Doing Mediation: A Guide for Practitioners

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This manual is based on the authors' own knowledge and desk reviews. Consequently, the authors will like to acknowledge the utilization of the following source materials in the design of the manual:

1. Brinkmann, C. (2005) "*Steps for Peace: Working Manual for Peace building and Conflict Management*." German Development Service.
2. Fisher, R and Ury, W. (2011). *Getting to yes: Negotiating agreement without giving in*. New York: Penguin Books.
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Introduction to the training manual

Recognizing the negative effects of conflicts on national development, Ghana established the National Peace Council (NPC) with the mandate to facilitate and develop mechanisms for conflict prevention, management, resolution and to build sustainable peace in the country. Among its functions, the Council is further required to facilitate the amicable resolution of conflicts through mediation and other processes including the indigenous mechanisms for conflict resolution and peace building. The emphasis on mediation as stated in the National Peace Council Act 818 of 2011 reinforces the position of the United Nations (UN) that it is one of the most effective methods of preventing, managing and resolving conflicts.

Following from the seminal research carried out by the University of Cape Coast for the NPC on violent conflicts in Ghana, the Council is now able to map the location of violent conflicts thereby identifying the hotspots, which aids in designing strategies to pre-empt conflict. But since conflicts are part of human existence, they are bound to arise from time to time and place to place. Therefore, in addition to seeking to pre-empt violent conflicts from occurring, the NPC is also concerned with ensuring that when disputes arise they can be resolved much more quickly before they escalate into violence.

The common law has been the main source of dispute resolution in Ghana since independence. That this source of dispute resolution is not yielding the desired results is clear in the recurrence of conflicts, the long adjudication processes and the unhappiness that outcomes create among the parties. Recognizing the challenges associated with the court system, Ghana passed the ADR Act [Act 798] in 2010 to encourage parties in dispute to resolve their differences through mediation. A significant aspect of the Act is the inclusion of customary mediation in the legislation, thereby elevating these processes into the formal civil justice regime. Ghana therefore recognizes the role of mediation in peace building and conflict resolution.

Mediation is simply ‘third-party’ assisted negotiation to help parties in dispute prevent, manage or resolve conflict and reach mutually acceptable agreements. The NPC, with its networks across the regions and districts of Ghana, can and should provide the structure for engaging in mediation for conflict resolution whether as directed from courts or of the personal nature. This manual is designed therefore principally to train participants of the NPC and others interested in mediation as a concept and as a process. It is not directed to the needs of any specific group: rather it is general focusing on the following: 1, the need for deeper understanding of conflicts and how conflicts escalate and 2, mediation processes and how to carry out mediation. Here professionalism is stressed.

Mediation is a complex issue. There are no short-cuts and no easy solutions. While being professional can help in accelerating mediation outcomes, we should be constantly aware of the several other factors that can derail the process at any time. Therefore, there is no one-size fits all approach. Mediators have to be aware that contexts vary, issues are complex and each case must be approached differently. These notwithstanding, careful adherence to the procedures outlined in this manual should help increase success rates.

The manual is divided into four parts. In addition to this introduction to the manual, Part A focuses mainly on mediation in Ghana – the legal background and the structures for mediating disputes. We note that mediation in Ghanaian society predates colonialism: societies have their own mechanisms and structures for settling disputes. The introduction of the British common law has not completely supplanted the indigenous systems and many people even now still rely on the latter to resolve disputes. Recognizing the value of the indigenous system, Ghana passed the ADR Act to encourage mediation as a method of dispute resolution and also established the NPC to provide a structure for mediating conflicts.

Part B takes participants through the concept of conflict and conflict analysis on the premise that effective dispute mediation requires a deeper understanding of how the conflict emerged in the first place. Practical exercises are provided to assist in this regard. This part of the manual also explains the concept of mediation and the support services required for effective mediation.

The third part (Part C) presents the processes involved in designing and developing a mediation strategy. The last section (Part D) explains the stages involved in 'entering' or 'doing' mediation.

Taking together the manual provides a complete guide to the mediation process from analyzing the conflict situation to deciding that a conflict is ripe for mediation, designing the mediation strategy and actually doing the mediation. There are several exercises to help participants appreciate the issues.

Session 1: Mediation in Ghana

There are many mechanisms for resolving disputes. These include arbitration, negotiation, dialogue, conciliation and mediation. This session focuses on mediation in Ghana. It first traces indigenous/ customary mediation systems which have now been legalized into ADR mechanisms. It ends by situating the place of the NPC as the key national architecture for peacebuilding.

By the end of the session participants should:

- appreciate that our indigenous institutions have facilitated the resolution of conflicts since time immemorial;
- appreciate that the British imposition of the common law introduced an adversarial dispute resolution system with its own challenges;
- be able to explain why ADR mechanisms have emerged as part of the dispute resolution processes in Ghana; and
- Understand the role of the National Peace Council in the maintenance of peace in Ghana.

Before the advent of colonialism, communities living in Africa and Ghana in particular had their own conflict resolution mechanisms. Whenever a conflict arose negotiations could be done by the disputants. In other instances, the Council of elders or elderly men and women could act as third parties in the resolution of the conflict. Indigenous conflict resolution mechanisms are not merely about adjudication of who is right or wrong and the punishment of culprits, but the reconciliation of the parties to end conflict. The main aim is the transformation of conflict in which both parties are satisfied and willing to "let go their pain and forgive each other." As such, traditional conflict resolution mechanisms were geared towards fostering peaceful co-existence among the people.

Therefore, there is a long history of mediation ["customary ADR"] use in Ghana that dates to pre-colonial times. Parties who live in remote areas of the country without access to the courts are still more likely to use customary dispute resolution processes than the formal court system to resolve their disputes. The main actors in customary dispute resolution are family heads/elders, tribal chiefs and queen mothers, who resolve conflicts through arbitration, mediation and other settlement processes. Also, indigenous methods are holistic and consensus-based and often involve the participation of all parties and sometimes the entire community.

At the community level, customary mediation mechanisms revolve around the chiefs, queens and the traditional councils. Within this system, women also play important roles. Every culture has a system for resolving disputes and there are various rules governing these processes. Our indigenous system involves deities which are representatives of the Almighty. Since God is all knowing and all powerful, invocation of his name through the deity is expected yield instant results. This stands as one method of mediation derived from the wisdom of God.

Every society has its way of resolving conflicts which is made up of the traditions of the people (Nwolise, 2005). As a result, each strategy has its own norms, values, principles and structure. For instance, in the Akwa Ibom State in South East Nigeria, the use of "Mbiam" and Ayei (Palm Fronds) is for signaling war, distilling truth, mediation and cessation of hostilities. The sharing of Kola nut among the Ibos is to resolve conflict and promote social cohesion. In Ghana, the Kusasi's in the Upper East region use the rites of the *earth cult* in which there is blood cleansing rites, purification rites, blood collecting and sacrifice of animals as a major way of conflict resolution. The use of the rites of the earth cult is a major method of conflict resolution in Northern Ghana (Kirby, 2006). Furthermore, in the Asante Kingdom, the Great Oath locally referred to as the *"Ntamkesse"* is used to distill the truth and to resolve disputes. Such values have contributed to social harmony in African societies and may need to be innovatively incorporated into formal justice systems in the resolution of conflicts.

Mediation can be found in all cultures' conflict management processes. However, different cultures approach conflict and conflict management in different ways because of the varying customs across the regions in Ghana. Despite these variations there is a common understanding that communalism, humanism, togetherness and brotherliness could only be achieved where there is peace and reconciliation. This is the essence of the positive deviance theory which embodies the idea that different communities within a nation state tend to have national understanding about mediation outcomes despite the variation. The collective wisdom from the principal actors in dispute resolution derives from culture and traditions of the people. This remains a driving force in all societies as Buddha puts it: **"mediation brings wisdom, lack of mediation brings ignorance". (Provide the reference from the India manual)**

The beauty of the indigenous systems of mediation (through negotiation and dialogue) is the win-win outcomes that they engender. Ultimately, outcomes are acceptable because the people trust the system and its actors with the belligerents actively participating in the implementation. The mediator is to facilitate this win-win outcome which is essentially a coordination game.

Activity 1 [20 minutes]

Participants draw on their experiences on indigenous mediation from different cultures and share with the group.

Activity 2 [20 minutes]

Participants engage in the game of the Battle of the sexes in groups.

In spite of the recognition of mediation in the peaceful settlement of disputes there is consensus that challenges abound in mediation efforts in Ghana which is evidenced in the varying degrees of success. In response to these challenges, key actors in mediation are being urged by the UN to develop their mediation capacities to increase the chances of success.

Legal recognition of mediation in Ghana

As a colony, the Gold Coast adopted the British Common Law and this continued into the post-independence era. The British legal system does not recognize indigenous adjudication systems even though it continued to be practiced within the traditional systems. There remains a conflict between the win-lose values of the British Common Law and Ghanaian values which encourage parties to achieve compromise solutions to disputes via the customary law.

Recognizing the challenges associated with the above, Ghana passed the ADR Act [Act 798] in 2010 to encourage parties in dispute to resolve their differences through mediation. The development of modern ADR in Ghana began with the passage of the Courts Act of 1993 (Act 459) which encouraged the use of ADR in the courts. A significant aspect of The Act is the inclusion of customary mediation in the legislation, thereby elevating these processes into the formal civil justice regime. Customary mediation is referred to in the Act as negotiation for settlement and customary mediated settlement agreements are non-binding. Thus, the Act is in recognition of the system already used by majority of Ghanaians in resolving their disputes, and further institutionalizes the mediation process.

Modern mediation is understood in the Act as a "facilitative process in which the parties discuss their dispute with an impartial person (a third party) who assists them to reach a resolution." (Provide ref for the quotation) Although it is a process based on consent by the parties, the court can also refer parties to mediation. If the parties reach a settlement in mediation, their agreement has the same status as an arbitral award.

The National Peace Council

Pursuant to strengthening the National Peace Architecture in Ghana, the National Peace Council Act 818 of 2011 was passed. The Act mandates the NPC to harmonize and coordinate conflict prevention, management, resolution and build sustainable peace through networking and coordination. The council is further required to facilitate the amicable resolution of conflicts through mediation and other processes including the indigenous mechanisms for conflict resolution and peace building. The emphasis on mediation as stated in the NPC Act 2011 reinforces the position of the UN that it is one of the most effective methods of preventing, managing and resolving conflicts.

Activity 3 [15 minutes]

Participants refresh their memories on the structure and functions of the NPC and its associated challenges, based on Act 818 and the NPC Five Year Strategic Plan.

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PART A

Session 2: Understanding Conflict

It is important that in examining mediation, participants appreciate what conflict is and the resolution mechanisms that underlie mediation. How we define conflict obviously determines the mediation processes for resolving it. In this session, we will examine briefly the concept of conflict and how this is used in everyday parlance to refer to different actions, thoughts and emotions. In particular, we will discuss the following sub-topics:

- the nature of conflict
- continuum of tension
- the dimensions of conflicts
- the causes of conflicts

Objectives:

At the end of this session, participants should be able to;

- Explain what conflict is
- Understand continuum of tension
- Explain different aspects of conflicts
- Explain the different causes of conflict

Nature of Conflict provide reference

Conflict is an inevitable and necessary feature of life. This is because in our daily interactions as we seek to further our interests, conflicts are bound to arise. Individuals come with different interests which when not properly managed would lead to disputes and may eventually escalate. Each person possesses his/her own interest, opinions, ideas and sets of beliefs. We have our own ways of looking at things and we act according to what we think is proper. Hence, we often find ourselves in conflict in different scenarios. It may involve other individuals, groups of people, or a struggle within our own selves. Consequently, conflict influences our actions and decisions in one way or another and it pervades our relationships. The challenge is how to manage such conflicts when they arise so that they do not escalate into to violence.

