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A Soft Solution for a Hard Problem: Using Alternative Dispute Resolution in Post-Conflict Societies

James D. McGinley*

I. INTRODUCTION

In the immediate aftermath of war, justice will not wait for institutions. In anarchy, there is opportunity, but more importantly, there is opportunistic excess that thrives in a lawless vacuum unhindered by civil constraint.¹ This is the quintessential Hobbesian moment where life is “nasty, brutish, and short.”² The backbone of any attempt at reestablishing civil society is the reconstruction of a respected judiciary, but this takes time—and life will not wait. It is against this backdrop, which often seems to more closely

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1. DENNIS A. RONDINELLI, *THE CHALLENGES OF RESTORING GOVERNANCE IN CRISIS AND POST-CONFLICT COUNTRIES* 1-7 (2007), <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan025512.pdf>.

2. THOMAS HOBBES, *Of the Natural Condition of Mankind, as Concerning Their Felicity, and Misery*, in *LEVIATHAN* (1651), <https://www.gutenberg.org/files/3207/3207-h/3207-h.htm#link2HCH0013>.

resemble a scene from a *Mad Max* movie³ than anything we know of reality, that Alternative Dispute Resolution may present the best hope for equitable solutions.⁴

Depending on the type of dispute resolution techniques, their cultural acceptance, and the skill of implementation, there is a strong potential to dramatically increase the speed of stabilization by resolving differences before they lead to additional strife in an already chaotic environment. It is this combination of simplicity, efficiency, and light footprint that makes Alternative Dispute Resolution a potentially powerful tool in post-kinetic environments.

The kinetic phase of warfare reduces life for both combatants and non-combatants to its barest element of mere survival. Part II of this article will focus on the environment in the immediate aftermath of the kinetic phase as a shattered society faces anarchy, a vacuum regarding the Rule of Law⁵ and destructive opportunistic behaviors.

Although different cultures may have disparate traditions of Alternative Dispute Resolution, they all have as their goal the need to find acceptable solutions to significant disagreements. Part III will examine the key approaches to alternative dispute resolution, with a brief survey of negotiation, mediation, and arbitration. Importantly, the article will also consider the need to evaluate the use of indigenous dispute resolution methods that may vary substantially from established Western practices.

Modernly, there has been a greater focus on traditional Rule of Law efforts, specifically because of the need to create a high degree of confidence that justice will prevail in the formation of new institutions.⁶ After basic needs for survival have been met, this next step of resolving disputes is critical to establishing stability.

However, it is important to contrast the limitations of transitional justice, and its focus on criminal adjudication, with the need for civil justice as society strives to reestablish the foundation of the activities of daily living. Part IV will examine the challenges presented by the extensive process of recreating a judiciary, selecting judges, training staff, and building facilities. It will also contemplate the consequences of approaches that simply reach back to pre-conflict norms, in spite of being very time

3. Robert Firsching, *Mad Max (1979) NYT Critics' Pick*, N.Y. TIMES (Nov. 9, 2013), <http://www.nytimes.com/movies/movie/30657/Mad-Max/overview>.

4. The key techniques of Alternative Dispute Resolution that will be considered are indigenous dispute resolution, negotiation, mediation, and arbitration.

5. "Rule of Law" is capitalized as a proper noun to describe formal Rule of Law initiatives undertaken to reestablish governance in post-conflict societies. See UNITED NATIONS SEC. COUNCIL, THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST-CONFLICT SOCIETIES: REPORT OF THE SECRETARY-GENERAL 4 (2004), <http://www.ipu.org/splz-e/unga07/law.pdf> [hereinafter REPORT OF SECRETARY-GENERAL 2004].

6. See *infra* Part IV.

consuming, and risk being perceived as yet another competitor for scarce governmental resources. This part points out that a simple reach back approach may be ill-suited to a full spectrum of conflict resolution, with little buy-in from unstable populations, and may test their patience to the extent of aggravating instability.

The success of any transitional effort depends on the skill, knowledge, and expertise of the personnel who are tasked with implementing Rule of Law initiatives and their mission readiness. This is especially true where there has been a severe breakdown in the foundations of civil society, or where there is still an extremely high threat of physical violence.⁷

Part V will address coalition force capacity to cope with these challenges by providing trained facilitators and critical manpower support. Active component military attorneys, like members of the Judge Advocate General's (JAG) Corps, often do not have any specialty training or experience in Alternative Dispute Resolution, and yet, they provide the most immediate legal resource to the commander in the combat zone.

Part V will also suggest that coalition manpower management specialists should plan to source Reserve component attorneys with Alternative Dispute Resolution specialization, other attorneys from the State Department or equivalent coalition ministries, and trained negotiators to fill this critical gap. Planners will also have to build force packages with sufficient security resources to source safe movement and operations throughout the battle space. Typically, this will require transport helicopters, armored vehicles, associated logistic support packages, and gun teams to man personal security detachments for the movement of key Alternative Dispute Resolution personnel.

The capacity of post-kinetic development is always dependent on the threat environment and must take into consideration the conditions on the ground in setting realistic goals to evaluate successful progress. Part VI will explore a spectrum of transition scenarios matching resources to requirements and focusing on personnel that provide the best results in a given threat environment. These scenarios include: "hot conflict" (still too dangerous for anyone but uniformed personnel),⁸ a transitional threat

7. See *infra* Part V.

8. In her concept paper for the World Health Organization, Judith Large defines "hot conflict" more conceptually, stating: "Hot conflict refers to the outbreak of violence, heated exchanges, riots or organised armed attack." Judith Large, *Considering Conflict, Humanitarian Health Action*, WORLD HEALTH ORG. (Oct. 1997), http://www.who.int/hac/techguidance/hbp/considering_conflict/en/. Here, "hot conflict" is used to indicate armed combat with major combat operations, as opposed to small, sporadic outbreaks of localized violence. *Id.*

environment (safe enclave, but defined by ungoverned battle space and perilous movement), and a steady state permissive environment (safe enclaves and diminished threat allowing ready movement with minimal additional security required).

Importantly, Part VII provides several significant insights about the potential to optimize techniques to typical disputes, and considers these methods in the context of difficult transition challenges. In particular, it includes a discussion of specific Alternative Dispute Resolution techniques and advantages in key situations, and posits an optimization matrix as a quick decision reference for battlefield commanders. This analysis is also meant to provide a foundation for planners who may have to develop an interagency Request for Forces (RFF) to support the Combatant Commander's requirement for Alternative Dispute Resolution resources as part of broader stabilization efforts. In essence, if the sourcing and deployment of Alternative Dispute Resolution resources is meticulously executed, then the Combatant Commander's success in transition will be dramatically increased.

Finally, Part VIII concludes by focusing on the critical importance of the need to train like we fight by offering the suggestion that each part of the system should be gamed and exercised as an integral part of post-conflict stabilization and reconstruction.⁹ Critical to this effort is the realization that these issues transcend strictly military manpower and resources, and should properly be seen as "whole of government" issues drawing on interagency sourcing from across all of the resources available from coalition partners. This not only broadens the aperture but also allows multi-disciplinary and multi-agency solutions to better fit the entire spectrum of issues that confront coalition efforts to reestablish civil society.

