitoring%20Update%20-%20May%202007.pdf>, last accessed 27/07/07. See also Fabio Scarpello, 'Bombs shake fragile Aceh peace', *South China Morning Post*, August 4, 2007.

### A Brief History of Aceh

Aceh has a long tradition of resistance to outside powers.<sup>82</sup> At one time Aceh was a free and independent state and the vital trading centre in the north Malaysian peninsula and remained as such for 500 years.<sup>83</sup> This power declined, however, due to internal dissention and eventually disappeared with the arrival of the colonial powers in Indonesia.<sup>84</sup> From the beginning of the 16th century until the signing of the Memorandum of Understanding, the Acehnese people were involved in an almost continuous struggle for independence<sup>85</sup> against the Netherlands, Japan and Indonesia at various times.<sup>86</sup> Britain and the Netherlands became embroiled in a power struggle over various places in the East Indies, including Aceh, in their search for wealth and this power struggle engendered violence and conflict.<sup>87</sup> The Netherlands invaded in 1898, with Major van Heutsz of the Dutch army becoming Governor of Aceh and much of the region was brought under Dutch control by 1904. It is estimated that between 50,000 to 100,000 Acehnese were killed during the conflict with 1 million wounded.<sup>88</sup>

### The Creation of Indonesia

War continued to be waged between the Dutch and the Acehnese on an intermittent basis until 1942 when Japan<sup>89</sup> conquered the colonial powers in the Dutch East Indies. After the Japanese surrendered to the Allies and the independence of the Republic of Indonesia<sup>90</sup> was proclaimed,<sup>91</sup> both Britain and the Netherlands returned to the region to try to regain their former colonies, although the Dutch avoided Aceh on their return.

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<sup>82</sup> See 'A Brief History of Aceh', 7 *Estafeta* (2001), available at: <http://www.etan.org/estafeta/01/winter/6aceh.htm>, last accessed 26/09/05.

<sup>83</sup> See Basset, D.K. (1989) 'British 'Country' Trade and Local Trade Networks in the Thai and Malay Straits, c. 1680 – 1770.' *Modern Asian Studies*, Vol.23, pp. 625 - 43.

<sup>84</sup> See Priyambudi Sulistiyanto, (2001) 'Whither Aceh?' *Third World Quarterly*, Vol.22, pp. 437 - 52, p. 438.

<sup>85</sup> See <http://www.unpo.org/member.php?arg=05>, last accessed 26/09/05.

<sup>86</sup> See 'A Brief History of Aceh', *Estafeta* (2001), Vol.7, available at: <http://www.etan.org/estafeta/01/winter/6aceh.htm>, last accessed 26/09/05.

<sup>87</sup> See *ibid.*

<sup>88</sup> See *ibid.*

<sup>89</sup> See Colbert, E. (1972-3) 'The Road Not Taken; Decolonization and Independence in Indonesia and Indochina.' *Foreign Affairs*, Vol.51, pp. 608 – 28 at p. 609; Reid, A. (1975) 'The Japanese Occupation and Rival Indonesian Elites: Northern Sumatra in 1942.' *The Journal of Asian Studies*, Vol.35, pp. 49 - 61.

<sup>90</sup> The text of the Proclamation of Independence of Indonesia can be found at: <http://www.indonesia.embassy.uz/aboutindonesia.htm>, last accessed 10/05/06.

<sup>91</sup> However, in a speech made around the same time as the independence of Indonesia was proclaimed, Sukarno included the territory from Banda Aceh to Ambon in the Moulaccas as falling within the jurisdiction of the Republic of Indonesia, see <http://w3.rz-berlin.mpg.de/~wm/PAP/afterWPC.html>, last accessed 06/08/06.

Under the Linggadjati Agreement,<sup>92</sup> the Dutch recognised Indonesian sovereignty over Java, Sumatra (including Aceh) and Madura. This was done in the absence of any agreement on the part of the Acehnese people.

Despite the fact that the Dutch had not occupied Aceh during their second colonisation, it was still included as part of the Republic of Indonesia in the Round Table Conference Agreements, which were concluded under the auspices of the United Nations.<sup>93</sup> The Jakarta government then mobilised its troops in an attempt to annex Aceh. In an effort to pacify the formerly independent Acehnese, the region was initially granted status as an autonomous province of the Republic of Indonesia with Teungku M. Daud Beureu'eh as its governor but it was amalgamated with the province of North Sumatra in 1950.<sup>94</sup> This was not to the satisfaction of the Acehnese, who rebelled against Jakarta. Aceh's resistance to integration into Indonesia continued until the Indonesian government granted Aceh 'special territory' status in 1959.<sup>95</sup> This conferred autonomy in religious, educational and cultural matters on Aceh and allowed 'a higher-than-usual official Indonesian respect for Islamic law and custom.'<sup>96</sup> While this was a positive step in the view of the Acehnese, Jakarta still controlled Aceh's considerable natural resources and the Indonesian army retained a presence in the region. In practice, many of the rights promised to Aceh by Jakarta never materialised. Resentment grew among the Acehnese in response to these, and other, matters over which the Acehnese felt exploited by Jakarta. This resentment led to the creation of the GAM,<sup>97</sup> the armed separatist group which attempted to rise up against Jakarta in a demand for independence.