Activity 4: [10 minutes]

In this session, we ask participants to share their everyday encounters with conflict situations so that we can collectively craft a definition of conflict based on our life experiences.

Understanding conflict using everyday examples

It is appropriate to begin the study of mediation with an examination of the nature of conflict and the principles of conflict resolution which underlie the mediation process. We will first attempt to understand conflict, and then examine the need to manage conflict through negotiation and finally study mediation as assisted negotiation to resolve conflicts effectively. This becomes necessary because how we understand conflict determines the way we will mediate.

Conflict can be considered as something normal, an everyday social phenomenon, and a simple and natural characteristic of human social systems. Society by its very nature, as human beings themselves, is not perfect; so disharmony and contradictions are inevitable parts of social development. The distinction that has to be made is between conflict itself and the negative consequences (such as war). In this perspective, war is not the conflict, but rather the negative result of how the conflict was dealt with.

Continuum of Tension

Another way of understanding conflict dynamics and especially how conflicts escalate and de-escalate is proposed in the *"staircase model"*. This model consists of seven steps and has at the base differences that brew tension and eventually affect the depth and form of any existing relationship. Tension is a strained relationship between individuals, groups, and nations derived from differences that can be personal, cultural or situational. The **unresolved differences** lead to **disagreements**. **Disagreements** cause **problems**. **Disagreements, when** unresolved become **disputes**. **Unresolved disputes** become **conflicts**. **Unresolved conflicts** can lead to **violence** and even **war**. (Provide reference) According to this model, any conflict that is not being reversed will ascend the staircase with accelerating and self-amplifying dynamics. This is called the continuum of tension and is often illustrated by the following chart:

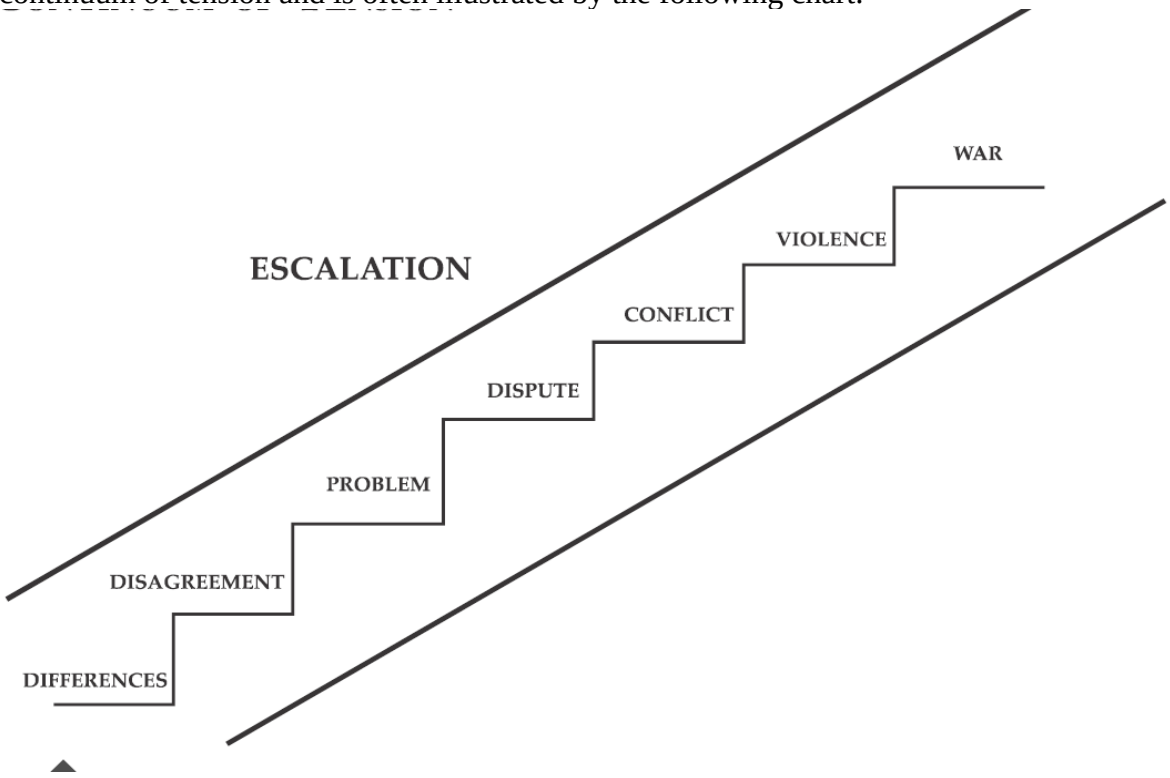


Figure 1: Continuum of Tension

Source: Mediation Training Manual of India

Activity 5 [20 minutes]

In the plenary, let the participants discuss any violent conflict focusing on how the conflict escalated from differences to violence. Participants are to discuss types of behaviors that are associated with each level of escalation. List the types of behavior that can transform disagreements into conflicts and so on. For each behavior, participants are expected to state the possible outcomes

Conflicts change over time, passing through different stages of activity, intensity, tension and violence. It is helpful to recognize the different behaviours associated with the stages and use them together with other tools to analyze the dynamics that relate to each stage of conflict. Provide references

Examples of escalating Behaviors (face to face, or not)

- raising voices
- not listening
- focus on blaming/shaming instead of resolving
- threatening
- asserting power
- defensiveness
- not taking responsibility
- cutting someone off
- not dealing with the issue
- sarcasm
- contempt
- insults
- ignoring,
- dismissing

Outcomes of Escalation

- people stop talking, disengage
- conflict widens, others get involved
- violence
- legal battles
- unilateral action
- sabotage
- people give up
- people get stressed
- people become irrational / make bad decisions
- conflict reaches point of no return

De-escalating Behaviors (mediator can guide, model and encourage these)

- focusing on problem & solution, not person
- listening
- acknowledging responsibility
- acknowledging strengths of other
- taking a break
- seeking alternate solutions
- acknowledging pain/stress
- apologizing

Conflict analysis

The first step in any mediation effort should be to assess the conflict. That assessment should neither overwhelm the mediator with extraneous information from an exhaustive historical review, nor be so cursory as to risk generating only foregone conclusions and standard formulas. Instead, conflict analysis should provide a contextualized understanding of the conflict and answer questions of strategy: at what level to engage, how to gain leverage, and on whom to focus efforts. References

That said I am certain that as individuals, you have come across conflicts in your communities and even probably addressed some of them. Before you addressed these conflicts, you tried to investigate **all** aspects of the conflict.

Activity 6: [35 minutes]

Let us begin our session today by individually writing down how you went about investigating one conflict that you were confronted with. You have 15 minutes to thoroughly describe this. Now we will all tell our stories in the next 20 minutes.

The stories put us in a position to make informed decisions. Our objectives, even if we did not spell them out at that time, were to find solutions to the conflict, and we hoped that the conflicts, especially the violent ones, would not recur (peace-building). We were unconsciously developing an analytical tool to deepen our understanding of potential or ongoing (violent) conflicts through the assessment of structures, actors, and conflict dynamics. The conflict analysis can also be done at various levels – local, regional, national, and even international.

From the context of mediation, conflict analysis should lead us to formulate strategies, programmes and projects that will significantly influence a reduction or resolution of identified conflicts. Conflict analysis enables the identification of:

- the type of the conflict;
- the reasons for the conflict;
- the causes and consequences of the conflict;
- the components and the different actors involved; and
- the levels at which the conflict takes place.

Conflict analysis can also provide information on how the conflict is seen (for example, manifest, latent), its dynamics, the relationships and hierarchy of positions between the conflicting parties, and their interests, needs and motivations. In this session we will look at each of these in more depth and explore some methods that are used for analyzing conflicts for information about each of the different elements listed.

Conflict analysis can be carried out through a variety of methods. There is no one "correct" method for conflict analysis. It is a process that uses analytical tools to understand a conflict from various points of view. It does not have to be a strongly structured process, and existing methods are most often adapted for particular cases, conditions and the specific aims of the conflict analysis being conducted. Three different methods will be discussed. These are the conflict onion analysis, problem analysis and conflict mapping.

The conflict onion analysis

This is a visual method using the metaphor of the onion for identifying the positions, interests and needs of conflict parties. The conflict onion consists of concentric circles which demonstrate the positions (uppermost layer circle), interests (middle layer circle) and needs (the core circle). This tool could help parties of the conflict to review their own position, understand better their interests, and needs in relation to the conflict. This is shown in Figure 2.

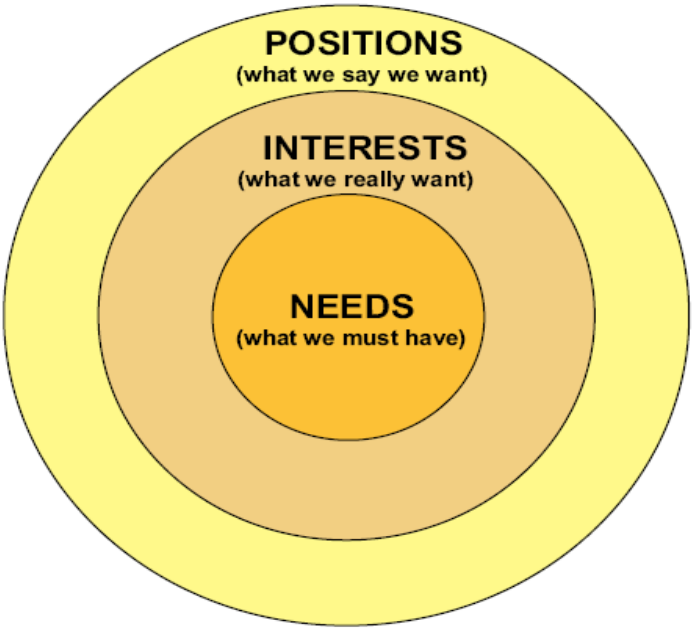


Figure 2: The Onion model for analyzing conflicts

Source: Brinkmann (2006) Steps for Peace, Working Manual for Peace building and Conflict Management.

As mentioned above, the onion model emphasizes the complexity of conflicts – who wants what, why and with what purpose? The Onion model analyses the motives of the conflicting parties, because it assists the analyzer in thinking deeper and broader in terms of needs, interests and positions of the involved parties. Sometimes gaps between needs, interests and positions come to display.