II. BACKGROUND OF ISSUES CONFRONTING COALITION FORCES IN THE IMMEDIATE AFTERMATH OF KINETIC PHASE

Although it can be difficult to describe or quantify the immediate chaos of life in war torn communities, anyone who has seen the pictures¹⁰ of

9. In its Integrated Disarmament, Demobilization and Reintegration Standards, the United Nations contextually defines the post-conflict environment thusly: "The post-conflict environment in which disarmament, demobilization and reintegration (DDR) usually take place is often characterized by "poor or badly functioning economies, . . . insecurity and lawlessness," and "a lack of social services and social cohesion." UNITED NATIONS INTEGRATED DISARMAMENT, DEMOBILIZATION AND REINTEGRATION STANDARDS § 2.20 (2006), <http://unddr.org/uploads/documents/IDDRS%202.20%20Postconflict%20Stabilization%20and%20Peace-building.pdf>.

10. The classic images of the bombing of Dresden, or more currently, the rubble of destroyed buildings in Syria readily convey the utter destruction of war. See *Violence in Syria*, U.S. NEWS & WORLD REPORT (Feb. 23, 2012), <http://www.usnews.com/photos/violence-in-syria>.

destruction can readily understand the almost insurmountable problems caused by kinetic¹¹ operations.

A. *Anarchy*

In the immediate aftermath of armed conflict, societies experience a vacuum of social order that can be every bit as destructive and lethal as the hostilities that proceeded it. During the spring of 2003 in Iraq, looting and violence became widespread and were followed by an even more devastating insurgency.¹² In the Democratic Republic of the Congo, war raged from 1998-2002.¹³ However, even after a peace agreement was reached, the Congolese suffered an estimated 2.1 million additional deaths following the formal end of the war.¹⁴ The peril of lawlessness is affirmed in the Geneva Declaration report, *The Global Burden of Armed Violence*, noting, “Even more problematic, in some post-conflict settings experiencing fragmentation and division, armed violence can take on more anarchic characteristics.”¹⁵

B. *Rule of Law Vacuum*

Post-conflict environments create a vacuum for the rule of law. This breakdown of civil society presses humanity to the limit with all of the excesses of unbridled lawlessness.¹⁶ The entire range of criminal conduct including murder, sexual violence, theft, and intimidation can become the norm.¹⁷ There is often a deep-rooted mistrust of fledgling judicial systems, which may be viewed as corrupt or merely an instrument of revenge or

11. W.J. HURLEY ET AL., NON-KINETIC CAPABILITIES FOR IRREGULAR WARFARE: FOUR CASE STUDIES, at ES-1 (2009), <http://handle.dtic.mil/100.2/ADA501354> (“‘Kinetic’ capabilities focus on destroying enemy forces through the application of physical effects.”).

12. LIEUTENANT COLONEL ROGER P. HEDGEPEETH, AVOIDING THE LEVIATHAN: A STRATEGY TO LIMIT POST-CONFLICT NORMATIVE BREAKDOWN 1 (2013), www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA589280.

13. GENEVA DECLARATION SECRETARIAT, GLOBAL BURDEN OF ARMED VIOLENCE 52 (2008), <http://www.genevadeclaration.org/fileadmin/docs/Global-Burden-of-Armed-Violence-full-report.pdf> (citing International Rescue Committee (IRC) data).

14. *Id.*

15. *Id.* at 54.

16. UNITED NATIONS DEV. PROGRAMME [UNDP], GLOBAL PROGRAMME ON STRENGTHENING THE RULE OF LAW IN CONFLICT AND POST-CONFLICT SITUATIONS: ANNUAL REPORT 2010, at 4 (2011).

17. *Id.* at 9.

retribution.¹⁸ Finally, it can be very difficult to harness military and security institutions that have been dominant in society during conflict and now are opposed to relinquishing absolute power in order to accommodate the balance required by the rule of law.¹⁹

C. *Opportunistic Behaviors*

Displaced populations are likely to return to “squatters” who have seized land, confiscated personal property, and seek to dominate essential resources like access to electricity and potable water.²⁰ These returning refugees have immediate needs for food, water, and shelter, which create opportunities for criminal enterprises to extort these vulnerable populations as they try to survive the resettlement process. It is also a turbulent time without established institutions to provide stability and order, and to constrain criminal behaviors that prey on the most physically vulnerable returnees.

III. KEY APPROACHES TO ALTERNATIVE DISPUTE RESOLUTION

Ordinarily, transitional justice environments focus on remedies for criminal conduct that has occurred in the context of hostilities.²¹ As a result, Alternative Dispute Resolution methods frequently used in civil disputes are often less familiar to Rule of Law practitioners whose emphasis is criminal justice. Although, an in-depth review of Alternative Dispute Resolution techniques is beyond the scope of this article, the brief survey that follows will provide the reader with the necessary foundation to understand the use of Alternative Dispute Resolution as the best post-conflict interim solution.

18. *Id.*

19. *Id.*

20. PATRICIA WEISS FAGEN, REFUGEES AND IDPS AFTER CONFLICT: WHY THEY DO NOT GO HOME 6 (2011). The United Nations’ programs consistently cite land disputes as recurring issues. According to the UNDP, “At the same time, return movements can trigger disputes over land, water and property, and open opportunities of economic exploitation. This, in turn, can aggravate existing problems of legal illiteracy, unemployment, marginalised and weakened statutory structures and traditional conflict resolution mechanisms.” UNDP, STRENGTHENING THE RULE OF LAW IN CRISIS-AFFECTED AND FRAGILE SITUATIONS 9 (2011), <http://www.arabstates.undp.org/content/dam/rbas/doc/Crisis%20prevention/Global%20Programme%20Phase%20II%20-%20FINAL.pdf>.

21. The United Nations provides the following definition of Transitional Justice:

For the United Nations, transitional justice is the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law.

UNITED NATIONS, GUIDANCE NOTE OF THE SECRETARY-GENERAL: U.N. APPROACH TO TRANSITIONAL JUSTICE 2 (2010) [hereinafter U.N. APPROACH TO TRANSITIONAL JUSTICE].

A. Indigenous Dispute Resolution

The Western focus of coalition forces carries with it the risk of overlooking the obvious preference for Indigenous Dispute Resolution's use in areas where local legal traditions provide a ready scheme for resolving disputes. It is also important to note, that often Indigenous Dispute Resolution may involve some or all of the techniques embodied in Alternative Dispute Resolution.

For example, in Arab traditions the rituals of *sulh* and *musalaha* focus on group reconciliation, even for individual wrongs:

The ritual process of *sulh* usually ends in a public ceremony of *musalaha* performed in the village square. The families of both the victim and the guilty party line up on both sides of the road and exchange greetings and accept apologies, especially the aggrieved party. The ceremony includes four major stages: 1) the act of reconciliation itself; 2) the two parties shake hands under the supervision of the *muslihs* or *jaha*; 3) the family of the murderer visits the home of the victim to drink a cup of bitter coffee; and 4) the ritual concludes with a meal hosted by the family of the offender. The specific form of the rituals varies from Israel/Palestine to Lebanon and Jordan, but the basic philosophy is based on *sulh*, *musalaha*, *musafaha* (hand-shaking), and *mumalaha* ("partaking of salt and bread," i.e., breaking bread together). While *sulh* resembles contemporary Western approaches to mediation and arbitration, a key difference is the relationship of the process to enduring communal relationships. *Sulh* does not merely take place between individuals, but between groups.²²

The specific benefit of looking to an indigenous solution is that it allows greater involvement of indigenous populations in the entire dispute resolution process, creating a sense of control and investment in the outcome. This, in turn, can be expected to increase the confidence of the larger community that disputes are being promptly and fairly resolved. Finally, to the extent that each resolution is a product of local culture, traditions, and mores, it is more likely to be embraced as a final solution to