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<sup>92</sup> Linggadjati Agreement, between the Government of the Netherlands and the Government of the Republic of Indonesia, signed on 25 March 1947. See Colbert, E. (1972-3) 'The Road Not Taken; Decolonization and Independence in Indonesia and Indochina.' *Foreign Affairs*, Vol.51, pp. 608 – 28 at p. 615. See also Sastroamidjojo, A. & Delson, R. (1949) 'The Status of the Republic of Indonesia in International Law.' *Columbia Law Review*, Vol. 49, pp. 344 - 61; Cheney Hyde, C. (1949) 'The Status of the Republic of Indonesia in International Law.' *Columbia Law Review*, Vol. 49, pp. 955 - 66 and Ricklefs, M.C. (1993) *A History of Modern Indonesia Since c. 1300*. 2nd ed., Stanford, California: Stanford University Press, pp. 224 - 5.

<sup>93</sup> Priyambudi Sulistiyanto comments that 'in 1947 President Sukarno persuaded Aceh to join the Republic of Indonesia, promising that Aceh would be given autonomy within Indonesia, and allowed to implement Islamic law.' - Priyambudi Sulistiyanto (2001) 'Whither Aceh?' *Third World Quarterly*, Vol.22, pp. 437 – 52 and pp. 438 - 9.

<sup>94</sup> See *ibid* at p. 438.

<sup>95</sup> See *ibid*, p. 438. See also Global Security Report on Aceh, available at: <http://www.globalsecurity.org/military/world/para/aceh.htm>, last accessed 27/09/05.

<sup>96</sup> *Ibid*.

<sup>97</sup> See Schulze, K.E. (2004) *The Free Aceh Movement (GAM): Anatomy of a Separatist Organization*. Policy Studies, Vol. 2, East-West Center Washington. See also Djuli, M.N. & Jereski, R. (2002-3) 'Prospects for Peace and Indonesia's Survival.' *Brown Journal of World Affairs*, Vol.9, pp. 35 - 48, pp. 41 - 43 in relation to the type of violence used by the GAM.

### Background to the Conflict in Aceh

The conflict between the GAM and the Indonesian military, the Tentara Nasional Indonesia (TNI),<sup>98</sup> began in earnest in the 1970s and continued until the Memorandum of Understanding was signed in August 2005. During the intervening years, the conflict was extremely violent with violations of human rights and international humanitarian law being committed by both sides.

The GAM was founded by Hasan di Tiro, a descendant of a prominent Acehese family of Muslim clergy. It proclaimed the independence of Aceh in December 1976 but di Tiro and other major players in the GAM were forced to leave Aceh in 1979 as the Indonesian government began to arrest or kill GAM members. They fled to Sweden where an Acehese government in exile was created. Some GAM members were trained in Libya and returned home to recruit and train new members in the late 1980s. The movement garnered such broad popular support in Aceh and caused so much damage in their attacks that the Indonesian government under Suharto declared Aceh to be a Military Operational Area / Daerah Operasi Militer (DOM) and launched a counter-insurgency campaign.<sup>99</sup> During this period various human rights abuses were carried out as part of military operations which encouraged the demand for Acehese independence even more.<sup>100</sup> While President Habibie lifted Aceh's DOM status in 1998, this did not serve to improve matters greatly.

When President Habibie announced that there would be a referendum on the question of self-determination in Timor Leste in 1999, the GAM and other groups called for a referendum for Aceh. However, the Indonesian government would not agree to such a demand and deployed various military operations, sending more troops into Aceh to counteract the GAM.<sup>101</sup> Whole villages were punished in retaliation for GAM action and pro-referendum groups were targeted.<sup>102</sup>

The GAM reorganised the village administrative apparatus. It replaced village leaders and reinstated the concept of a council of village elders that had operated before Aceh had been incorporated into Indonesia. In some cases, the GAM was in a position to make these changes without much opposition due to the extent of support for the organisation. Other times, however, GAM members abducted local government officials in order to institute changes and to bring the local government system under

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<sup>98</sup> See Rieffel, L. (2004) 'Indonesia's Quiet Revolution.' *Foreign Affairs*, Vol.83, pp. 98 - 110, pp. 104 - 6 in relation to the military in Indonesia. For a discussion on the role of the police in Indonesia see Meliala, A. (2001) 'Police as military: Indonesia's experience.' *Policing: An International Journal of Police Strategies and Management*, Vol.24, pp. 420 - 31.