Problem Analysis

This is one of the different ways of analysising conflict focusing on the causes and the effects of key conflict factors. the effects or results of the conflict. It is a good way to start thinking about conflict systems. The conflict tree works with one or more core problems, and then identifies the root causes, and the effects of the problem. As illustrated in Figure 2, the "roots" represent the underlying causes, while the "branches" represent effects.[1] Provide references

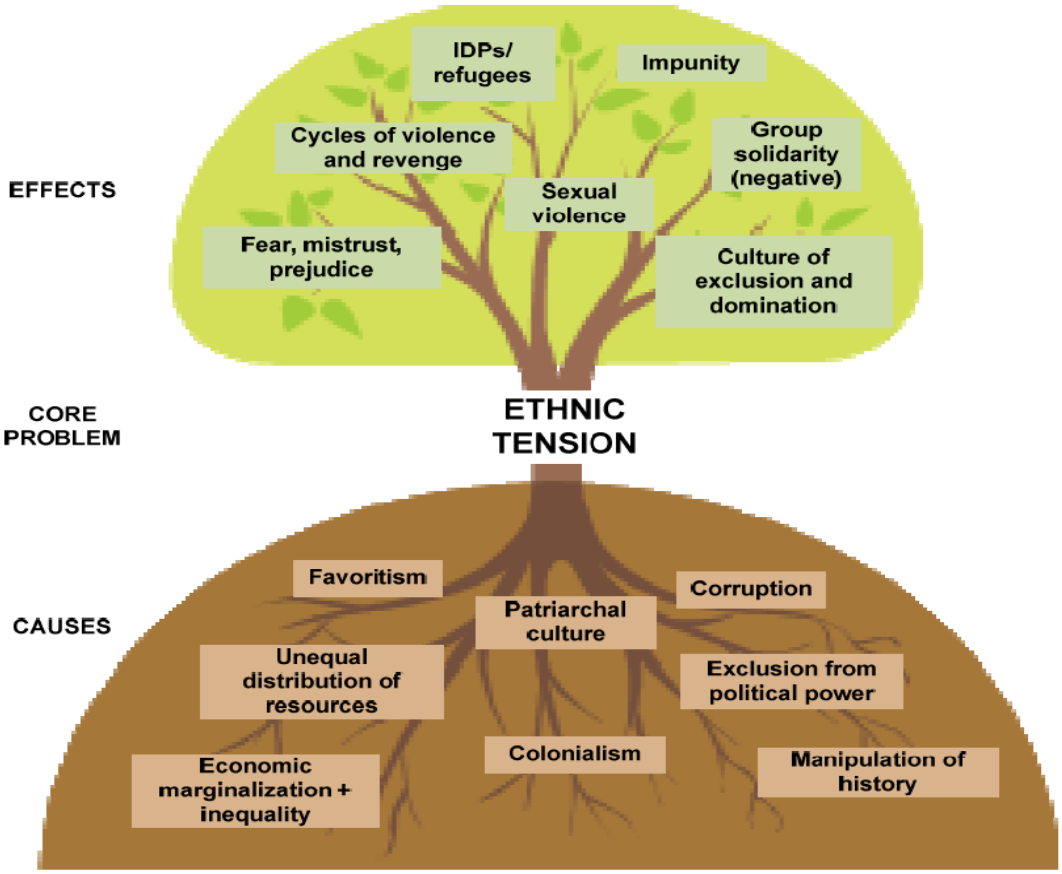


Figure 3: Ethnic Dynamics in a Community

Source: Brinkmann (2006) Steps for Peace, Working Manual for Peace building and Conflict Management.

[1] Adapted from Fisher et al, (2000) *Working with Conflict.* London: Zed Books.

In the entry process, mediators contact the different stakeholders and give them space to explain their cases, grievances and perceptions of the situation. In this early stage of confidence building, root cause analysis should not be carried out directly with the stakeholders. However, mediators may use the technique of asking "Why?" questions to explore the boundaries and underlying causes of the conflict in more detail.

Later, when the mediators meet together, they can use the information obtained from the different stakeholders to develop a preliminary conflict tree as the basis for their decision whether or not to engage in the conflict management process. Root cause analysis is useful in demonstrating how local causes of conflict can be linked to much broader social, political and economic issues. This, in turn, can help determine the level of conflict on which mediators need to focus their attention.

Conflict Mapping

The meaning of any conflict resides in its context. Context can be the background of the conflict, the environment where the conflict is taking place, or the circumstances which generated it. Conflict mapping enables the mediator to methodologically assess the inherent power dynamics between the actors in a given context. Contextualising complex information enables the analyst to remain truthful to the picture of the conflict, but also to focus attention on capturing and framing gathered information and data to facilitate the sharing of ideas and concepts. Provide references

Questions that help to guide the mapping

- Why is there conflict? What is it about? [This leads to an exploration of the meanings carried by those engaging in or observing the conflict]. How do these meanings alter their behaviour and attitudes towards the conflict?
- What social, political, economic, religious or systemic conditions feed the conflict?
- Where is the conflict located (geography, borders, scope, topography, vegetation, climate)?
- What past historical relations, events and myths drive the conflict?
- Who is involved in and/or affected by the conflict? What are their roles and conditions?
- What are the demographics and categories of women, children, the elderly and cultural groups?
- What are their numbers, population density and qualities of life?

Box 1: The Malian Case is illustrated using the Conflict Map[2]

Situation from the Mali case

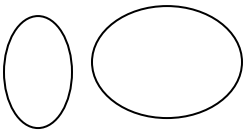
To gain a wider perspective of the Malian conflict, there needs to be consideration and understanding of its historical background and geography. Therefore, one needs to consider the Tuareg people, who are indigenous to North Africa and have resided in northern Mali for many centuries. Tuareg communities have been advocating for self-determination since the 1960s, after Mali gained independence from France. In pursuitof independence, they have engaged in several rebellions. The first uprising took place in 1963. In June 1990, the second Tuareg revolt broke out, led by Iyadag Ghali of the Mouvement Populaire de Libération de l'Azawad (Popular Movement for the Liberation of Azawad (MPLA)). This uprising ended with an Algeria-brokered peace treaty and the National Pact of 1992.

On 23 May 2006, a new rebel group – the Alliance Démocratique du 23 mai pour le Changement (May 23, 2006 Democratic Alliance for Change (ADC)) – attacked the Malian army in Kidal. Algeria stepped in and a peace deal, known as the Algeria Accord, was brokered. On 12 January 2012, the newest Tuareg rebel group, the Mouvement National pour la Libération de l'Azawad (National Movement for the Liberation of Azawad (MNLA)), attacked the town of Menaka in north-east Mali (Devon 2013). An escalation of the crisis unfolded when Malian soldiers staged a coup, led by Captain Amadou Sanogo. This created a power vacuum that allowed Tuareg and Islamist rebels to snatch the large desert north and take over key towns, including Timbuktu. The take-over was a result of the Malian soldiers' discontent with government's inability to handle the northern rebellion by Tuareg separatist which had already claimed the lives of numerous soldiers since the beginning of 2012. Provide references

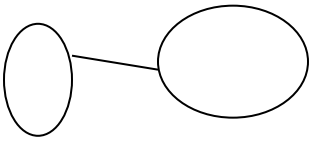
Source: United Nations Mediation-Startup Guidelines, 2011

Key components for mapping conflicts

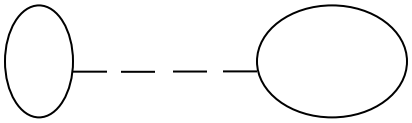
In maps, we use particular conventions. You may want to invent your own.



Circles indicate parties to the situation; relative size = power with regard to the issues

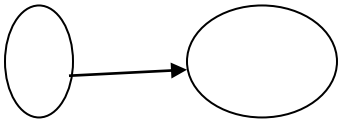


A straight line indicates a link, a fairly close relationship



A dotted line indicates an informal or intermittent link

[2] Adapted from UN/DPA Mediation Start-up Guidelines (2011)



Arrow indicates the predominant direction of influence or activity

Lines like lighting indicates discord, conflict

A conflict map is prepared using the Malian example in Box 2. The conflict map as illustrated in Figure 4 gives both the intervener and the conflict parties a clearer understanding of the origins, nature, dynamics, and possibilities for resolution of conflict. It provides information on the following: conflict context, conflict parties in addition to the nature of the power relations between/among them. It further provides each party's main goals(s) in the conflict and the potential for coalitions among parties.

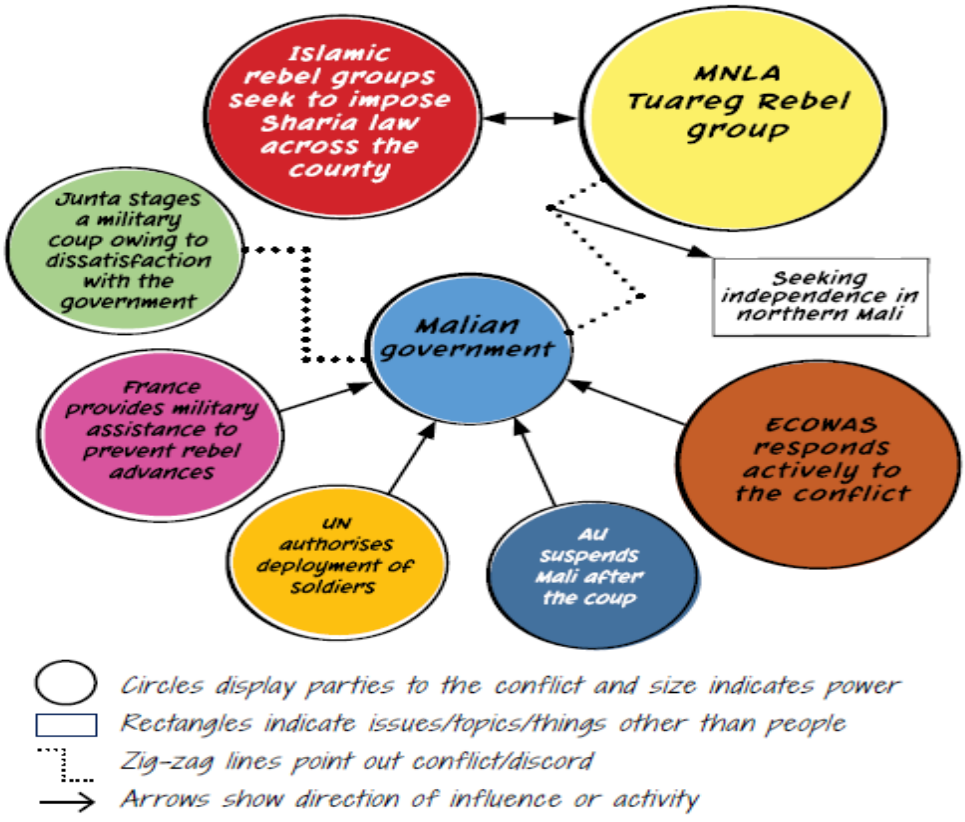


Figure 4: A conflict map of the Malian example

Source: Ndinga-Muvumba (2011) Towards Enhancing the Capacity of the African Union in Mediation.

Activity 7 – [30 minutes]

Participants form small groups and select a focal conflict. After that the participants use any of the conflict analysis tools to analyze the conflict.

The Dimensions of Conflict

Before becoming involved in conflict, it is useful to consider its basic dimensions. People dealing with conflict need to be aware of the following:

- The origins of a conflict are often complex and diverse. They are embedded in local cultural systems, but are also connected to wider social, economic and political processes.
- Conflicts are changing, interactive social processes rather than single, self-contained events. Each conflict has its own unique history and runs its own course of various phases and levels of intensity.
- There is no single "true" or "objective" account of a conflict. Rather, the participants in and the observers of conflicts may interpret or frame conflicts differently, depending on their perspectives and interests. Conflicts are about perceptions and the (different) meanings that people give to events, policies, institutions, etc.

We will study the nature of conflict in three broad dimensions. (1) The sense of threat which drives it (the Conflict Core). (2) What happens when it escalates (the Conflict Spiral)? (3) The three primary aspects of conflict that mediation needs to address (the Conflict Triangle). Understanding these dimensions will help us understand our own approaches to conflict as well as those of the parties we deal with.