22. George E. Irani, *Arab-Islamic Rituals of Conflict Resolution and Long-Term Peace in the Middle East*, PALESTINE-ISR. J. POL. ECON. & CULTURE (2000), <http://www.pij.org/details.php?id=994>.

provide a genuine answer to the underlying dispute so the parties can permanently put their differences behind them.²³

Moreover, internationally, there is a greater expectation from coalition partners that local solutions from indigenous populations will be given due consideration. This notion is reflected in Article 40 of the United Nations Declaration on the Rights of Indigenous Peoples, which states:

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.²⁴

B. Negotiation

Negotiation, in one form or another, has extraordinary universality because it forms the basis of bargaining in the marketplace. Ideally, this good faith approach to meeting, discussing issues in dispute, and proposing acceptable solutions will result in ultimate resolution.²⁵ However, because negotiation styles, expectations, and norms are so deeply engrained in culture, the local parties to the dispute should play the dominate role rather than introducing the additional barriers of cultural misunderstanding from an outsider.²⁶

23. The Australian Capital Territory sets out the following aims for its Indigenous Sentencing Courts in working with Aboriginal populations:

Involve Aboriginal and Torres Strait Islander communities in the sentencing process[;]
Increase the confidence of Aboriginal and Torres Strait Islander communities[;]
Reduce barriers between Courts and Aboriginal and Torres Strait Islander communities[;]
Provide culturally relevant and effective sentencing options for Aboriginal and Torres Strait Islander offenders[;]
Provide the offender concerned with support services that will assist the offender to overcome his or her offending behavior[;]
Provide support to victims of crime and enhance the rights and place of victims in the sentencing process[;]
Reduce repeat offending in Aboriginal and Torres Strait Islander communities.

Elena Marchetti & Kathleen Daly, *Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model*, 29 SYDNEY L. REV. 415, 432 (2007).

24. UNITED NATIONS, GUIDELINE ON INDIGENOUS PEOPLES' ISSUES 56 (2009).

25. 1 JAY E. GREINIG, *ALTERNATIVE DISPUTE RESOLUTION* 50 (3d ed. 2005).

26. Researchers who focus on the impact of culture in the context of negotiation expectations observe:

Another application of the theory is in understanding differences between intracultural and intercultural negotiations. Negotiators from the same culture, exposed to the same public cultural elements, will have a common set of chronically accessible constructs—self-conceptions, metaphors, expectations, and scripts—making for an “organized” interaction. Not so in intercultural conflicts, which inherently involve two negotiations,

Negotiation styles are often broken down into two distinct approaches: competitive and cooperative negotiation.²⁷ In competitive bargaining, the negotiator often opens the negotiation with an extreme endpoint to shift the eventual midpoint of resolution in his favor.²⁸ The basic outlook is seen as a linear zero sum game, with all gains resulting in an attendant loss for the opposing party.²⁹ Importantly, this adversarial approach to negotiation naturally introduces a controlling element of mistrust by both parties.³⁰

In contrast, the cooperative bargaining approach sets a more constructive foundation with a more moderate opening demand and seeks to find a cooperative solution.³¹ Concessions are seen as a vehicle to build momentum,³² even if it comes at a price of a less favorable result. The fact that the dispute is resolved may be every bit as important as the ultimate terms of the settlement. Often, the issue of the dispute is less important than maintaining a strong, continuing relationship between the parties.³³

These contrasting styles are extremely important in post-conflict environments because desperation can evoke competitive negotiation just when more cooperative approaches would help build or preserve relationships, and help to ease any mistrust between the parties.

C. Mediation

At its essence, mediation uses the good offices of a third party specialist (mediator) to guide and facilitate the parties as their settlement discussions progress to resolution.³⁴ By its very nature, mediation is enormously

the original conflict over resources and the meta-level negotiation over the meanings that should define the event.

Michael W. Morris & Michele J. Gelfand, *Cultural Differences and Cognitive Dynamics: Expanding the Cognitive Perspective on Negotiation*, in THE HANDBOOK OF NEGOTIATION AND CULTURE 65 (Michele J. Gelfand et al., eds., 2004), <http://www.libvolume7.xyz/psychology/bsc/semester6/managingbehaviorinorganizations/powerconflictandnegotiation/powerconflictandnegotiationnotes2.pdf>.

27. GRENIG, *supra* note 25, at 51-52. For a more expansive treatment of negotiation theory and strategy, see generally ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000).

28. GRENIG, *supra* note 25, at 51.

29. *Id.*

30. *Id.*

31. *Id.* at 52.

32. *Id.*

33. *Id.* See also CARRIE MENKEL-MEADOW ET AL., NEGOTIATION: PROCESSES FOR PROBLEM SOLVING 89-100 (2006).

34. TANIA SOURDIN, ALTERNATIVE DISPUTE RESOLUTION 26 (2d ed. 2005).

flexible and can be broadly adapted to address the variables of disparate cultures, varying issues, and independent personalities.

1. Models

Scholars in the field look to explain different mediation approaches as the result of analytical models that differentiate each style based on the underlying concept of the mediation.³⁵ For example, in the Facilitation Model, the mediator serves as a conduit, gathering relevant facts and information, and then delivers the information to the opposing party.³⁶ Here, the emphasis is on letting the parties work through their differences, with the potential buffer of the mediator in constructively presenting the information.³⁷

Usually, the parties are physically separated during this phase, and the mediator is able to calm the message with a careful selection of words and a constructive emotional attitude. This may be the most important part of the mediator's role because it helps to diffuse the tension and provides the best opportunity for each party to objectively evaluate the substance of an offer, rather than being offended by the tone.

In contrast, in the Formulation Model, the mediator is expected to take part in the substance of the dispute.³⁸ In this model, the mediator is an active participant in developing new solutions, but refrains from actually advocating a particular solution.³⁹ It is these substantive contributions that differentiate the Formulation Model from the mediator's role as a mere facilitator.

In the Manipulation Model, the mediator is expected to go beyond the role of formulator and use all the advantages of power and leverage to "manipulate" the parties into a resolution.⁴⁰ Here, the choice of labels is unfortunate because it implies something sinister; when in practice, it actually can be extremely helpful to the parties to have an active participant in finding resolution. In the end, it is still up to the disputing parties to voluntarily accept or reject the ultimate solution.

It is important to note that although analytical purists might prefer that the entire mediation be conducted according to only one model, in reality,

35. Lars Kirchhoff, *Linking Mediation and Transitional Justice: The Use of Interest-Based Mediation in Processes of Transition*, in BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, PEACE AND DEVELOPMENT 237, 239-243 (Kai Ambos et al., eds., Springer 2009).

36. *Id.* at 240.

37. *Id.* at 240-42.

38. *Id.* at 240.

39. *Id.*

40. Kirchhoff, *supra* note 35, at 240.

each model is better understood as part of a spectrum or range of solutions. In situations where it is easy to build consensus, simple facilitation may be all that is required, but in more problematic disputes, it may be necessary for the mediator to progress using full leverage on each of the disputing parties to forge a resolution.