<sup>99</sup> See 'A Brief History of Aceh', 7 *Estafeta* (2001), available at: <http://www.etan.org/estafeta/01/winter/6aceh.htm>, last accessed 26/09/05. See also, 'The structure of military abuse.' *Inside Indonesia*, No. 62, April - June 1999, available at: <http://www.insideindonesia.org/edit62/dom2.htm>, last accessed 08/11/05.

<sup>100</sup> See Human Rights Watch Report, (August 2001) 'Indonesia: The War in Aceh.' Volume 13 (4) (C), p. 8.

<sup>101</sup> *Ibid*, p.10.

<sup>102</sup> See *ibid*.

the group's control.<sup>103</sup> It began to impose 'war taxes' on individuals and on businesses, from which it gained a valuable source of income.<sup>104</sup>

#### Peace Negotiations in Aceh

In the middle of 2000, a conflict resolution organisation based in Geneva, the Henri Dunant Centre, later renamed the Humanitarian Dialogue Centre (HDC), succeeded in brokering a temporary peace deal between the GAM and the Indonesian government. It had been approached in November 1999 by Indonesian President Abdurrahman Wahid, with a view to employing its good offices to attempt to bring peace to Aceh.<sup>105</sup> At this time, the majority of the Indonesian government was not in favour of entering into talks with the GAM, fearing that this type of recognition would confer legitimacy on the group and therefore the role of HDC was not made public. The HDC was deemed to be an acceptable organisation to mediate a potential peace deal with the GAM as it was small, neutral and non-governmental. The Indonesian government did not want any interference from the UN in the peace talks as they did not want to internationalise the conflict,<sup>106</sup> as had happened previously with UN intervention in Timor Leste. The HDC was originally invited to participate in peace talks as facilitators, however, as the talks progressed, representatives from the Centre began to take on the mantle of mediators.<sup>107</sup>

#### The 'Humanitarian Pause' Agreement and the Cessation of Hostilities Agreement

The first temporary peace deal brokered by the HDC was the Joint Understanding on Humanitarian Pause for Aceh (Humanitarian Pause). Finalised in May 2000, it was designed to last for a period of three months and was signed by Dr. Hassan Wirajuda of Indonesia and Dr. Zaini Abdullah of the GAM.<sup>108</sup> It was not quite a cease-fire but it allowed negotiations between the two parties to the conflict to proceed and for humanitarian aid to be delivered in the region. Committees were set up in Aceh, consisting of members of the GAM and representatives of the Indonesian government to discuss security issues. The pause allowed for a dissipation of violence for a few months. However, violations of the pause by the Indonesian government soon prompted retaliation from the GAM on the military and the police. The Indonesian army was very dissatisfied with the pause and viewed it as an opportunity for the GAM to copper-fasten its control over the rural areas of Aceh. The pause was renewed twice and was renamed 'moratorium on violence' and 'peace

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<sup>103</sup> See *ibid*, p. 10. This states: 'Sometimes through persuasion, sometimes through abduction and a kind of reeducation of local government officials, GAM gradually took control over most governmental functions from the district level down in wide swathes of districts...'

<sup>104</sup> See *ibid*.

<sup>105</sup> Kivimaki, T. & Gorman, D. (2007) *Non-Governmental Actors in Peace Processes – The Case of Aceh*. Switzerland:Henri Dunant Centre for Humanitarian Dialogue, p. 8.

<sup>106</sup> *Ibid*. p. 9

<sup>107</sup> *Ibid*. p.13

<sup>108</sup> Joint Understanding on Humanitarian Pause for Aceh, 12<sup>th</sup> May 2000. Available at <  
<http://www.hdcentre.org/files/JoU%20FINAL.pdf>>

through dialogue', but retained its basic purpose of providing a platform for discussion between the GAM and the Indonesian government.<sup>109</sup>

However, in March 2001, Indonesia's Defence Minister and the Commander of the Armed Forces announced the beginning of new military operations against the GAM and more troops were deployed into Aceh. One of the reasons for the increase in troops was to protect the region's biggest investor, Exxon Mobil. Exxon Mobil had closed three of its gasfields in North Aceh as a result of attacks by the GAM on its employees.<sup>110</sup> The extra military presence in the region was intended to assure the company that its workers would not be attacked by the GAM and that they could safely resume normal work.<sup>111</sup> However, Human Rights Watch comment that '[m]any in Aceh believed the army was using the closure of the gasfield as a pretext to start a long-planned offensive.'<sup>112</sup> President Wahid then issued Presidential Instruction (Impres) No. 4 of 2001<sup>113</sup> which stated that attempts to resolve the conflict with the 'armed separatists' and that the government had decided to respond to the situation with 'a more comprehensive approach, and to address the political, economic, social, law and order, security and information and communication aspects of the problem.'<sup>114</sup> In order to achieve these goals, the government devised a structure of people responsible for the implementation of the new approach. The security structure in Aceh was reorganised and an 'Operation of Security and Upholding the Law' (Operasi Pemulihan Keamanan dan Penegakan Hukum / OKPH) was initiated.