The Conflict Core

The Conflict Core diagram shows how at the very core of any conflict, there lies a sense of threat concerning individuals, groups, communities or nations. This sense of threat emerges when any disagreement, annoyance, competition or inequity threatens any aspect of human dignity, personal reputation, physical safety, psychological needs, professional worth, social status, financial security, community concerns, religious membership or national pride. This list is not exhaustive and only indicates broad areas of threat. By the time parties get to the negotiating or mediation table, they are threatened both by the opposite side and within themselves! There is fear, suspicion, helplessness, frustration, embarrassment, anger, hurt, humiliation, distrust, desperation, vengeance and a host of mixed emotions that need to be addressed. Failure to address these emotions will prevent the parties from resolving their dispute.

The Conflict Spiral

When a given conflict intensifies, the initial tensions start spiraling outwards, affecting individuals, relationships, tasks, decisions, organizations and communities. This outward manifestation of the conflict is called the Conflict Spiral.

Personal responses

The stress of conflict provokes strong feelings of anxiety, anger, hostility, depression, and even vengeance in relationships. Every action or in-action of the other side becomes suspect. People become increasingly rigid in how they see the problem and in the solutions they demand. It can be difficult for them to think clearly. Hence what the parties really need is a forum which will understand and address their emotions and not just their dispute. Without emotions being addressed it is difficult to find real solutions.

Community responses

Emotions have a vital community and cultural context, even though individual responses may not always be the same for all members of the same culture or community. Any dispute takes color from its community and cultural context. When the dispute begins to affect those around it, people may take sides or leave. Communities and families get polarized when the dispute involves a family or community member. However, a solution for a family dispute in one part of the country may not necessarily be perceived to be the solution in another part of the country. Similarly, a solution in the context of a metropolitan urban city may not be the same as for a rural area. A solution for a voluntary organisation working with education may not be the solution for an information technology firm.

Legal advice

Legal advice often becomes important in a conflict. This may add to the increasing tensions and inability of parties to control the situation themselves. Through the process of interaction between the parties, assisted by a neutral person, a possible solution acceptable to all can be evolved.

Conflict becoming public

Sometimes the conflict becomes public. Each side develops rigid positions and gathers allies for the cause. The conflict may spread beyond the original protagonists' control. It may also attract public and media attention. The relationships of the old and new protagonists become more complicated. Resolving the original conflict therefore becomes more difficult.

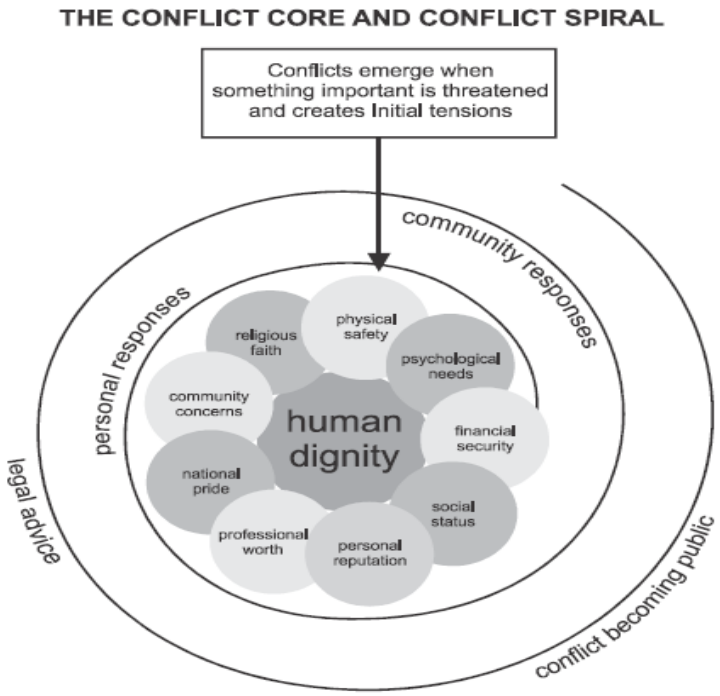


Figure 5: The conflict core and conflict spiral
Source: Mediation Training Manual of India, 2011

The Conflict Triangle

The Conflict Triangle arranges the three primary aspects of Conflict namely: The People, the Process and the Problem into three sides of the triangle. This Conflict Triangle becomes the basic framework to understand and address conflict. Elements of each side of this Conflict Triangle differ from person to person, situation to situation and problem to problem requiring different solutions.

1. People. Dealing with any conflict involves dealing with people. People come from different personal, social, cultural and religious backgrounds. They have their own individual personalities, relationships, perceptions, approaches and emotional equipment to deal with varying situations.
2. Process. Every conflict has its own pattern of communication and interaction between and among all the parties. Conflicts differ in the way each one intensifies, spreads and gets defused or resolved.
3. Problem. Every conflict has its own content. This comprises all the issues and interests of different parties involved, positions taken by them and their perceptions of the conflict.

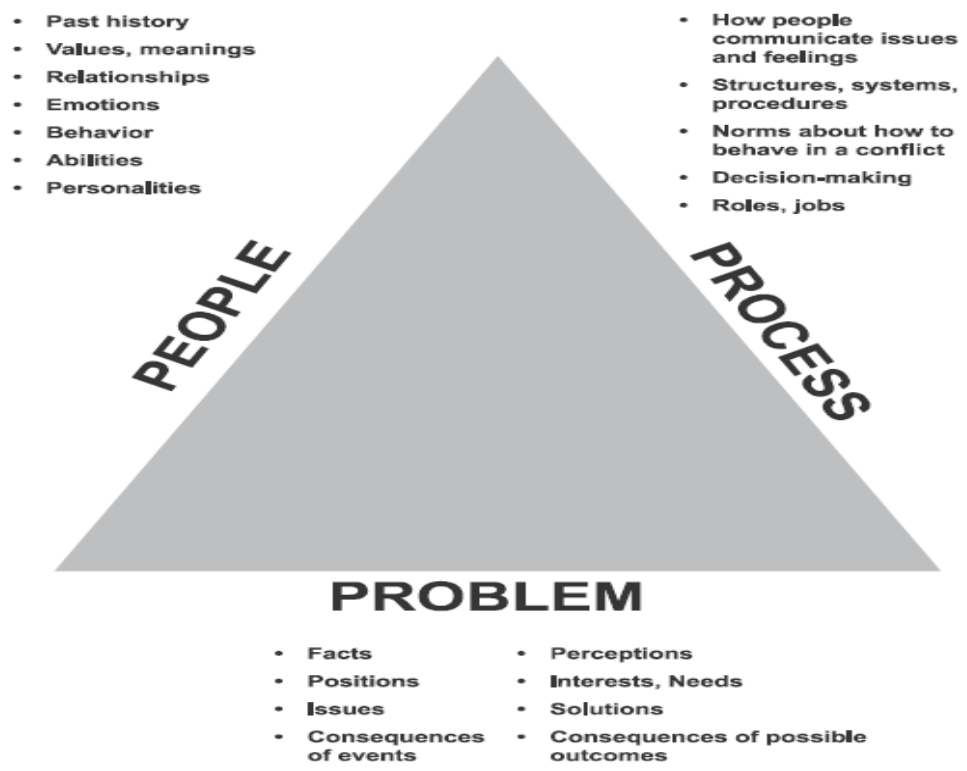


Figure 6: Conflict Triangle 1

Source: Mediation Training Manual of India, 2011

Going Beyond Mere Problem-Solving

If the parties are able to address each side of the conflict triangle, easing their emotional state, changing their ways of interacting and addressing the problems which threatened their core interests, then the conflict is not merely resolved, but mindsets and hearts change. It is in this sense that mediation at its best goes beyond mere problem-solving or managing a conflict.

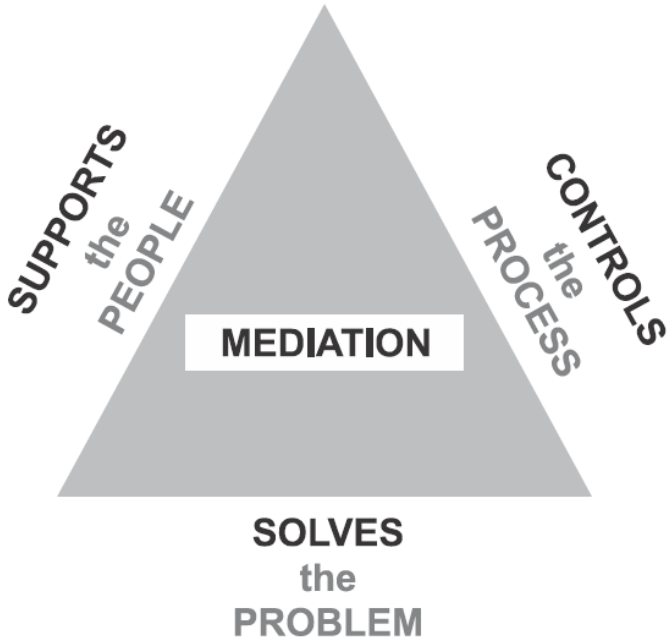


Figure 7: Conflict Triangle 2

Source: Mediation Training Manual of India, 2011

In this regard, mediation is an extension of problem solving, interest-based negotiation (Fisher & Ury, 1991). When people talk with one another in an effort to resolve their opposing interests, they negotiate. Those who are involved in a negotiation are called parties. It is important to remember that no-one can be forced into a negotiation. Negotiating is a voluntary activity. In some negotiations, the parties in dispute have become so entangled in their differences that they are no longer able to find any constructive solution by themselves. In such cases, a so-called "third party" - a facilitator or mediator- might be able to help. The role of the facilitator/mediator is to assist individuals and groups to negotiate and reach agreement successfully.

Causes of Conflict and Addressing Them

Activity 8: **[20 minutes]**

Refer to the conflict map and identify different types of conflicts and ask the participants to analyze and further suggest ways of addressing them.

Session 3: Concept of Mediation

We have seen that, in some conflict situations, parties may be so fixed in their positions that, negotiation becomes difficult. Beyond seeking adjudication through the courts, facilitators or mediators can come in handy to help parties resolve their differences. This session now focuses on mediation as a concept, types of mediation and the mediation process.

By the end the session, participants should be able to:

- Distinguish between judicial process and various ADR processes in dispute resolution;
- Explain what mediation is
- Understand the mediation process
- Discuss advantages and the challenges of using mediation in settling disputes

Understanding mediation

In our villages and home-towns across Africa, it is common to find a chief, an elder, a pastor or a catechist involved in face-to-face negotiation with an estranged couple or quarrelling siblings, in an effort to resolve their differences, unite them or restore peace and harmony. While facilitating a compromise, the third-party remains neutral and ensures that each side contributes fully to the process of generating a solution to the problem. The third-party does *not* impose a solution but *facilitates* the emergence of a solution by assisting the disputants to come up with *options* and to focus on solutions. The result, frequently, is the amicable settlement of the problem. That, in simple terms, is ***mediation.***

Mediation then is a voluntary, non-binding process in which parties in conflict discuss their differences with an impartial person who assists them to reach a settlement. Thus the parties *voluntarily* seek the resolution of their differences, with the assistance of a mediator who must be neutral and impartial.

In a broad sense, mediation is:

1. an extension of the parties' own efforts to manage their conflict,
2. an intervention by an acceptable third party,
3. non-coercive, non-violent, and ultimately non-binding,
4. an attempt to reduce or prevent violence and achieve a peaceful outcome,
5. a voluntary form of conflict management, whereby the conflict parties retain their control over the outcome (if not always over the process), as well as their freedom to accept or reject any aspects of the process or the ultimate agreement.