2. Phases

Briefly, an individual mediation event can be broken down into seven stages or phases. Stage One is the mediator's opening statement, setting the tone, identifying ground rules, and explaining the process.⁴¹ Stage Two opens the process to the parties' statements, outlining their views of the facts and issues in dispute.⁴² Stage Three involves the parties' identification of issues in dispute.⁴³ Stage Four is a joint session where all parties meet together under the supervision of the mediator and get their chance to air their grievances directly to the opposing party.⁴⁴

During Stage Five, the parties privately caucus with the mediator where their concerns can be presented frankly, without fear of offending the opposing party.⁴⁵ This additional opportunity to be heard can be a very effective way of diffusing tension, even though the opposing party is not present, because it allows the party to fully air their grievances. At this point, the mediator can begin "shuttle diplomacy," carrying the message from each private meeting with the opposing party, in an effort to find middle ground.⁴⁶ Finally, when an agreement is reached in Stage 7, the mediator can assist the parties in reducing their understanding to writing, and bringing the parties together to encourage a better prospective relationship.⁴⁷

In understanding the process, it is important to note that Stages One through Three and part of Stage Five focus on the dispute and the problems in the past. In contrast, part of Stage Four and Stages Five through Seven

41. GRENIG, *supra* note 25, at 93.

42. *Id.* at 95-96.

43. *Id.*

44. *Id.* at 93-94.

45. *Id.* at 94-95.

46. SOURDIN, *supra* note 34, at 29.

47. RUTH CHARLTON & MICHELINE DEWDNEY, *THE MEDIATOR'S HANDBOOK: SKILLS AND STRATEGIES FOR PRACTITIONERS* 4-7 (Sydney 1995). Of note, the stages or phases range broadly from three to nine depending on the author and the type of analysis, but the process varies little in what actually occurs. See U.S. ARMY, *ALTERNATIVE DISPUTE RESOLUTION SERIES: MEDIATION* 17 (May 2010).

focus on the solutions in the future which will allow the parties to resolve the dispute.⁴⁸

D. Arbitration

Arbitration is sometimes characterized as a “private tribunal.”⁴⁹ In a standard civil litigation context, arbitration may have many distinct advantages to the litigants when compared with the more cumbersome process of a judicial trial. Importantly, the key drawback is that arbitration denies the parties the benefit of a jury to assist as a fact finder.⁵⁰ However, this loss is often of no moment in cultures where disputes are normally tried before a tribal elder or a judge.

Foremost among arbitration’s many advantages is its flexibility as a forum for dispute resolution.⁵¹ Every aspect of the proceeding has the potential to be individually tailored to maximize the benefits of resolution, while minimizing the process deficits that are typically associated with litigation.⁵²

If the tactical environment makes location an issue, then an arbitration hearing can be relocated to a secure location, because the key facility requirement is a hearing room with enough privacy for the parties to be heard without undue distraction.⁵³ This approach stands in stark contrast to the usual facilities requirements associated with a traditional courthouse and individual courtrooms.

Along the same lines, in its simplest form, an arbitration hearing can be held with a single arbitrator presiding, devoid of staff or counsel for the parties.⁵⁴ This rudimentary approach is often not only more than sufficient, it may also harmonize very well with local traditions where a single elder is asked to sit in judgment.⁵⁵ Arbitration also lends itself to streamlined civil

48. CHARLTON & DEWDNEY, *supra* note 47, at 7.

49. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979), reprinted in ALAN RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 599 (4th ed. 2006).

50. ARTHUR MAZROW, THE ADVANTAGES AND DISADVANTAGES OF ARBITRATION AS COMPARED TO LITIGATION 2 (2008), http://www.cre.org/images/my08/presentations/the_advantages_and_disadvantages_of_arbitration_as_compared_to_litigation_2_mazirow.pdf.

51. SOURDIN, *supra* note 34, at 37.

52. *Id.* For a detailed discussion of the key comparative benefits of arbitration when contrasted with judicial litigation, see Landes & Posner, *supra* note 49, at 599-600.

53. See generally Landes & Posner, *supra* note 49.

54. GRENIG, *supra* note 25, at 173.

55. The Food and Agriculture Organization of the United Nations has studied indigenous arbitrators in the context of forestry disputes, and provides the following insights reflecting the emphasis on judicial temperament and tradition:

Indigenous arbitrators share many of the characteristics of mediators. They tend to be prosperous male elders, often renowned for their speaking skills and sound judgment. In

and evidentiary procedure, elevating substance over form,⁵⁶ with less chance of prejudice (or the need for more complex safeguards) from the misinterpretations of a lay jury. Finally, arbitration verdicts are generally designed to be final, without the attendant delays of appellate wrangling that can deprive the parties of any benefits or efficiencies from an alternative approach to dispute resolution.⁵⁷

IV. TRADITIONAL RULE OF LAW EFFORTS

Traditional Rule of Law efforts overwhelming focus on criminal conduct, often as the result of some of the most heinous crimes imaginable. In the meantime, disputes over property boundaries, rights to personal property, torts, and business disputes are neglected. Unfortunately, if these ordinary disputes are left to fester, they can boil over into physical violence. From a governance perspective, this lawless vacuum can readily create a sense of societal chaos and hopelessness that slows the progress of reestablishing judicial norms. These ordinary differences are the types of disputes that readily lend themselves to resolution through alternative means.

A. *Contrasting Limitations of Transitional Justice*

The United Nations provides the following vision of transitional justice: “Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof.”⁵⁸

many cases they possess formal or informal leadership positions. Kpelle arbitrators, for example, commonly hold such influential roles as town chief or quarter elder. In northern Somalia, the clan and sub-clan sultans often serve as mediators and arbitrators. The sultans’ process of arriving at a decision is often collaborative, allowing the disputants an active role in shaping a compromise. Indeed, to be heavy-handed undermines a sultan’s authority, as expressed in a Somali proverb: “Three things bring the down of Sultans; biased judgment (in the settlement of disputes), dryhandedness (meanness) and indecision.

Alfonso Peter Castro & Kreg Ettenger, *Indigenous Knowledge and Conflict Management: Exploring Local Perspectives and Mechanisms for Dealing with Community Forestry Disputes*, in 1 COMPILATION OF DISCUSSION PAPERS FROM THE E-CONFERENCE ON ADDRESSING NATURAL RESOURCES CONFLICTS THROUGH COMMUNITY FORESTRY (1996), <http://www.fao.org/docrep/005/ac696e/ac696e09.htm>.

56. MICHAEL KING ET AL., NON-ADVERSARIAL JUSTICE 108 (2009).

57. ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 732 (4th ed. 2006).

58. U.N. APPROACH TO TRANSITIONAL JUSTICE, *supra* note 21, at 3.

Analytically, there is a general sense that transitional justice focuses more on criminal responsibility for government abuses from an often tyrannical regime,⁵⁹ than on civil disputes that may be considered less pressing in the aftermath of the devastation of human rights violations.

The one area where transitional justice may overlap with civil disputes in post-conflict environments is reparations. Reparations encompass a broad range of remedies including building memorials, providing health services, the return of property, and specifically the payment of monetary damages.⁶⁰

However, the emphasis is once again on the harm caused by the prior government, with little or no attention to civil disputes that have been allowed to fester for lack of a suitable forum. The area of reparations is much more likely to address mass claims administration needs to benefit a broad poverty-stricken indigenous population than the individual disputes of parties to a civil action.⁶¹

B. Limitations in Current Rule of Law Approach

At a conceptual level, the rule of law is an all-encompassing notion that societies should embrace justice under the law as an elemental “principle of governance.”⁶² Yet, this mandate is so broad that it risks losing track of the need for prompt fundamental mechanisms of dispute resolution. As such, there is a defined risk that it can result in unacceptable delays or abject neglect of many of the elemental disputes that may impede the reinstitution of civil society. In the extreme environment of post-conflict anarchy, there is the potential for “rough justice” or self-help remedies that aggravate or prolong the inequities of an already desperate society.