The new troops deployed for this operation set about targeting GAM facilities. However, it was claimed that many civilians were also killed in the process.<sup>115</sup> The conflict between the GAM and the central government continued in 2002. In April of that year GAM leaders announced that the Indonesian offer of 'special autonomy' for Aceh was inadequate and once again began to demand full independence.<sup>116</sup> In late July the government planned to send in thousands of extra troops in an attempt to finally crush the GAM and Minister Susilo Bambang Yudhoyono even put forward the idea of imposing a state of civil emergency in Aceh. However, these plans came under attack amid fears that they would exacerbate the situation.<sup>117</sup>

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<sup>109</sup> See Human Rights Watch Report (August 2001) 'Indonesia: The War in Aceh.' Volume 13 (4) (C), p. 10

<sup>110</sup> See *ibid.*

<sup>111</sup> Exxon Mobil re-opened two of the gasfields in early August 2001 but with a reduced production rate - see *ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> Indonesian Ministry of Foreign Affairs, 'Instruksi President Republik Indonesia Nomor 4 Tahun 2001 Tentang Langkah-Langkah Komprehensif Dalam Rangka Penyelesaian Masalah Aceh.' <http://www.dfa-deplu.go.id>, April 20, 2001 - see Human Rights Watch Report, (August 2001) 'Indonesia: The War in Aceh.' Volume 13 (4) (C), p.11.

<sup>114</sup> *Ibid.*

<sup>115</sup> See *ibid* at p. 11.

<sup>116</sup> See <http://www.globalsecurity.org/military/world/para/aceh.htm>, last accessed 27/09/05.

<sup>117</sup> See *ibid.*

Foreign observers came to Aceh in mid-November 2002 in order to monitor the situation and try to broker a peace plan between the two sides. The GAM pronounced that it approved the peace plan in principle but wanted a withdrawal of Indonesian troops from the region before it would begin talks. The withdrawal of troops did not come to pass but a peace plan was eventually brokered by Switzerland's HDC,<sup>118</sup> the organisation responsible for the Humanitarian Pause in 2000. The plan offered more autonomy for Aceh, elections for a provincial legislature and administration and demanded a complete cessation of violence.<sup>119</sup> This peace agreement, a Cessation of Hostilities Agreement,<sup>120</sup> was signed by both the Indonesian government and GAM leaders in December 2002, but it was not a major success. The main problem was that of the GAM's demand for independence from Indonesia. While the government was willing to grant considerable autonomy to Aceh in principle, the GAM stated that it would be happy with nothing less than a complete break from Indonesian rule.

By mid-May 2003, the peace deal seemed unsalvageable. Government officials and GAM leaders met in Tokyo for negotiations but no agreement was forthcoming. President Sukarnoputri declared a six-month period of martial law in May and the Indonesian army launched an offensive involving the deployment of 35,000 troops into Aceh the following day. There was violence and casualties on both sides and the Indonesian Red Cross reported that 12 civilians were also killed.<sup>121</sup>

In May 2004 the situation in Aceh was reclassified by the Indonesian government as a 'civil emergency'. The government claimed to have had considerable success during the period of martial law in crushing the GAM and claimed that thousands of GAM members had been killed, captured or had surrendered to the army. However, '[c]ritics of the military operation countered that most of those killed were civilians, and say the heart of the...GAM is still relatively untouched.'<sup>122</sup>

#### The Memorandum of Understanding

On 26 December 2004, a powerful tsunami hit and devastated Aceh and many other surrounding areas. More than 170,000 people were killed and another 400,000 people were left homeless by the disaster.<sup>123</sup> In the

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<sup>118</sup> The organisation's official website is to be found at: <http://www.hdcentre.org>.

<sup>119</sup> [Http://www.globalsecurity.org/military/world/para/aceh.htm](http://www.globalsecurity.org/military/world/para/aceh.htm), accessed 27/09/05.

<sup>120</sup> The Cessation of Hostilities Agreement is available at: <http://www.hdcentre.org/index.php?aid=43>, accessed 27/09/05.