The mediator has the power to manage the *process*, but has no power over the *content* of the outcome. The mediator is simply a **facilitator** between the parties and has no power therefore to make awards or orders. A mediator may, where necessary or appropriate, make recommendations for settlement after the parties have generated the options.

Types of mediation

- Court referred mediation (court connected ADR) – It applies to cases pending in Courts and which the Courts will refer to mediation.
- Private mediation
- Indigenous mediation
- Informal mediation

When to use mediation/ripeness of mediation

As stated earlier, mediation is an extended from of negotiation and it is considered appropriate when the conflicting parties are unable to reach a decision through dialogue and negotiation. This may result from entrenched positions, mistrust, broken relationship and the inability to resolve the dispute. Zartman (2000) specifies two conditions that are necessary, though not sufficient, for rational policy makers to be receptive to negotiation/mediation:

1. A mutually hurting stalemate. Both sides realize they are in a costly deadlock that they cannot escape by escalating the conflict. Such a stalemate is especially motivating if augmented by a recent or impending catastrophe.
2. A mutually perceived way out. Both sides foresee that "a negotiated solution is possible" (Zartman, 2000, p. 229), that a formula can be found that is "just and satisfactory to both parties (Zartman, 1989, p. 291)

Case 1: Ripeness of mediation

The usefulness of the ripeness theory is illustrated by the 1993 Oslo negotiations that led to establishment of the Palestinian Self-Government Authority (see Pruitt, Bercovitch, and Zartman, 1997). Both sides were experiencing a stalemate. Israel could not reach the Palestine Liberation Organization (PLO), which was far away in Tunis, and "The PLO had been politically and economically weakened by the disintegration of the Soviet Union and by the Arab retaliation for the PLO's support of Iraq during the Gulf Crisis, curtailing its capacity to continue an effective campaign against Israel" (Pruitt, 1997, p. 243). Israel was also experiencing severe costs and a sense of hopelessness in trying to contain the First Intifada (a Palestinian uprising) (Aggestam and Jonsson, 1997; Lundberg, 1996); and both sides were aware of an impending catastrophe in the rise of militant Islam. The growing Hamas movement threatened to unseat the PLO as leader of the Palestinians, which would have been a catastrophe for PLO Chairman Yasser Arafat (Corbin, 1994). "Israel's new Prime Minister Yitzhak Rabin also feared this development and foresaw the possibility that a fundamentalist Palestinian leadership would make common cause against Israel with militant Iran or a revitalized Iraq" (Pruitt, 1997, p. 243). Memory of a recent near catastrophe—Iraqi missile attacks during the 1991 Gulf War—strengthened this concern. Rabin had won the election with the promise that he would negotiate a settlement with the Palestinians, and he quickly learned that this negotiation could be done only with PLO participation (Lieberfeld, 1999).

Source: Ndinga-Muvumba (2011) Towards Enhancing the Capacity of the African Union in Mediation.

As the case study illustrates, mediation is likely to occur when (1) a conflict has gone on for some time, (2) the efforts of the individuals or actors involved have reached an impasse, (3) neither actor is prepared to countenance further costs or escalation of the dispute, and (4) both parties welcome some form of mediation and are ready to engage in direct or indirect dialogue.

Activity 9: **[25 minutes]**

Participants watch a film on mediation will be shown to the participants after which they will analyze the film to tease the skills of an effective mediator.

When to stop mediation

During the mediation process, the mediator may decide to exit mediation when any of the following factors exist:

1. Parties refuse to budge from their entrenched positions after a sustained dialogue.
2. Both parties appear to lose confidence in the mediator.
3. A party to the mediation withdraws from the process.
4. When in the mediator faces a conflict of interest tersest.
5. The third party mandating the mediator asks him /her to withdraw from the process.
6. A change in the political environment is not conducive for continued mediation.

Alternative Dispute Resolution

As discussed in the earlier sections of this module, there are four main dispute resolution processes:

- Negotiation: Parties themselves and/or their attorneys discuss their dispute so as to reach a resolution;
- Mediation: A mediator who is described as the neutral facilitates the process by assisting the disputants to resolve their conflict but the final decision is taken by the disputants themselves and not the neutral;
- Arbitration: A neutral hears the case of both parties and makes a binding award;
- Litigation: A judge hears the case of both parties and gives a binding judgment

ADR refers to a range of methods and techniques for resolving disputes (Reference, Section 135 of the ADR Act [Act 798]). ADR was in existence even before the advent of the formal court system. The bulk of the socially disadvantaged naturally may subscribe to ADR as the overwhelming majority of the poor do not have access even to the lowest level of the formal court system.

There are several categories of ADR. First, we have court-connected ADR, under which the courts are mandated to resort to ADR by referring disputes firstly to compulsory ADR before formal trial can commence in the court. Under the latter, termed the integrated or mandatory approach, ADR is integrated into the court process as a mandatory requirement. This is practiced in the Commercial Court Division of the High Court. The practice there is additional to the

normal reference of cases ordered by other courts to arbitration where the judge is of the opinion that ADR will be better suited to resolve any particular dispute.

The mechanisms of ADR also exist in the informal and traditional set-up. Informal justice system applies those traditional processes which are not formally regulated and includes other forms of social control practices that occur outside the bounds of legal regulations.

Table 1: Comparison between Judicial Process and Various ADR Processes

Judicial Process	**Arbitration**	**Mediation**
Judicial process is an adjudicatory process where a third party (judge/ other authority) decides the outcome.	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted, and controlled by the provisions of the ADR Act [Act 798]).	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility
The decision is binding on the parties	The award in an arbitration is binding on the parties	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature as focus is on determination of rights and liabilities of parties.	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.
Personal appearance or active participation of parties is not always required	Personal appearance or active participation of parties is not always required	Personal appearance or active participation of parties is always required
A formal proceeding held in public and follows strict legal proceedings	A formal proceeding held in private following strict procedural stages.	A non-judicial and informal proceeding held in private with flexible procedural stages.
Decision is appealable.	Award is subject to challenge on specified grounds	Decree/Order in terms of the settlement is final and is not appealable.
No opportunity for parties to communicate directly with each other.	No opportunity for parties to communicate directly with each other.	Optimal opportunity for parties for parties to communicate directly with each other in the presence of the mediator

Source: Mediation Training Manual of India, 2011

Activity 10: **[15 minutes]**

Show a video to demonstrate the differences between the Judicial Process and the Various ADR Processes.

Reasons for Mediation

Modern mediation focuses on the resolution of the conflict between the disputants by uncovering the disputants' underlying interests and finds common ground. Based upon this common ground, a settlement between the disputants can be reached. Whereas the process itself enables the disputants to confront tensions underlying the dispute, mediated settlements often include a framework which aids the disputants in resolving problems in the future. This is why mediation has been called a ***"forward looking"*** process.

Box 2: Narratives of participants on advantages of mediation

Some of the parties' reasons for favoring mediation suggest that it offered a significantly different experience than the directive and oracular nature of customary mediation. Parties liked "the neutrality of the mediator," "the process," the "documentation of our agreement," "our power to determine the outcome" and "not the mediator[s]," and the ability "to talk freely. Nobody forced me to understand something against my will." Other responses ranged from efficiency-- "It was short and simple," fair and fast" to the benefits of receiving advice or insight on a particular issue. Most of the responses, however, focused on the common characteristics of procedural justice: the ability to express one's views, being treated respectfully and evenhandedly, and perceptions of fairness.

Source: Ahorsu, K. & Ame, R. (2011) "Managing Communal Conflicts: Mediation with Traditional Flavour," African Conflict and Peacebuilding Review Journal, Vol. 1, Issue 2

From the comments from respondents in the box above, it can be noted that mediation:

- Gives people opportunity to become directly involved in resolution of their conflict;
- Provides opportunity to get to the root cause of conflict;
- Provides much less costly/time consuming way of settling disputes.
- Transform conflicts into beneficial relationships

Box 3: Narratives of parties on what did not like about mediation

When asked to describe what they did not like about mediation, responds offered objections both to process, --"not given the opportunity to invite other people who know much about the case," the "liberal nature of the process" "too much liberty for the parties" as well as objections to structure--"The other party was allowed plenty of time to speak," "my lawyer did not get the chance to speak as much as I expected." Other negative perceptions of mediation also reveal in part a misunderstanding of the mediation process as one party had "wanted the mediator to pronounce judgment," and another was concerned that "the respondent was not punished enough." Finally, behavioral concerns affected the perception of mediation. Parties had a negative perception of mediation based on a mediator's behavior "allowing my husband's insolence," and also based on a plaintiff's behavior due to an "inability to compromise."

Source: Ahorsu, K. & Ame, R. (2011) "Managing Communal Conflicts: Mediation with Traditional Flavour," African Conflict and Peacebuilding Review Journal, Vol. 1, Issue 2

From the respondents' comments in the box above, it can be noted that mediation has the following limitations:

- Sessions are confidential, so notes are not kept on file. Consequently, possible malpractice and misuse are difficult to detect and correct.
- One party may be more articulate than another
- One party may have better financial resources and may want to go to court.
- Underlying personal problems may restrict the process.
- Participation is voluntary - there is no compulsion.
- The mediator may be inexperienced or unprofessional which may rather complicate matters.

The Process of Mediation

Mediation is a dynamic process in which the mediator assists the parties to negotiate a settlement for resolving their dispute. In practice, the logistics of a mediated settlement are defined by the disputants. Several mediation services have set rules of procedure which establish the parameters of the settlement process. These rules are flexible and may be tailored to the disputants' case. As mediation is shaped to meet the disputants' needs, its overall form can range from a three to a five stage process, with the number of stages dependent upon the nature of the dispute.

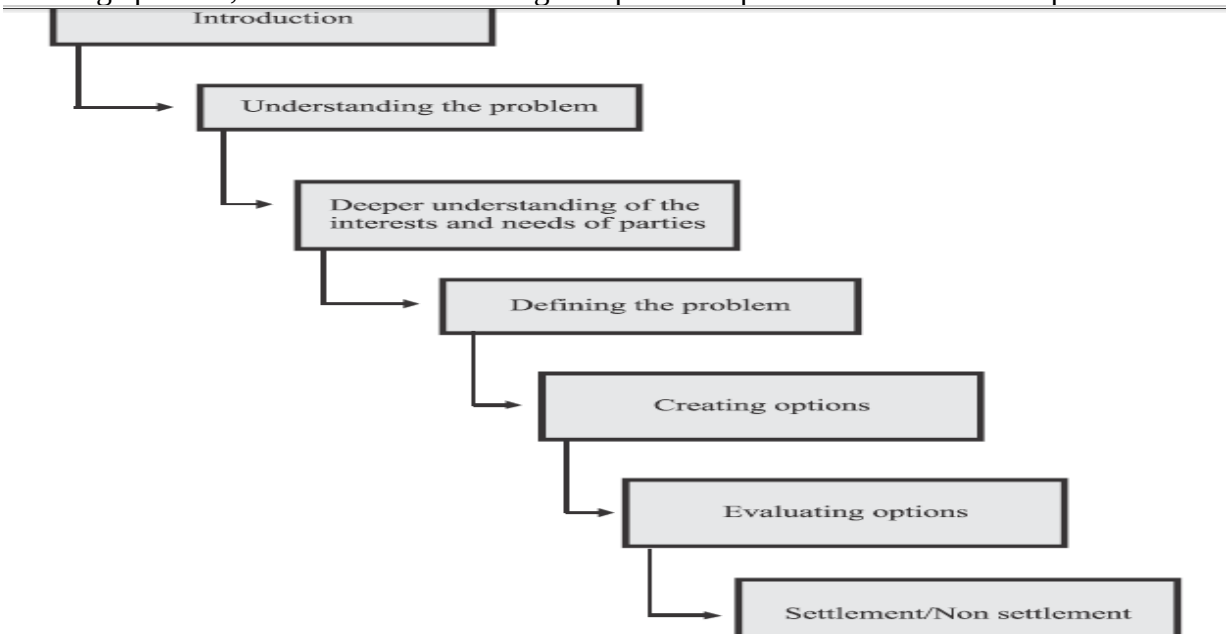


Figure 8: Process of mediation

Source: Mediation Training Manual of India, 2011

Usually, the mediator uses the four functional stages of mediation, namely, (i) Introduction and Opening Statement (ii) Joint Session (iii) Separate Session and (iv) Closing. These functional

stages are used in an informal and flexible manner so that the mediation process gains momentum, following a specific and predictable course as illustrated below.