59. See Nicholas Rostow, *Transitional Justice for Syria*, NAT’L DEF. UNIV. STRATEGIC FORUM 1 (Sept. 2013), <http://ndupress.ndu.edu/Portals/68/Documents/stratforum/SF-282.pdf>.

60. INT’L CTR. TRANSITIONAL JUSTICE, TRANSITIONAL JUSTICE AND DISPLACEMENT: CHALLENGES AND RECOMMENDATIONS 9 (June 2012), <https://www.ictj.org/sites/default/files/ICTJ%20and%20Brookings-LSE%20Transitional%20Justice%20and%20Displacement%20Report.pdf>.

61. *Id.* at 3.

62. The United Nations uses the following definition as a “Common Language” for understanding the Rule of Law:

The “rule of law” is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

REPORT OF SECRETARY-GENERAL 2004, *supra* note 5, at 4.

The sheer magnitude of a Rule of Law project can be breathtaking, carrying the enormity of civil society reestablishment. Policing functions have to be reconstructed with careful attention to staffing, training, and equipping.⁶³ Typically, there are basic divisions to assist in elementary specialization and defined jurisdiction with examples such as local police, national police, border guards, and port of entry police.⁶⁴ Each institution has immediate infrastructure needs, including buildings, transportation, and communications equipment.⁶⁵ Finally, there are the attendant personnel administration functions, such as screening applicants for prior human rights abuses and payroll functions of salary based on shift scheduling.⁶⁶

Similarly, the judiciary has the same type of requirements for supporting infrastructure as other nascent institutions, but its need for highly skilled judges and clerical personnel can be especially difficult to rapidly reconstitute at the conclusion of hostilities.⁶⁷ Often, the judiciary that served

63. In evaluating policing functions the United Nations specifically considers factors such as: Effectiveness and efficiency; Public confidence; Integrity, transparency and accountability; Treatment of members of vulnerable groups; Material resources; Human resources; and Administrative and management capacity. UNITED NATIONS, RULE OF LAW INDICATORS: IMPLEMENTATION GUIDE AND PROJECT TOOLS 6-7 (1st ed. 2011), http://www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf [hereinafter RULE OF LAW INDICATORS].

64. For example, U.S. Forces in Iraq assisted with establishing a series of specialized security forces including National Police (later Federal Police), Iraqi Police Service, Traffic Police, River Police, Border Police, Oil Police, and Facilities Protection Services. See U.S. DEP'T OF DEF., MEASURING STABILITY AND SECURITY IN IRAQ: DECEMBER 2009 REPORT TO CONGRESS IN ACCORDANCE WITH THE SUPPLEMENTAL APPROPRIATIONS ACT 2008, at 43, http://www.defense.gov/Portals/1/Documents/pubs/Master_9204_29Jan10_FINAL_SIGNED.pdf (last modified Jan. 29, 2010).

65. Infrastructure problems were flagged to Congress during Iraq reconstruction efforts. *Id.* at 59 ("However, logistics, sustainment of ISF personnel, equipment distribution, infrastructure maintenance, and force generation continue to pose obstacles to long-term operational capability.").

66. The United Nations Security Sector Reform provides the following guidance on the issue of prior screening to exclude known human rights abusers from serving in newly formed security forces:

Human rights benchmarks and individual screening of past human rights records shall be established for all security sector personnel through vetting: those responsible for violations, including conflict-related sexual violence, are to be excluded from reconstructed security forces – including armed forces, police, intelligence services and national guard, as well as civilian oversight and control mechanisms. The 2006 UN Integrated DDR Standards (IDDRS) include modules on Women, Gender and DDR, and HIV and DDR. Former female combatants should also be vetted before they are transitioned to security services.

UNITED NATIONS SEC. SECTOR REFORM TASK FORCE, INTEGRATED TECHNICAL GUIDANCE NOTES 53 (2012), https://issuu.com/cprundprslac/docs/un_integrated_technical_guidance_no/1.

67. The difficulty of establishing competent rule of institutions is described as a period of years. See, e.g., KRISTI SAMUELS, RULE OF LAW REFORM IN POST-CONFLICT COUNTRIES:

the prior regime is considered corrupt and abusive, so prior judges and staff may be distrusted to serve in a newly reconstituted judiciary.⁶⁸ As a result, there can be a significant delay in screening, training, and installing new judges and their attendant support staff.⁶⁹

Prisons are typically the third key focal point for reestablishing the rule of law, and they are often uniquely vulnerable to abuse.⁷⁰ In post-conflict environments, anger, grief, and a need for retribution can reach a destructive crescendo with prisoners providing a dangerous convergence of vengeance and opportunity. Under these circumstances, it is more than reasonable to provide a critical level of effort to rebuild, train, and staff a nation's prison system. However, this endeavor becomes a voracious competitor for precious resources within the broader Rule of Law effort.

C. *Extended Rule of Law Timelines*

Due to the enormity of the task, Rule of Law initiatives can often bog down, being perceived as slow, plodding, and often ill-suited to the full spectrum of conflict resolution.⁷¹ Afghanistan provides key insight as a case

OPERATIONAL INITIATIVES AND LESSONS LEARNT, 37 WORLD BANK SOC. DEV. PAPERS SERIES 18 n.34 (Oct. 2006), http://siteresources.worldbank.org/INTCPR/Resources/WP37_web.pdf.

68. In considering the effect of corruption on the judiciary, Professor Susan Rose-Ackerman makes the following recommendation: "Review the training and integrity of law enforcement officers, military personnel, judges, and prosecutors. This may involve mass firings followed by universal training opportunities (with testing) before people are hired or rehired. International aid can help integrate former rank-and-file combatants with financial aid and training." Susan Rose-Ackerman, *Corruption and Post-Conflict Peace-Building*, 34 OHIO N.U. REV. 405, 445 (2008).

69. The United Nations uses a very similar set of criteria in evaluating rule of law progress in establishing a judicial system: Public confidence; Access to justice; Effectiveness and efficiency; Integrity and independence; Transparency and accountability; Treatment of members of vulnerable; Material resources; Human resources; and [that] Courts and prosecution services have competent leadership. RULE OF LAW INDICATORS, *supra* note 63, at 7-8.

70. Prisons get a few different key areas of scrutiny in no small part because of their inherent potential for abuse. *See id.* at 8-9. The United Nations lists the following areas of inquiry: Security, safety and order; Prisoner health, welfare and rehabilitation; Integrity; Transparency and accountability; Treatment of members of vulnerable groups; Material resources; Human resources; and Administrative and management. *Id.*

71. *See generally* REPORT OF SECRETARY-GENERAL 2004, *supra* note 5. The United Nations, through its rule of law efforts, has substantial experience with the size and scope of the problems facing post-conflict states. *Id.* at 1-2. To this end, it is important to note the language used to describe such challenges, like "daunting" and "overwhelming":

And yet, helping war-torn societies re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming, task. It requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights and, more generally, a lack of peace and security. Over the years, the United Nations has

study in considering an extended timeline for meaningful implementation. As noted by the State Department, the broader Rule of Law mission is so extensive because “[t]he capacity of the Afghan justice sector is so low that most observers, including government of Afghanistan officials, talk about ROL development as being a ‘generational’ program, at best.”⁷²

In Iraq, the Office of the Special Inspector General for Iraq Reconstruction also reached the same “generational” conclusion in analyzing the timeline for establishing a judicial system that meets international standards.⁷³ The U.S. Government effort in Iraq for the period 2003-2012 included a multi-agency task force with the State Department’s Bureau of International Narcotics and Law Enforcement Affairs designated as the lead entity.⁷⁴ During those nine years, the United States “funded four programmatic areas at a total cost of about \$197.9 million: judicial outreach, judicial development, judicial security, and court administration.”⁷⁵

Unfortunately, even as of 2012, the Bureau of International Narcotics and Law Enforcement Affairs determined that the programmatic areas listed above were not complete and therefore could not provide end of mission reports to assist in the evaluation.⁷⁶ In the end, the report concluded that, “deep, lasting institutional reform is a generational undertaking, requiring a sustained commitment and a long-term perspective to bring about permanent change.”⁷⁷

Moreover, without donor nation support, attempts at rebuilding civil society can suffer and quickly lose momentum based on the limited resources from the indigenous population.⁷⁸ Festering insurgencies may

accumulated significant expertise in addressing each of these key deficits. Departments, agencies, programmes and funds and specialists across the system have been deployed to numerous transitional, wartorn and post-conflict countries to assist in the complex but vital work of rule of law reform and development.