<sup>121</sup> [Http://www.globalsecurity.org/military/world/para/aceh.htm](http://www.globalsecurity.org/military/world/para/aceh.htm), accessed 27/09/05. See also Human Rights Watch Briefing Paper (September 2003) 'Aceh under Martial Law: Unnecessary and Dangerous Restrictions on International Humanitarian Access.'

<sup>122</sup> [Http://www.globalsecurity.org/military/world/para/aceh.htm](http://www.globalsecurity.org/military/world/para/aceh.htm), last accessed 27/09/05.

<sup>123</sup> See 'After 29 years, an Aceh peace pact.' *Christian Science Monitor*, available at <http://www.csmonitor.com/2005/0718/p06s02-woap.htm>, last accessed 30 August 2005.

immediate aftermath of the tsunami sporadic violence between members of the GAM and the Indonesian security forces continued. It was reported that on the day after the tsunami the Indonesian forces launched military operations that killed 4 GAM members.<sup>124</sup> However, the tragedy did in fact prompt the conflicting parties to return to negotiations for a peace plan and in January 2005 representatives of the GAM and of the Indonesian government met in Helsinki for discussions. These talks were held under the auspices of the CMI, an independent non-governmental organisation concerned with response to challenges in sustainable security,<sup>125</sup> which had been contacted the previous year about the possibility of becoming involved in the peace talks in Aceh. It was not until the tsunami hit that all actors involved in the conflict showed willing to participate in more talks. From January 17 to 19 2005, former president of Finland, Martti Ahtisaari, chaired a meeting between the GAM and the Indonesian government. These talks were positive and other meetings between the two groups ensued in the following months. One of the main reasons why the talks were successful was the abandonment - albeit temporarily, according to some sources - of the GAM's demand for independence. The CMI prepared a draft Memorandum of Understanding which was eventually signed on 15 August 2005. This document<sup>126</sup> begins as follows:

The Government of Indonesia (GoI) and the Free Aceh Movement (GAM) confirm their commitment to a peaceful, comprehensive and sustainable solution to the conflict in Aceh with dignity for all.

The parties commit themselves to creating conditions within which the government of the Acehnese people can be manifested through a fair and democratic process within the unitary state and constitution of the Republic of Indonesia.

The parties are deeply convinced that only the peaceful settlement of the conflict will enable the rebuilding of Aceh after the tsunami disaster on 26 December 2004 to progress and succeed.

The parties to the conflict commit themselves to building mutual confidence and trust.

This Memorandum of Understanding (MoU) details the agreement and the principles that will guide the transformation process.

It is clear that such a document would have been impossible to agree upon if the GAM had not conceded on the issue of independence. It is

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<sup>124</sup> See 'Crisis Profile: Deadlock in Indonesia's Aceh conflict.' *Reuters AlertNet*, August 30, 2005, available at <http://www.alertnet.org/printable.htm?URL=/thefacts/reliefresources/111997187760.htm>, last accessed 30/08/05.

<sup>125</sup> See official website of the organisation at <http://www.cmi.fi/>, last accessed 23/11/05.

<sup>126</sup> Memorandum of Understanding between the Government of Indonesia and the Free Aceh Movement, *supra* note 3.

also questionable whether such a concession would have been made had it not been for the tsunami. When asked why the Helsinki negotiations succeeded where all other ones had failed, GAM Prime Minister, Malik Mahmud commented:

Aceh had been in a conflict situation, but with the tsunami...we saw that indeed the people of Aceh really needed peace. We took this opportunity to pursue peace negotiations. Also, at that time the international community came in throngs to Aceh to give humanitarian assistance and help reconstruct Aceh. There was a very strong voice in the international community that this was the time to continue negotiations. They were very supportive. I presume they also monitored the progress of the previous negotiations that collapsed, but this time, everyone was very sympathetic with Aceh. While helping tsunami victims, they urged and supported this peace initiative.<sup>127</sup>

However, when asked why the GAM had dropped the demand for independence, Mahmud replied that it was a change in the attitude of the Indonesian government in relation to Aceh more than anything else that was the impetus for this concession:

First of all, we have to understand why Aceh wanted independence. The policy of previous governments was that they didn't want Aceh to get independence and at the same time they imposed a system that was not acceptable to Acehnese, and this caused many problems. Under the new government, we saw that this had changed. They were more flexible on that point and of course we responded. If Aceh can get what it wants peacefully without separating itself from Indonesia, why should we go to war? So, that is what I said at the time, that we had the right people at the right time and the right place to achieve peace.<sup>128</sup>

This statement seems to be quite a drastic departure from the earlier stance of the GAM in relation to the demand for independence, even in contrast to the Cessation of Hostilities Agreement, and it is uncertain if this is the real view of all of the members of the GAM who had for many years demanded nothing short of independence from Indonesia.