Each of the above phases reflects an essential pre-requisite in the dynamics of the mediation process which must be accomplished before moving to the next phase.

Skills of a mediator

Mediators have been described from the passive facilitator to the active shaper of situation (Merry, 1982). This variation is caused by the differing compromises mediations make between expectations. The golden rule for a mediator is the acceptability by all conflict parties. Impartiality may help the mediator to gain high acceptability but it is not always necessary. Thus, a mediator often has a formal mandate to fulfill the role of a third party according to clearly defined rules. A mediator should possess the following qualities:

- Active listener
- Use of diplomatic language
- Good communication skills
- Effective summarizer (evaluation skills)
- Empathetic
- Good facilitator
- Creative
- Ability to deal with barbed comments with neutral statements; (Ask for specifics)
- Emphasise commonalities
- Leadership skills
- Consensus builder

Ethics and Code of Conduct for Mediators

1. *Avoid conflict of interest*

A mediator must avoid mediating in cases where they have direct personal, professional or financial interest in the outcome of the dispute. If the mediator has any indirect interest (e.g. he works in a firm with someone who has an interest in the outcome or he is related to someone who has such an interest) he is bound to disclose to the parties such indirect interest at the earliest opportunity and he shall not mediate in the case unless the parties specifically agree to accept him as mediator despite such indirect interest.

Where the mediator is an advocate, he shall not appear for any of the parties in respect of the dispute which he had mediated.

A mediator should not establish or seek to establish a professional relationship with any of the parties to the dispute until the expiry of a reasonable period after the conclusion of the mediation proceedings.

2. *Awareness about competence and professional role boundaries*

Mediators have a duty to know the limits of their competence and ability in order to avoid taking on assignments which they are not equipped to handle and to communicate candidly with the parties about their background and experience.

Mediators must avoid providing other types of professional service to the parties to mediation, even if they are licensed to provide it. Even though, they may be competent to provide such services, they will be compromising their effectiveness as mediators when they wear two hats.

3. *Practice Neutrality*

Mediators have a duty to remain neutral throughout the mediation i.e. from beginning to end. Their words, manner, attitude, body language and process management must reflect an impartial and even handed approach.

4. *Ensure Voluntariness*

The mediators must respect the voluntary nature of mediation and must recognize the right of the parties to withdraw from the mediation at any stage.

5. *Maintain Confidentiality*

Mediation being confidential in nature, a mediator shall be faithful to the relationship of trust and confidentiality imposed on him as a mediator. The mediator should not disclose any matter which a party requires to be kept confidential unless;

- the mediator is specifically given permission to do so by the party concerned; or
- the mediator is required by law to do so.

6. *Do no harm*

Mediators should avoid conducting the mediation process in a manner that may harm the participants or worsen the dispute. Some people suffer from emotional disturbances that make mediation potentially damaging psychologically. Some people come to mediation at a stage when they are not ready to be there. Some people are willing and able to participate, but the mediator handles the process in a way that inflames the parties' antagonism towards each other rather than resolving. In such situations, the mediator must modify the process (e.g. meet the parties separately or meet the counsel only) and if necessary withdraw from mediation when it becomes apparent that mediation, even as modified, is inappropriate or harmful.

7. *Promote Self-determination*

Supporting and encouraging the parties in mediation to make their own decisions (both individually and collectively) about the resolution of the dispute rather than imposing the ideas of the mediator or others, is fundamental to the mediation process. Mediator should ensure that there is no domination by any party or person preventing a party from making his/her own decision.

8. Facilitate Informed Consent

Settlement of dispute must be based on informed consent. Although, the mediator may not be the source of information for the parties, mediator should try to ensure that the parties have enough information and data to assess their options of settlement and the alternatives to settlement. If the parties lack such information and data, the mediator may suggest to them how they might obtain it.

9. Discharge Duties to third parties

Just as the mediator should do no harm to the parties, he should also consider whether a proposed settlement may harm others who are not participating in the mediation. This is more important when the third parties likely to be affected by a mediated settlement are children or other vulnerable people, such as the elderly or the infirm. Since third parties are not directly involved in the process, the mediator has a duty to ask the parties for information about the likely impact of the settlement on others and encourage the parties to consider the interest of such third parties also.

10. Commitment to Honesty and Integrity

For a mediator, honesty means, among other things, full and fair disclosure of:

- his qualifications and prior experience;
- direct or indirect interest if any, in the outcome of the dispute;
- any fees that the parties will be charged for the mediation; and
- any other aspect of the mediation which may affect the party's willingness to participate in the process.

Honesty also means telling the truth when meeting the parties separately, e.g. if party 'A' confidentially discloses his minimum expectation and party 'B' asks the mediator whether he knows the opponent's minimum expectation, saying 'No' would be dishonest. Instead, the mediator could say that he has discussed many things with party 'A' on a confidential basis and, therefore, he is at liberty to respond to the question, just as he would be precluded from disclosing to party 'A' certain things what was told by party 'B'. When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position. He must not abuse the trust the parties placed in him, even if he believes that bending the truth will further the cause of settlement.

Apart from the fee/remuneration/honorarium, if any, prescribed under the rules, the mediator shall not seek or receive any amount or gift from the parties to the mediation either before or after the conclusion of the mediation process.

Session 4: Mediation Support Services[3]

Introduction

With a growing demand for mediation, a lot of attention is now focused on mediation support services which are considered a central part of the mediation process. Mediation support services help states, organisations and key individuals to be better equipped to undertake and support mediation endeavors. Providing effective support to mediators can increase the chances of successfully preventing, mitigating and resolving conflicts, and of thereby creating a durable and equitable peace. In particular, we will discuss the following sub-topics:

- Recruitment
- Capacity Building and training
- Financial planning and budgeting

Objectives:

At the end of this session, participants should be able to;

- Explain what mediation support entails
- Understand how to strengthen capacities to support mediation

Explaining mediation support

Mediation support can be defined as 'activities that assist and improve mediation practices, e.g. training activities, developing guidance, carrying out research, working on policy issues, offering consultation, backstopping ongoing mediation processes, networking and engaging with parties'. It builds capacity of mediation staff as well as conflict parties; provides analytical resources to enable learning from previous experience; builds on networks for sharing ideas and insights; and provides on-site support and day-to-day management of the process and parties.

Three parts of mediation support

Mediation support can entail any (or usually several) of the following three activities.

1. **Operational support**,
2. **Institutional capacity building and training**
3. **Knowledge management and research**

The next section looks at ways in which mediation support mechanisms and activities can benefit the practice of mediation. It provides an overview of the three separate yet overlapping categories of mediation support activities: operational support; institutional capacity building and training and knowledge management and research.

[3] Centre for Humanitarian Dialogue, 2014

Operational support

This includes direct support through field deployment such as on-site thematic and process-orientated expertise, day-to-day management of the process and parties, and logistic support and flexible resource management; substantive desk support such as process design and problem-solving workshops, briefings, research and analysis; as well as support activities including confidence building and technical support to the parties.

Operational support includes three interlinked areas of work – direct support, general support and other support activities.

a) Direct support through field deployment, long- and short-term, through highly skilled staff and experts forming part of the local mediator's team.

This can feature:

- On-site secretarial assistance to draft reports, take notes and draft agreements; give legal and communications advice; identify thematic issues and experts; and manage logistics, human resources and finance.

- mediation practitioners to provide advice and guidance to the mediator and team; design the process; assess the strategy; and identify thematic concerns.

- Technical experts, for example in power-sharing, constitution-making, security transformation processes, resource-sharing, land reform, or civil society inclusion, to address thematic concerns depending on the needs of the process and the issues being discussed by the negotiating parties.

b) Substantive desk support to the peace process. This type of short-term, periodic support is provided both on- and off-site by desk officers, political analysts and mediation support staff.

General support can include:

- Process design, including thinking through of the strategy; ensuring inclusion of parties and coordination mechanisms; and securing a venue and support team. As the process evolves, the design can comprise problem-solving workshops, such as review/stocktaking sessions on ongoing processes.

- Briefings on context, substance and previous and ongoing processes to mediators, experts/advisers, on-site support teams, partners and others joining the process.

- Research and analysis of past and current issues, either context-specific or thematic.

- The injection of substantive knowledge, such as on power-sharing or gender issues, or how to deal with amnesty versus transitional justice. This can be done through either workshops or experts joining the team regularly.

c) Support activities to strengthen the parties' involvement in the process, such as:

- Confidence-building exercises for the parties (before or during the process), to mitigate concerns, mistrust and animosity.

- Technical support to parties, including skills training and training on the substantive issues of the process; clarifying what negotiations are about; providing information and knowledge on the context and parties involved; introducing new ideas through strategy development; and defining a negotiation approach.

Institutional capacity building and training

Institutional capacity building and training involve capacity building such as establishing clear decision-making, planning and coordination procedures, briefings, training curricula design, and access to expert networks and human resources; and training and skills enhancement, including training of mid- and high-level mediators and staff.

Capacity building and training programmes can be divided into two sub-categories:

a) Capacity-building activities focused on enhancing institutional support mechanisms include:

   - Rosters of mediators, support staff and experts
   - Standard operating procedures (both internal and associated with external relations with partner organisations) to streamline management across the institution
   - Templates for strategic and operational mediation plans
   - Training curricula
   - Procedures for briefing and debriefing mediators and mediation teams
   - Communication and logistical systems
   - Human resources.

b) Training and skills enhancement are provided on an institutional and individual level for:

   - Practitioners and mediators (high- and mid-level)
   - Support staff and experts.

Knowledge management and research

Knowledge management entails accumulating, managing and disseminating comparative knowledge or substantive issues on mediation processes; and research refers to both tailor-made, process-specific research such as conflict briefs and stakeholder analysis, and additional research relevant to the field.

Access to research and analysis informs mediation processes and teams, and strengthens mediation actors' understanding of the context and of their role in the process. It also establishes and preserves institutional memory.

Knowledge management and related activities include the accumulation, management and dissemination of knowledge on the profession of mediation and about mediation processes or substantive issues for mediation. In an ideal scenario (with no human resource restraints), such activities could include:

- Briefings of newly appointed staff
- Debriefings, lessons-learned exercises, evaluations and case studies of finalised processes
- Dissemination of best practices through guidance notes, guidelines, lessons-learned reports and other publications.

Research related to mediation support can be:

- Conducted independently of a specific process (i.e. on how to assess and evaluate success and effectiveness)
- Tailor-made or provided on a needs basis upon request from the field. This could include conflict briefs or stakeholder analysis.