Id. at 3.

72. U.S. DEP’T OF STATE, REPORT OF INSPECTION RULE-OF-LAW PROGRAMS IN AFGHANISTAN 14 (2008), <https://oig.state.gov/system/files/106946.pdf>.

73. OFFICE OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, SUSTAINING THE PROGRESS ACHIEVED BY U.S. RULE OF LAW PROGRAMS IN IRAQ REMAINS QUESTIONABLE 20 (2012).

74. *Id.* at 1-2.

75. *Id.* at 13.

76. *Id.* at 19.

77. *Id.* at 20.

78. Although the cited information that follows reflects the status of Afghanistan Rule of Law efforts in 2004, it is uniquely instructive on the issues confronting any organization involved in the implementation of Rule of Law initiatives. See U.S. INST. OF PEACE, SPECIAL REPORT ESTABLISHING THE RULE OF LAW IN AFGHANISTAN (2004), <http://www.usip.org/sites/default/files/file/sr117.pdf>. According to United States Institute Of Peace:

target new judges, specifically for the chilling effect of intimidation.⁷⁹ Unfortunately, attempts to hurry the process may be understood as “outside powers” imposing their will on a fragile society, risking little, if any, buy-in from unstable populations.

V. COALITION FORCE CAPACITY TO PROVIDE TRAINED FACILITATORS AND CRITICAL MANPOWER SUPPORT

The great paradox of post-conflict environments is that just at the point where civil society fully breaks down, devolving into anarchy, is exactly when professionals of all disciplines are needed most to restore the basic activities of daily living. As a result, Rule of Law initiatives often find their greatest initial hurdle to be foundational elements of personal safety and overall security.

Stated another way, if the threat environment is too dangerous, then it may be nearly impossible to establish a fledgling judicial system to address the critical legal needs of a demoralized and exploited populace. At this critical juncture, there is no reasonable expectation that attorneys or specialists from outside agencies such as the State Department, United States Agency for International Development (USAID), various non-governmental organizations, and civilian coalition partners could be deployed into an extremely high threat environment.

A. Active Component JAG Officers

Ordinarily, the Active component would be expected to be manned, trained, and equipped for such a high threat environment.⁸⁰ Unfortunately,

In 2003, the U.S. spent about \$13 million on rule of law activities other than police, including support for the Judicial Reform, Constitutional, and Independent Human Rights Commissions. (As insufficient as these amounts are relative to the needs of the Afghan justice sector, they make the U.S. the second largest donor to the sector.) Money aside, relatively little political attention is being paid to the justice sector; the field has been left largely to “lead nation” Italy, which is widely seen as focused mainly on implementation of its own projects, rather than coordination of broader efforts. As a consequence, and despite the presence of some Afghan officials who are committed to reform, since the fall of the Taliban little progress has been made toward building a functioning justice system.

Id. at 5.

79. Commenting on the deaths of Iraqi judges the SIGIR Report notes that, “[s]ince 2003, at least 48 judges have been murdered, and the Justice official estimated that they have been able to provide security for only about 60 percent of the judges and their families.” SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, *supra* note 73, at 18.

80. The Judge Advocate General’s Corps plays a critical role in the administration of military discipline. See *Mission Statement of the Military Justice Section*, JOINT FORCE HEADQUARTERS NATIONAL CAPITAL REGION, U.S. ARMY MILITARY DISTRICT OF WASHINGTON, OFFICE OF THE STAFF JUDGE ADVOCATE, http://www.mdwhome.mdw.army.mil/sja_nav/military-justice (last visited

based on the usual career patterns (and youth) of the Judge Advocate General's Corps (JAG Corps), the Active component JAG officer typically does not have significant professional experience in civil Alternative Dispute Resolution.⁸¹ Similarly, the Naval Justice School, which provides the Basic Lawyer Course for Navy, Marine Corps, and Coast Guard Judge Advocates, not surprisingly, does not include training in arbitration or mediation in its ten-week curriculum.⁸²

Further, personalities that have excelled in the sharply defined strictures of military law may be a poor fit for disputes that require extraordinary patience to build even a modicum of consensus. However, as with any generality, there are notable exceptions, and to the extent there are Active

Feb. 28, 2016). The Joint Force Headquarters National Capital Region U.S. Army Military District of Washington Office of the Staff Judge Advocate provides the following Mission Statement:

The typical actions the Military Justice Section handles include:

- Prosecuting violations of the Uniform Code of Military Justice in Special and General Courts-Martial
- Assisting law enforcement during the criminal investigative process
- Preparing and assisting in the adjudication of Non-Judicial Punishment
- Drafting of Letters of Reprimand
- Advising, preparing, and representing the United States in Administrative Separation Boards
- Acting as a liaison between Commanders and civilian prosecutors
- The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

Id.

81. However, the United States Army does specifically mention the opportunity to employ Alternative Dispute Resolution techniques in the *Recognized Alternatives to the Formal Court System* section of its Rule of Law handbook. CTR. FOR LAW AND MIL. OPERATIONS, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 105 (2011), https://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2011.pdf (“[Judge Advocates] should be aware of and consider the use of less traditional legal dispute resolution mechanisms.”).

82. The Naval Justice School provides the following overview of its emphasis on the fundamentals of military justice and operational law:

Basic Lawyer Course: The 10-week course trains Navy, Marine Corps and Coast Guard judge advocates in the fundamentals of military justice and relevant civil law, with particular attention to administrative law, investigations, legal assistance and military justice. Furthermore, NJS emphasizes trial advocacy skills required for new military attorneys to serve as counsel at courts-martial. Navy and Marine Corps judge advocates also receive training on basic operational law in conjunction with the Basic Lawyer Course curriculum. Graduates often return to NJS from the fleet for further training as staff judge advocates and for specialized schooling in trial advocacy, computer crimes, legal assistance, the law of military operations, and prosecuting and defending complex cases.

Naval Justice School Curriculum, U.S. NAVY JUDGE ADVOCATE GENERAL'S CORPS, http://www.jag.navy.mil/njs_curriculum.htm (last visited Feb. 28, 2016).

component JAG attorneys that would be especially well suited for post-conflict Alternative Dispute Resolution missions, they should be identified as a critical resource for expedited deployment when needed.