The Memorandum itself contains various provisions regarding the governance of Aceh and it foresaw the adoption of new legislation on governing the region. This law, the Law on Governing Aceh, Law No. 11/2006, was passed on July 11 2006, after some delays.<sup>129</sup> However, it has been claimed that this piece of legislation is, in fact, in violation of the Memorandum of Understanding. It is claimed that while the law was intended to give greater autonomy to Aceh, that it allows for a considerable level of interference from Jakarta. Among the most contentious issues in the law is the fact that Article 11 gives the

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<sup>127</sup> Malik Mahmud in an interview with Kanis Dursin in *The Jakarta Post* on his first visit to Aceh in over thirty years. He had been living in exile in Sweden - *Jakarta Post*, Sunday, May 28, 2006.

<sup>128</sup> Malik Mahmud in an interview with Kanis Dursin in *The Jakarta Post* - *Jakarta Post*, Sunday, May 28, 2006.

<sup>129</sup> The text of this piece of legislation is available at: [http://www.acheh-eye.org/data\\_files/english\\_format/indonesia\\_government/indogovt\\_decrees/indogovt\\_decrees\\_2006\\_08\\_01\\_11.pdf](http://www.acheh-eye.org/data_files/english_format/indonesia_government/indogovt_decrees/indogovt_decrees_2006_08_01_11.pdf), last accessed 27/07/07.

Indonesian government a monitoring role of all affairs of the Acehese regional administration. Another controversial issue is that under Article 160 the management of the oil and gas resources in Aceh is to be undertaken both by the regional administration and the central government, and not the Acehese alone.<sup>130</sup> However, the law did address some of the issues which had been a cause of dissatisfaction for the Acehese people and which had been highlighted in the GAM struggle for many years, such as the implementation of Shariah law<sup>131</sup> and the creation of a Human Rights Court.

#### The Current Situation in Aceh<sup>132</sup>

At the moment the peace process in Aceh is working 'beyond all expectations.'<sup>133</sup> Members of the GAM have willingly given in the number of weapons required under the terms of the Memorandum of Understanding and the armed wing of the organisation has been dissolved. On the other side, the Indonesian army has withdrawn troops from Aceh in accordance with the agreement. The release of amnestied GAM prisoners also seems to have gone smoothly.<sup>134</sup> However, there have been number of instances of violence in the region in 2007 and 2008, attributed to independence groups.<sup>135</sup>

Voting took place in Aceh on December 11 2006 to elect the heads of the province and its districts. These were the first elections ever to directly elect the rulers - the governor and vice-governor - of Aceh. Previously, these positions had been filled by the central Indonesian government. Irwandi Yusuf, the leader of the 'young Turks'<sup>136</sup> within the GAM, was elected governor and was sworn in on 8 February 2007. Irwandi had originally graduated as a veterinary surgeon but had travelled to South

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<sup>130</sup> For a discussion of this see Barron, P. & Clark, S. (December 2006) 'Decentralizing Inequality? Center-Periphery Relations, Local Governance, and Conflict in Aceh.' *Social Development Papers*, Paper Number 39.

<sup>131</sup> In relation to the implementation of Shariah law in Aceh see Hillman, B. (January/ February 2007) 'Aceh's Rebels turn to Ruling.' *Far Eastern Economic Review* and 'Islamic Law and Criminal Justice in Aceh.' International Crisis Group Asia Report Number 117, Jakarta / Brussels, 31 July 2006.

<sup>132</sup> See Statement of then-Secretary-General of the United Nations, Kofi Annan on situation in Aceh - SG/SM/10289, 30/12/2005.

<sup>133</sup> 'Aceh: So far, so good.' International Crisis Group Asia Briefing Number 44, Jakarta / Brussels, 13 December 2005. See also 'Aceh: Now for the Hard Part.' International Crisis Group Asia Briefing Number 48, Jakarta / Brussels, 29 March 2006.

<sup>134</sup> 'Aceh: So far, so good.' International Crisis Group Asia Briefing Number 44, Jakarta / Brussels, 13 December 2005, p. 2.

<sup>135</sup> See World Bank / Decentralisation Support Facility, 'Aceh Conflict Monitoring Update 1-31 May 2007', available at: <http://www.conflictanddevelopment.org/data/doc/en/regCaseStudy/aceh/mon/Aceh%20Conflict%20Monitoring%20Update%20-%20May%202007.pdf>, last accessed 27/07/07. See also Scarpello, F. 'Bombs shake fragile Aceh peace.' *South China Morning Post*, August 4, 2007.

<sup>136</sup> See 'Aceh's Local Elections: The Role of the Free Aceh Movement.' International Crisis Group Asia Briefing Number 57, Jakarta / Brussels, 29 November 2006.