Financial planning and budgeting

Mediation and dialogue facilitation are relatively cost effective means to resolve conflicts. However, when considering a mediation role, the NPC needs to ensure the availability of sufficient funds before engaging. The mediator will have to make a thorough estimation of costs, including the cost of staff in the mediation team, travel, meeting venues and special events in the framework of negotiations. In joint mediation efforts, where several mediators co-operate and all third parties have the right to convene meetings and organize special events, the costs of the process can be shared.

Budget decisions should be made on the basis of available information and take into account the myriad of support needs for a mediation operation. As outlined in the mediation start-up budget template, the main categories of expenses are the following:

- Staffing (international and national)

- Travel & DSA
- Office facilities
- Operational expenses (meeting rooms, hospitality, etc.)
- Communications & IT
- Local transport

Activity 11 [30minutes]

Participants are to go back to the conflict they worked on in Activity 7 and develop a mediation support plan for that conflict focusing on the three key areas of mediation support. Participants are to include a budget for the operations.

PART B

Session 5: Mediation Strategy

Mediation represents a unique opportunity to bring conflicting parties together to achieve a facilitated resolution. For many conflicts, "getting to the mediation" is simply a matter of agreeing to mediate, identifying a mediator, and meeting on the day of mediation. However, the great majority of disputes need a certain amount of preparation and this is where a mediation strategy becomes very crucial for the overall mediation process. In particular, we will discuss the following sub-topics:

- Median strategy
- Contents of a mediation strategy

Objectives:

At the end of this session, participants should be able to;

- Design a mediation strategy
- Develop a mediation strategy

What is a mediation strategy?

Mediation strategy denotes an overall plan of mediators to resolve and manage conflicts. Kolb (1983:249), explains mediation strategy as "an overall plan, approach or method a mediator has for resolving a dispute. . . [I]t is the way the mediator intends to manage the case, the parties, and the issue." A mediation strategy should outline the broad approach to the resolution of the conflict, principles of process design, and the role of local and international actors, schematic coordination architecture and an indication of post-agreement requirements to enable advance planning and identify broad support requirements. The latter should include an indication of the type of support structure that will need to be established.

Mediation strategies are often flexible and as such come in different forms. The differences in various mediation strategies may be attributed to how a mediator chooses to handle the mediation process, and the specific context of the conflict. In essence, the practice and process of mediation revolve, to a large extent, around mediators' choice of strategic behaviors.

Designing the mediation strategy

Based on conflict analysis and assessment, the options for designing the intervention will form a mode of engagement where mediation is one option among other forms of third-party intervention. It is important to bear in mind that context matters in mediation. Through conflict analysis, the mediation support team can identify the contextual elements of the crisis. Sometimes, the context might be supportive to peace processes; at other times, the context might be detrimental to efforts to reach a sustainable outcome. The peace process might slow down and

then pick up again once the context changes. A key challenge for the mediation team is to analyze the context and wait for a favourable moment to confirm engagement during difficult periods. While designing the intervention, the mediation team liaises constantly with the relevant supporting actors as it seeks to run concurrent and complementary peacemaking processes.

Building intervention scenarios

Intervention styles vary greatly according to the mandate, needs of the parties and the mediator. Thus, contingency planning depends on a sound analysis of the nature of the dispute, the parties involved and a plan responsive to the respective answers to the following guiding questions:

- Who are the parties and stakeholders in the conflict?
- What do the parties want to achieve?
- How does the mediation team contact and remain in communication with parties?
- How will other stakeholders, such as civil society groups, be involved?
- How will spoilers be identified and managed?
- How cohesive are parties?
- What are parties' positions and real interests?
- How should the public be involved in the process?
- How can a gender perspective be incorporated in the mediation process and its substantive issues and what aspects of UNSC Resolution 1325 can be promoted through the process?
- What do parties expect of the mediator?
- Is the mediation sufficiently objective to manage, settle or resolve the conflict?
- What can be done to enhance ripeness? The term 'ripeness' refers to parties resolving their conflict only when they are ready to do so – when alternative, usually unilateral, means of achieving a satisfactory result are blocked and the parties feel that they are in an uncomfortable and costly predicament. At that moment, they seek, or are amenable to, proposals that offer a way out.
- What are the minimum operating conditions for the mediation to proceed?
- Which actors can provide leverage in case of a stalemate?
- How should the negotiations be sequenced?
- What techniques and strategies are required for the consultation and negotiation phase of the mediation?
- In what order should substantive issues be approached?
- Is there a need for confidence-building measures to be put in place?
- How should the agreement be implemented?
- How should the agreement be monitored at the political and operational levels?
- Is there a need for specific expertise to generate options for compromise?
- What are the conditions for success of the mediation?

Enhancing ripeness for mediation intervention

As noted above, a conflict should be ripe for mediation before the mediation processes start. Even though the mediation team assesses the right intervention strategy, the analysis and concurrent peacemaking strategies need to ensure that the conflict is ripe for resolution. A conflict may become ripe for resolution and negotiation when belligerent parties recognise that they are in a mutually detrimental stalemate and sense that a way forward is possible. They become aware that they cannot defeat the enemy outright and that continued violence is not only costly, but also ineffective.

The relevant institutions can do the following to enhance the ripeness of a conflict:

- determine whether parties believe they have reached a mutually hurting stalemate, e.g. a delegation of the NPC can do an area assessment,
- confirm that parties can deliver on agreements and,
- assess internal political and public support for peace in order to provide scenarios for action.

Developing the mediation strategy

Once mediation has been chosen as the appropriate tool for intervention during the conflict analysis, the third party will be required to develop a comprehensive strategy on how the mediation will proceed. The mediation strategy then becomes the overarching plan of action which will be developed by an appropriate lead mediator (e.g., Ministry of Interior) and the National/Regional/District Peace Councils.

The strategic plan will be based on political judgments and choices. The mediation strategy (strategic plan) should indicate the mediator's mandate, provide overall direction and focus, contain clearly formulated goals, objectives and strategies, identify key partners and allies and outline the approach to addressing the principal challenges and risks. The plan should take account of all the main actors.

Table 1 provides a list of the activities required to develop a mediation strategy.

Table 1: Strategic plan for mediation

Item No	Indicators	Task to be performed
1.	mediator's mandate	
2.	The overall direction and focus of the mediation	
3.	clearly formulated goals	
4.	objectives	
5.	strategies	
6.	identify key partners and allies	
7.	Identify the challenges and risks	
8.	outline the approach to addressing the principal challenges and risks	
9.	What strategies should you put in place to address the Main actors with an interest in the conflict	
10.	government and its agencies	
11.	civil Society Groups	
12.	International organisations	

Source: Authors' Construct

- The mediator will prepare his/her initial visit to the conflict area to meet with all the relevant stakeholders and make his/her preliminary strategic assessment.
- The mediator will then convene a strategy session with his/her mediation team to develop an initial mediation strategy.
- The mediator will thereafter submit a confidential strategic plan to the NPC. This plan should be reviewed for possible updating every six months or more often if necessary.

Endorsement of a mediation strategy

Once developed, the mediation strategy should be communicated and endorsed at the highest level of the organizations involved. Some aspects of the strategy may need to remain confidential. The nature of the mediation is such that strategies may be highly personal and too sensitive for even the mediator to articulate fully, but it is important to share some sense of the strategy to enable other components of the organization to play their role in support of the process. This is necessary to facilitate "vertical" strategic coherence (within organizations) as well as "horizontal" coherence (among organizations). Coherence at all levels ensures that all actors convey the same messages and complement each other's efforts at their various levels of intervention (e.g., leveraging the influence of allies at the local level as well as through diplomatic activity at the NPC Headquarters and in district capitals). A pragmatic approach should nonetheless be adopted to avoid overloading the endorsement process.

From strategy to operational plan

The mediation strategy provides the basis for conceptualising the structure of a mediation team and corresponding substantive, administrative and logistical needs. This can be articulated in an operational plan, which focuses on implementing the strategy. While an overarching strategic plan provides overall direction and focus, with clearly formulated goals, objectives and strategies, the operational plan is a technical document that translates the strategic plan into

activities, tasks and time frames, assigns responsibility for action, and identifies what is required in terms of posts, expertise, logistics, equipment and funds.

The purpose of the operational plan is to translate the strategy into doable steps. These include:

- defining concrete steps to be taken
- who on the team is to do each specific step?
- approximate timelines for completing each step
- communication strategies between/among team members and partners
- budgeting and logistical requirements for each step
- how/when to update the strategy as events unfold

PART C

Session 6: Doing Mediation

The mediation process can be functionally broken down into four stages. These are:

- Introduction and Opening Statement
- Joint Session
- Separate Session(s)
- Closing

Stage 1: Introduction and Opening Statement

Objectives

- Establish neutrality
- Create an awareness and understanding of the process
- Develop rapport with the parties
- Gain confidence and trust of the parties
- Establish an environment that is conducive to constructive negotiations
- Motivate the parties for an amicable settlement of the dispute
- Establish control over the process

Seating Arrangement in the Mediation Room

At the commencement of the mediation process, the mediator shall ensure that the parties and/or their counsel are present. There is no specific or prescribed seating arrangement. However, it is important that the seating arrangement takes care of the following:

- The mediator can have eye-contact with all the parties and he can facilitate effective communication between the parties.
- Each of the parties and his counsel are seated together.
- All persons present feel at ease, safe and comfortable.

Introduction

- To begin with, the mediator introduces himself by giving information such as his name, areas of specialization if any, and number of years of professional experience.
- Then he furnishes information about his appointment as mediator, the assignment of the case to him for mediation and his experience if any in successfully mediating similar cases in the past.
- Then the mediator declares that he has no connection with either of the parties and he has no interest in the dispute.
- He also expresses hope that the dispute would be amicably resolved. This will create confidence in the parties about the mediator's competence and impartiality.
- Thereafter, the mediator requests each party to introduce himself. He may elicit more information about the parties' and may freely interact with them to put them at ease.

- The mediator will then request the counsel to introduce themselves.
- The mediator will then confirm that the necessary parties are present with authority to negotiate and make settlement decisions
- The mediator will discuss with the parties and their counsel any time constraints or scheduling issues.
- If any junior counsel is present, the mediator will elicit information about the senior advocate he is working for and ensure that he is authorized to represent the client.

The Mediator's Opening Statement

The opening statement is an important phase of the mediation process. The mediator explains in a language and manner understood by the parties and their counsel, the following:

- Concept and process of mediation
- Stages of mediation
- Role of the mediator
- Role of advocates
- Role of parties
- Advantages of mediation
- Ground rules of mediation

The mediator shall highlight the following important aspects of mediation:

- Voluntary
- Self-determinative
- Non-adjudicatory
- Confidential
- Good-faith participation
- Time-bound
- Informal and flexible
- Direct and active participation of parties
- Party-centred
- Neutrality and impartiality of mediator
- Finality
- Possibility of settling related disputes
- Need and relevance of separate sessions

The mediator shall explain the following ground rules of mediation:

- Ordinarily, the parties/counsel may address only the mediator
- While one person is speaking, others may refrain from interrupting
- Language used may always be polite and respectful
- Mutual respect and respect for the process may be maintained
- Mobile phones may be switched off
- Adequate opportunity may be given to all parties to present their views

Finally, the mediator shall confirm that the parties have understood the mediation process and the ground rules and shall give them an opportunity to get their doubts if any, clarified.