B. Reserve Component Attorneys with Alternative Dispute Resolution Specialization

In contrast to their Active component counterparts, Reserve component attorneys in civil practice are highly likely to have Alternative Dispute Resolution expertise as a necessary part of their practice. Depending on the state, many jurisdictions require some form of non-binding Alternative Dispute Resolution as part of their case management systems in an effort to decrease court caseloads.⁸³ These approaches vary widely by jurisdiction, but typically include mandatory settlement conferences, non-binding arbitration, and mediation.

This unique blend of full combat functionality, coupled with Alternative Dispute Resolution skill, knowledge, training, and expertise makes the use of Reserve attorneys in high threat environments the best bridging strategy in the combat zone. Their competency and currency are derived from their professional civilian careers and their continued, year-round periodic military training provide their combat abilities.

The Department of Defense could readily track both core Alternative Dispute Resolution competencies and currencies through its existing Civilian Employment Information Program (CEI) database, thereby providing a ready reference for manpower planners to meet contingency staffing requirements.⁸⁴

83. The local rules for the United States District Court, Central District of California are illustrative of typical rules requiring the parties to pursue resolution of the case through some form of Alternative Dispute Resolution. Note that in the Central District the obligation to attempt resolution through Alternative Dispute Resolution is mandatory. L.R. 16-15 Policy Re Settlement & ADR. It is the policy of the Court to encourage disposition of civil litigation by settlement when such is in the best interest of the parties. The Court favors any reasonable means to accomplish this goal. Nothing in this rule shall be construed to the contrary. The parties are urged first to discuss and to attempt to reach settlement among themselves without resort to these procedures. It is also the policy of the Court that unless an Alternative Dispute Resolution (ADR) Procedure is selected by the parties, the judge assigned to preside over the civil case (the trial judge) may participate in facilitating settlement. L.R. 16-15.1 Proceedings Mandatory. Unless exempted by the trial judge, the parties in each civil case shall participate in one of the ADR Procedures set forth in this rule or as otherwise approved by the trial judge. C.D. Cal. R. 16-15, 16-15.1 (based on the authority of Fed. R. Civ. P. 16).

84. Master Sergeant Bob Haskell, *Reserve Component Civilian Employment Information Program Begins*, U.S. DEP'T OF DEF. (Mar. 31, 2004), <http://archive.defense.gov/news/newsarticle.aspx?id=26978> ("The database is called the Civilian Employment Information Program, and it is the way for all Guard and Reserve members to comply with the law that requires them to inform DoD of who employs them and how they are employed

C. State Department Attorneys and Trained Negotiators

As the threat decreases and basic stability operations take hold, Rule of Law efforts should progress beyond a primary effort by uniformed combat capable personnel. At this point, coalition force leadership should shift the emphasis to a whole of government approach.

At its essence, rule of law is a governance issue, which would suggest that in the context of the United States, the State Department should take the lead at the earliest opportunity, based on improvements in security and gains in stabilization.

It should also be noted that this does not mean the environment needs to be absolutely devoid of any personal risk of physical danger, but rather, there should be sufficient security so that non-combatants can move and function with a fair expectation of their own personal safety. In fact, State Department personnel in both Iraq and Afghanistan have acquitted themselves very well, facing dangerous environments on a daily basis, as they worked to reestablish civil society.

In Afghanistan, the State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL) provides critical support for Rule of Law efforts "by helping the Afghan government to develop a formal justice sector with efficient, capable, and independent legal institutions, and by helping Afghan citizens to access justice mechanisms and understand their legal rights."⁸⁵

Ideally, the State Department would program Alternative Dispute Resolution initiatives at the outset of their broader long-term Rule of Law efforts to provide a "quick win" in initial civil society calming efforts. Although there is significant civilian Alternative Dispute Resolution expertise and capacity resident within the federal government,⁸⁶ this is an

when not performing their military duties."). See also 10 U.S.C. § 10204(a)(4) (2006) (requiring that the Secretary maintain current records of a Reservist's "[c]ivilian occupational skills").

85. *Rule of Law Programs in Afghanistan Fact Sheet*, STATE.GOV, <http://www.state.gov/j/inl/rls/fs/189320.htm> (last visited Dec. 2, 2013). However, it is important to make the distinction that the thrust of this effort is primarily criminal justice with an emphasis on major crimes, gender justice, and long-term legal education. *Id.* (sponsoring Afghan scholars to come to the United States to study for advanced law degrees).

86. The Interagency Alternative Dispute Resolution (ADR) Working Group consists of nearly 100 federal cabinet agencies, sub-agencies, and independent agencies within the United States government that defines itself as follows: "We are the central forum and resource for information about the federal government's use of ADR. We advance the use of ADR through: Coordination of multi-agency initiatives; Promotion of best practices and programs; Dissemination of policy and guidance." *Interagency Alternative Dispute Resolution (ADR) Working Group*, ADR.GOV, <http://www.adr.gov/index.html> (last visited Nov. 11, 2015).

area that would readily lend itself to outside contracting to provide trained personnel on a task organized, *ad hoc* basis to meet the specific requirements of the mission.

D. Allocating Sufficient Security Resources to Source Safe Movement and Operations Throughout the Battle Space

Although recent coalition efforts in Iraq and Afghanistan have included significant logistical planning for life support areas to sustain additional non-military personnel with showers, lavatories, dining facilities and sleeping quarters, secure transportation can be problematic.⁸⁷ Moreover, American experiences with contracted security like Blackwater USA have proven mixed at best.⁸⁸ The use of lethal force by private contractors can raise significant legal issues, provide an unnecessary source of friction with the local populace, and cause severe command and control concerns for coalition forces because contractors often operate outside of the established military chain of command.⁸⁹

In contrast, if military manpower planners are tasked with sourcing and providing military personnel to handle personal security detachment (PSD) missions, and the overall mission of providing movement to alternative dispute personnel is designed into the larger rebuilding governance effort, then this critical element will be properly supported. This would have the advantage that PSD ground movements in the battle space would be fully coordinated, and any aviation requirements, typically for tactical helicopter movements, would also be fully coordinated to make best use of all available assets. However, this level of support must be built-in from the start as part of the fundamental planning assumptions, with sourcing tracked into the various different planning documents and databases like the Global Force Management process.⁹⁰

E. Alternative Dispute Resolution in Action—Hypothetical Relief for Moldova and Transnistria

For purposes of this hypothetical, the reader is asked to assume that border tensions between Moldova and Transnistria have festered for years

87. Matt Apuzzo, *Ex-Blackwater Guards Given Long Terms for Killing Iraqis*, N.Y. TIMES (Apr. 13, 2015), <http://www.nytimes.com/2015/04/14/us/ex-blackwater-guards-sentenced-to-prison-in-2007-killings-of-iraqi-civilians.html>.

88. *Id.*

89. Jennifer K. Elsea, *Private Security Contractors in Iraq and Afghanistan: Legal Issues*, CONG. RESEARCH SERV. (Jan. 7, 2010), <http://www.fas.org/sgp/crs/natsec/R40991.pdf>.

90. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 5-0: JOINT OPERATION PLANNING, at H-1 (2011), http://www.dtic.mil/doctrine/new_pubs/jp5_0.pdf.

and, with a new “Russian Spring,” have boiled over into a devastatingly violent internal conflict. Inspired by events in Crimea and the Ukraine, a coalition of Cossacks, ethnic Russians in Moldova, Transnistrians, and unidentified outside fighters (likely supported with arms, training, and financing by Russia), have engaged in a ruthless insurgency that has brought Moldova to the verge of anarchy. At the heart of this conflict are claims of disputed territory lost during the War of Transnistria in 1990.