America and trained in the theory and practice of guerrilla warfare.<sup>137</sup> When he returned home he entered the GAM military central command. He was arrested in 2003 in Jakarta and sentenced to 7 years imprisonment for treason. This sentence was increased to 9 years on appeal. He began working behind the scenes in the peace talks on the Memorandum of Understanding when the prison in which he was being kept flooded as a result of the tsunami.<sup>138</sup>

The elections were an important victory for the GAM. Irwandi and his running mate Muhammad Nazar won 38% of the vote. A rival GAM duo came second with 17%. In the elections for district executives in 19 out of the 21 districts in Aceh, GAM won in 8 of the districts. Not all areas of Aceh have very strong GAM support. In fact in some areas, in the south and southwest, local leaders have been calling for separation from Aceh and the establishment of new provinces.<sup>139</sup> However, the strength of support for the GAM as evidenced in the election results was taken as a worrying sign by some, who believed that the GAM would return to its independence demands. Hillman comments:

Some in Jakarta are worried that GAM will build on its political victories to continue its struggle for independence. Mr. Irwandi will have to show Jakarta that GAM is serious about working within the new autonomy framework. Giving post-election interviews in front of a GAM flag, as he has done, offends the spirit if not the letter of the peace deal.<sup>140</sup>

Irwandi has also promised to renegotiate the Law on Governing Aceh, to properly reflect the original agreements made by the GAM and the government of Indonesia in the Memorandum of Understanding.<sup>141</sup> However, for some, Irwandi's moves do not go far enough and he will have to deal with continued demands for the independence of Aceh. The Preparatory Committee of the Free Aceh Democratic<sup>142</sup> issued a press release on 15 January 2006. This is in the form of a Declaration to the nation of Aceh, the 'nations in the world and international institutions'. It states:

We, the Preparatory Committee of the Free Aceh Democratic, would like to declare that we will continue our struggle for broader democratic environment in our ancestral land with respect for international laws.

It goes on to state that the peace process and the Memorandum of Understanding are 'politically and democratically unsounded [*sic.*], morally unjustifiable, and therefore, in the longer term unsustainable' and that the group, who are 'loyal to the struggle for an independent nation state have decided to unite and establish this Committee for the following purposes:

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<sup>137</sup> Ibid. See also 'How GAM won in Aceh.' International Crisis Group Asia Briefing Number 61, Jakarta / Brussels, 22 March 2007.

<sup>138</sup> See *Tapol*, Tuesday, December 12, 2006.

<sup>139</sup> See Hillman, B. (January/ February 2007) 'Aceh's Rebels turn to Ruling.' *Far Eastern Economic Review*.

<sup>140</sup> See *ibid.*

<sup>141</sup> See *ibid.*

<sup>142</sup> The website of this organisation is available at: <http://www.freeaceh.info/>, last accessed 17/07/07.

to continue our struggle for independence; to reclaim the Achenese state and its sovereignty; to lay the groundwork for the establishment of a democratic and free government in Aceh and to provide the voice for the many Achenese voices that have been left unheard.' The Declaration was signed in New York by 25 members of the Preparatory Committee of the Free Aceh Democratic, based in various places, including Aceh, the US, Sweden, Norway and Malaysia.<sup>143</sup>

#### An Analysis of the Peace Deals in Aceh

It is clear that the peace process in Aceh was complex and complicated. While the Cessation of Hostilities Agreement and its precursors succeeded in opening up channels of communication between the GAM and the government, they failed to bring about a lasting peace in Aceh. Numerous reasons have been given for the failure of the Cessation of Hostilities Agreement, such as uncertainty concerning the meaning of its detailed provisions (GAM did not feel that it had given up its independence demand whereas the Indonesian government felt this was implied in the agreement), a weak enforcement mechanism (the Joint Security Council could investigate violations of the agreement but only had the power make recommendations as to what should be done, which were rejected by the GAM and the Indonesian government<sup>144</sup>) and a lack of agreement within the GAM and the Indonesian government.

On the surface, the provisions of the Memorandum of Understanding seem to give Aceh a lot of powers; however in reality, most of these powers merely repeat or reinforce provisions already contained in the Special Autonomy law and a few other laws passed on Aceh.<sup>145</sup> There are however, new additions, including the right to set interest rates differing from those of the Central Bank and the requirement that any national laws with the potential to affect Aceh must be approved by the province's legislature.