Stage 2: Joint Session (understanding the problem and defining the problem)

Objectives

- Gather information
- Provide opportunity to the parties to hear the perspectives of the other parties
- Understand perspectives, relationships and feelings
- Understand facts and the issues
- Understand obstacles and possibilities
- Ensure that each participant feels heard

Procedure

- The mediator should invite parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge.

    1. First, the plaintiff/petitioner should be permitted to explain or state his/her case/claim in his/her own words.
    2. Second, counsel would thereafter present the case and state the legal issues involved in the case.
    3. Third, defendant/respondent would thereafter explain his/her case/claim in his/ her own words.

    Fourth, counsel for defendant/respondent would present the case and state the legal issues involved in the case.

- The mediator should encourage and promote communication, and effectively manage interruptions and outbursts by parties.

- The mediator may ask questions to elicit additional information when he finds that facts of the case and perspectives have not been clearly identified and understood by all present.

- The mediator would then summarize the facts, as understood by him, to each of the parties to demonstrate that the mediator has understood the case of both parties by having actively listened to them.
- Parties may respond to points/positions conveyed by other parties and may, with permission, ask brief questions to the other parties.

- The mediator shall identify the areas of agreement and disagreement between the parties and the issues to be resolved.

- The mediator should be in control of the proceedings and must ensure that parties do not 'take over' the session by aggressive behaviour, interruptions or any other similar conduct.

- During or on completion of the joint session, the mediator may separately meet each party with his counsel, usually starting with the plaintiff/petitioner. The timing of holding the separate session may be decided by the mediator at his discretion having regard to the productivity of the on-going joint session, silence of the parties, loss of control, parties becoming repetitive or request by any of the parties.

- There can be several separate sessions. The mediator could revert back to a joint session at any stage of the process if he feels the need to do so.

Stage 3: Separate Session (Deeper understanding of the interests and needs of parties)

Objectives

- Understand the dispute at a deeper level
- Provide a forum for parties to further vent their emotions
- Provide a forum for parties to disclose confidential information which they do not wish to share with other parties
- Understand the underlying interests of the parties
- Help parties to realistically understand the case
- Shift parties to a solution-finding mood
- Encourage parties to generate options and find terms that are mutually acceptable

Procedure

i. Re - Affirming Confidentiality

During the separate session each of the parties and his counsel would talk to the mediator in confidence. The mediator should begin by re-affirming the confidential nature of the process.

ii. Gathering Further Information

The separate session provides an opportunity for the mediator to gather more specific information and to follow-up the issues which were raised by the parties during the joint session. In this stage of the process:

- Parties vent personal feelings of pain, hurt, anger etc.,
- The mediator identifies emotional factors and acknowledges them;
- The mediator explores sensitive and embarrassing issues;
- The mediator distinguishes between positions taken by parties and the interests they seek to protect;
- The mediator identifies why these positions are being taken (need, concern, what the parties hope to achieve);

- The mediator identifies areas of dispute between parties and what they have previously agreed upon;
- Common interests are identified;
- The mediator identifies each party's differential priorities on the different aspects of the dispute (priorities and goals) and the possibility of any trade off is ascertained.
- The mediator formulates issues for resolution

Reality - Testing

After gathering information and allowing the parties to vent their emotions, the mediator makes a judgment whether it is necessary to challenge or test the conclusions and perceptions of the parties and to open their minds to different perspectives. The mediator can then, in order to move the process forward, engage in **REALITY-TESTING**. Reality-testing may involve any or all of the following:

- A detailed examination of specific elements of a claim, defense, or a perspective;
- An identification of the factual and legal basis for a claim, defense, or perspective or issues of proof thereof;
- Consideration of the positions, expectations and assessments of the parties in the context of the possible outcome of litigation;
- Examination of the monetary and non-monetary costs of litigation and continued conflict;
- Assessment of witness appearance and credibility of parties;
- Inquiry into the chances of winning/losing at trial; and
- Consequences of failure to reach an agreement.

Techniques of Reality-Testing

Reality-Testing is often done in the separate session by:

- Asking effective questions,
- Discussing the strengths and weaknesses of the respective cases of the parties, without breach of confidentiality, and/or
- Considering the consequences of any failure to reach an agreement (Best Alternative to Negotiated Agreement (BATNA), Worst Alternative to Negotiated Agreement (WATNA) and Most Likely Alternative to Negotiated Agreement (MLATNA) analysis.

1. *Asking Effective Questions*

Mediator may ask parties questions that can gather information, clarify facts or alter perceptions
of the parties with regard to their understanding and assessment of the case and their expectations.

Examples of effective questions:

- OPEN-ENDED QUESTIONS like 'Tell me more about the circumstances leading up to the signing of the contract'. 'Help me understand your relationship with the other party at the time you entered the business'. 'What were your reasons for including that term in the contract?'

- CLOSED QUESTIONS, which are specific, concrete and which bring out specific information. For example, 'it is my understanding that the other driver was going at 60 kilometers per hour at the time of the accident, is that right?' 'On which date the contract was signed?' 'Who are the contractors who constructed this building?'

- QUESTIONS THAT BRING OUT FACTS: 'Tell me about the background of this matter'. 'What happened next?'

- QUESTIONS THAT BRING OUT POSITIONS: 'What are your legal claims?' 'What are the damages?' 'What are their defenses?'

- QUESTIONS THAT BRING OUT INTERESTS: 'What are your concerns under the circumstances?' 'What really matters to you?' 'From a business / personal / family perspective, what is most important to you?' 'Why do you want divorce?' 'What is this case really about?' 'What do you hope to accomplish?' 'What is really driving this case?'

2. *Discussing the Strengths and Weaknesses of the Respective Cases of the Parties*

The mediator may ask the parties or counsel for their views about the strengths and weaknesses of their case and the other side's case. The mediator may ask questions such as, 'How do you think your conduct will be viewed by a Judge?' or 'Is it possible that a judge may see the situation differently?' or 'I understand the strengths of your case, what do you think are the weak points in terms of evidence?' or 'How much time will this case take to get a final decision in court?' Or 'How much money will it take in legal fees and expenses in court?

3. *Considering the Consequences of any failure to reach an agreement (BATNA/WATNA /MLATNA Analysis).*

One technique of reality-testing used in the process of negotiation is to consider the different alternatives to a negotiated settlement. In the context of mediation, the alternatives are 'the best', 'the worst' and 'the most likely' outcome if a dispute is not resolved through negotiation in mediation. As part of reality-testing, it may be helpful to the parties to examine their alternatives outside mediation (specifically litigation) so as to compare them with the options available in mediation. It is also helpful for the mediator to discuss the consequences of failing to reach an agreement e.g., the effect on the relationship of the parties, the effect on the business of the parties etc.

While the parties often wish to focus on best outcomes in litigation, it is important to consider and discuss the worst and the most likely outcomes also. The mediator solicits the viewpoints of the advocate/party about the possible outcome in litigation. It is productive for the mediator to work with the parties and their advocates to come to a proper understanding of the best, the worst and the most likely outcome of the dispute in litigation as that would help the parties to recognize reality and thereby formulate realistic and workable proposals.

If the parties are reaching an interest-based resolution with relative ease, a BATNA/WATNA/MLATNA analysis need not be resorted to. However, if parties are in difficulty at negotiation and the mediator anticipates hard bargaining or adamant stands, BATNA/ WATNA/ MLATNA analysis may be introduced.

By using the above techniques, the mediator assists the parties to understand the reality of their case, give up their rigid positions, identify their genuine interests and needs, and shift their focus to problem-solving. The parties are then encouraged to explore several creative options for settlement.

4. *Brain Storming (Creating Options and Evaluating Options)*

Brain Storming is a technique used to generate options for agreement. There are two principal issues here:

a) Creating options

b) Evaluating options

Creating options: - Parties are encouraged to freely create possible options for agreement.
Options that appear to be unworkable and impractical are also included. The mediator reserves judgment on any option that is generated and this allows the parties to break free from a fixed mind set. It encourages creativity in the parties. Mediator refrains from evaluating each option and instead attempts to develop as many ideas for settlement as possible. All ideas are written down so that they can be systematically examined later.

Evaluating options: - After inventing options the next stage is to evaluate each of the options generated. The objective in this stage is not to criticize any idea but to understand what the parties find acceptable and not acceptable about each option. In this process of examining each option with the parties, more information about the underlying interests of the parties is obtained. This information further helps to find terms that are mutually acceptable to both parties.

Brainstorming requires lateral thinking more than linear thinking.

- Lateral thinking: Lateral thinking is creative, innovative and intuitive. It is non-linear and non-traditional.

Mediators use lateral thinking to generate options for agreement.

- Linear thinking: Linear thinking is logical, traditional, and rational and fact based. Mediators use linear thinking to analyze facts, to do reality testing and to understand the position of parties.

5. *Sub- Sessions*

The separate session is normally held with all the members of one side to the dispute, including their advocates and other members who come with the party. However, it is open to the mediator

to meet them individually or in groups by holding sub- sessions with only the advocate (s) or the party or any member(s) of the party.

- Mediator may also hold sub-session(s) only with the advocates of both sides, with the consent of parties. During such sub-session, the advocates can be more open and forthcoming regarding the positions and expectations of the parties.

- If there is a divergence of interest among the parties on the same side, it may be advantageous for the mediator to hold sub- session(s) with parties having common interest, to facilitate negotiations. This type of sub-session may facilitate the identification of interests and also prevent the possibility of the parties with divergent interests, joining together to resist the settlement.

6. *Exchange of Offers*

The mediator carries the options/offers generated by the parties from one side to the other. The parties negotiate through the mediator for a mutually acceptable settlement. However, if negotiations fail and settlement cannot be reached the case is sent back to the referral Court.

Stage 4: Closing (Settlement/Non-Settlement)

(A) Where there is a settlement

Once the parties have agreed upon the terms of settlement, the parties and their advocates re-assemble and the mediator ensures that the following steps are taken:

- Mediator orally confirms the terms of settlement;
- Such terms of settlement are reduced to writing;
- The agreement is signed by all parties to the agreement and the counsel if any representing the parties;
- Mediator also may affix his signature on the signed agreement, certifying that the agreement was signed in his/her presence;
- A copy of the signed agreement is furnished to the parties;
- The original signed agreement sent to the referral Court for passing appropriate order in accordance with the agreement;
- As far as practicable the parties agree upon a date for appearance in court and such date is intimated to the court by the mediator;
- The mediator thanks the parties for their participation in the mediation and, congratulates all parties for reaching a settlement.

THE WRITTEN AGREEMENT SHOULD:

- clearly specify all material terms agreed to;
- be drafted in plain, precise and unambiguous language;
- be concise;

- use active voice, as far as possible. Should state clearly WHO WILL DO, WHAT, WHEN, WHERE and HOW (passive voice does not clearly identify who has an obligation to perform a task pursuant to the agreement);
- use language and expression which ensure that neither of the parties feels that he or she has 'lost';
- ensure that the terms of the agreement are executable in accordance with law;
- be complete in its recitation of the terms;
- avoid legal jargon, as far as possible use the words and expressions used by the parties;
- as far as possible state in positive language what each parties agrees to do;
- as far as possible, avoid ambiguous words like reasonable, soon, co-operative, frequent etc;

(B) Where there is no settlement

- If a settlement between the parties could not be reached, the case would be returned to the referral Court merely reporting "not settled". The report will not assign any reason for non settlement or fix responsibility on any one for the non-settlement. The statements made during the mediation will remain confidential and should not be disclosed by any party or advocate or mediator to the Court or to anybody else.

- The mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for settlement.