One big difference between the Memorandum and previous agreements, such as the Cessation of Hostilities Agreement, is the provision allowing for local political parties. This issue represents one of the major concessions of the Indonesian government, comparable to the GAM's abandonment of its demand for independence.<sup>146</sup> As mentioned it is doubtful whether the GAM would have conceded on its demand for independence if the tsunami had not devastated the region. However, independence was never up for discussion in the peace talks mediated by Ahtisaari.<sup>147</sup>

The Memorandum also allows for a much stronger monitoring and enforcement mechanism than the Cessation of Hostilities Agreement,

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<sup>143</sup> The text of the declaration is available at: <http://freeaceh.info/?to=Declaration>, last accessed 27/07/07.

<sup>144</sup> Huber, (2004) *The HDC in Aceh: Promises and Pitfalls of NGO Mediation and Implementation*. East-West Center Washington, pp. 36-40

<sup>145</sup> Aspinall, E. (2005) 'The Helsinki Agreement – A More Promising Peace for Aceh?' East –West Center Washington, pp. 43 - 4.

<sup>146</sup> Ibid. p.42

<sup>147</sup> See Aspinall, E. (2007) 'Peace Without Justice? The Helsinki Peace Process in Aceh.' Centre for Humanitarian Dialogue, p. 12.

establishing the Aceh Monitoring Mission (AMM) which was assigned a broad range of duties. Whereas the HDC lacked the sufficient political authority to enforce their decisions on violations of the agreement under the Cessation of Hostilities Agreement, Ahtisaari was in a strong position when mediating the Memorandum of Understanding and was able to get the support of the EU to monitor the implementation of this instrument.<sup>148</sup> Violations of the Memorandum of Understanding are settled by the impartial AMM, whose ruling is binding on both parties. The CMI saw the design of a much stronger monitoring and enforcement mechanism than had been incorporated into the Cessation of Hostilities Agreement as one of their greatest and most important challenges, with Ahtisaari himself stating that NGOs should not be responsible for monitoring peace agreements.<sup>149</sup> This led to the ASEAN states and the EU becoming part of the AMM.

#### **Section 4: Applying the Legal Framework on Mediation to Aceh**

In this section an evaluation will be undertaken of the role of the mediator and the mediation style employed in the international peace mediation process in Aceh. The role and influence of President Ahtisaari as a mediator have been acknowledged as a significant factor in the success of this process.<sup>150</sup> Analysis of Ahtisaari's particular role reveals that his mediation style echoes that of the role of the evaluative mediator within traditional mediation. From the literature discussed above, Riskin identifies the ability to persuade parties to accept a settlement as a particular characteristic of the evaluative mediator. This is certainly true of Ahtisaari during the Aceh peace process, who perceived:

“his role as largely persuading GAM to explore ‘a narrow opening in the autonomy clause’... to encourage the movement to bend to the government’s position...”<sup>151</sup>

Ahtisaari was very much involved in the negotiations between the GOI and GAM, making concerted efforts to direct the parties toward settlement, to the extent of setting out a strict timeframe which was rigidly adhered to.<sup>152</sup> Not only did Ahtisaari direct the parties towards settlement, he intervened to remind the parties that they had to move forward in terms of the negotiation process instead of dwelling on the past.<sup>153</sup>

An evaluative mediator will suggest settlement options to the disputing parties. Again Ahtisaari demonstrates traits of an evaluative mediator as he intervened during the negotiation process, especially on human rights issues, and included a human rights court (which the GAM sought at

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<sup>148</sup> Aspinall, E. (2005) 'The Helsinki Agreement – A More Promising Peace for Aceh?' East–West Center Washington, pp. 46 - 7

<sup>149</sup> Ibid. p. 47

<sup>150</sup> Aspinall, E. (2008) *Peace Without Justice? The Helsinki Peace Process in Aceh*. Centre for Humanitarian Dialogue, p.12. Available at <http://www.hdcentre.org/files/Justice%20Aceh%20final.pdf>

<sup>151</sup> Aspinall, E. (2008) p.12

<sup>152</sup> Ibid. p.14

<sup>153</sup> Ibid. p.17

earlier stages in the negotiation process) in the final draft of the agreement.<sup>154</sup>

Ahtisaari also put pressure on the parties to continually move the peace process forward, insisting that the parties focus on the key issues, but not allowing the parties to use the negotiation process to thrash out the finer details of those issues, as Ahtisaari believed that to allow the parties to do so would prevent the parties from ever reaching a mutually acceptable settlement.<sup>155</sup> Again the tactics adopted by Ahtisaari as a mediator demonstrate that his particular style is that of an evaluative mediator. Even his insistence that both parties had to fully participate in the process is a characteristic pertinent to the evaluative mediation style. Ahtisaari was of the view that an agreement could deal with all of the parties issues and concerns, and that it required the parties to both commit to the process before an agreement could be reached or indeed implemented.

## **Conclusions**

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. 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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<sup>154</sup> Ibid.

<sup>155</sup> Ibid. p.14