The damage has been extraordinary, and after the Russians cut off Moldova’s supply of petroleum, coal, and natural gas, even a mild winter was too much for almost a third of its three million inhabitants who fled the violence, food shortages, and lack of electricity.

Eventually, through a series of difficult capitulations, Moldova has lost almost half of its territory, but the conflict has settled down to the point that the United States and the European Union member states have started to fund Moldova’s reconstruction. Although there is some shockingly lethal violence from zealots on both sides that refuse to give up the fight, the former refugees have come streaming back, worried that if they do not re-stake their property claims squatters will take everything they own.

Vowing not to repeat the mistakes of the prior administration in the Ukraine in 2014, the new President has rapidly moved U.S. troops into Moldova in a robust “partnering” effort. The President is confident that the Europeans will eventually commit both troops and funding, but there have been a series of delays in negotiations that have hindered the European response.

The American Task Force Commander (based on the advice of his senior staff JAG officer) has ordered a two-pronged approach to re-establish the Moldovan justice system. First, in conjunction with Rule of Law experts at the United Nations and the American Bar Association, there would be a primary effort to recreate the Moldovan Judiciary with an immediate focus on the investigation and prosecution of crimes committed during the conflict. Given the enormity of the task, he was advised that this effort might take several years to make foundational progress and would not meet international standards for another 15-20 years.

Second, the Commander directed a comprehensive Alternative Dispute Resolution effort to head off violence over internal civil disputes. Staff estimates for this second prong projected that many of the functions usually handled in civil courts could be fully functioning within ninety days and would provide immediate relief as a bridging strategy over the next 3-5 years.

At the outset, the deadly combination of Russian trained snipers and improvised explosive devices proved to be a stubbornly lethal combination.

At that point in time, the Force Protection Officer recommended that personnel movements be restricted to uniformed military only. In response, the Task Force Commander deployed primarily reserve officers with extensive mediation and arbitration experience. Fortunately, they were very successful in mediating property disputes between squatters and rightful owners. As a relief valve, the Moldovan government agreed to provide land grants to squatters if they promptly re-settled.

Thereafter, as security improved, the sheer volume of construction contracts caused contracting disputes between the various contractors, suppliers, and subcontractors. Infrastructure projects like power plants, highways, and schools dominated the initial reconstruction efforts. Importantly, the Moldovans who are typically suspicious of outsiders, showed a clear preference for Swiss arbitrators. As a result, the Task Force Commander established a secure enclave for the Swiss (nicknamed Little Geneva), where the parties traveled to have their disputes resolved. Thankfully, there was a true sense of urgency by all parties, because many massive reconstruction projects had come to a grinding halt as these construction disputes cropped up.

Finally, after two years, a significant number of Moldovan attorneys have been cross-trained in Alternative Dispute Resolution and have stepped in to handle all but the most complex arbitrations. When large sums of money are involved, the Moldovans still look to the Swiss, with many Moldovan corporations continuing to use arbitration in lieu of the newly established Moldovan civil courts. Throughout the development process, the Task Force Commander was complimented for defusing violence caused by civil disputes, the speed of dispute resolution, and the deep sense of fairness in the result experienced by a society that had become cynical from protracted corruption.

VI. SPECTRUM OF TRANSITION SCENARIOS—MATCHING RESOURCES IN A GIVEN THREAT ENVIRONMENT

When viewed as a spectrum, the assignment of trained personnel to assist in developing an Alternative Dispute Resolution program has an inverse relationship with the threat environment. In the extreme, when existence is defined solely by combat, there is little need for civil dispute resolution because life has sunk to the most basic elements of survival.⁹¹ At

91. The International Committee of the Red Cross often plays a unique role in aiding civilian populations during times of war and unfortunately bears witness to some of the horrors. The excerpt below provides dramatic insight into the devastating effects of war on civilian populations especially women and children:

Women increasingly bear the brunt of conflicts in which they rarely play a part. Like other civilians caught up in the maelstrom of war, they face shelling, famine, epidemics,

the other extreme, there is sufficient security and stability that issues beyond ordinary street crime are no longer controlling factors for program development. The artful part of reestablishing civil society comes from successfully adapting to the threats and circumstances between the extremes.

A. Hot Conflict (still too dangerous for anyone but uniformed personnel)

In insurgent environments like Iraq and Afghanistan, the threat may remain extremely high even after a technical cessation of hostilities. Under these circumstances, the use of Alternative Dispute Resolution qualified attorneys and specialists from the Reserve component would provide technical expertise with full combat functionality. As a forcing function, moving quickly to reestablish these foundations of civil society with immediate relief for pre-existing disputes would hasten the sense of a return to normalcy, obviate the need for self-help justice, and begin to establish confidence in follow-on governance.

B. Transitional Threat Environment (safe enclave, but defined by ungoverned battle space and perilous movement)

At the outset in a transitional threat environment, civilian Alternative Dispute Resolution is best accommodated by fixed-base operations. This approach enables a rapid hand-off from purely military facilitators, but does not expose non-combatants to an unnecessary risk of harm. As key government centers are reestablished, planners should consider the possibility of locating landing zones nearby to allow movement by tactical aircraft. Air movement capitalizes on an opportunity to bypass local ground threats by shuttling key personnel between and among safe enclaves.

However, working from built-up enclaves should be seen as a transitional approach because it comes with real limitations in accessibility to the local populace. By its very nature, dispute resolution is a people

forced displacement, detention, torture and execution. But women are also subjected to additional suffering[,] which they endure with courage and dignity. In many cases, when a conflict breaks out women find themselves the sole breadwinner and pillar of the family, taking care not only of their children but also of elderly parents. They repeatedly risk their lives while searching for water and food or collecting wood in areas infested with mines or under constant shelling. Family unity often depends on these women who greatly contribute to human and social survival.

Civilians in War, ICRC.ORG (Jan. 10, 1995), <https://www.icrc.org/eng/resources/documents/misc/57jmkz.htm>.

business and must be co-located as a matter of convenience with major populations in order to be readily accessible.

C. Steady State Permissive Environment: Safe Enclaves, and Diminished Threat Allowing Ready Movement with Minimal Additional Security Required

Once a steady state permissive environment is achieved, to the greatest extent possible, the original military effort should rapidly shift to a whole of government approach.⁹² This creates a greater sense of calm and stability, as well as reduces any unspoken intimidation that is inherent in the presence of armed combatants in uniform.

As security and stability increase, this drawdown of coalition forces should eventually result in a purely civilian Alternative Dispute Resolution effort with little, if any, support required from the military. At this point, the final transition should be from international facilitators to an entirely indigenous endeavor.

Importantly, all of the gains that have been achieved in implementing and utilizing Alternative Dispute Resolution techniques should be institutionalized, so that they are not lost in the final phase of transition.

92. The Obama Administration reportedly issued Presidential Policy Directive Number 23 on Security Sector Assistance, which sets out rule of law and support for justice sector institutions as enumerated goals. Specifically, the Fact Sheet which was released to the public states:

The principal goals of our security sector assistance are to:

1. Help partner nations build sustainable capacity to address common security challenges, specifically to: disrupt and defeat transnational threats; sustain legitimate and effective public safety, security, and justice sector institutions; support legitimate self-defense; contribute to U.S. or partner military operations which may have urgent requirements; maintain control of their territory and jurisdiction waters including air, land, and sea borders; and help indigenous forces assume greater responsibility for operations where U.S. military forces are present.
2. Promote partner support for U.S. interests, through cooperation on national, regional, and global priorities, including, but not limited to, such areas as: military access to airspace and basing rights; improved interoperability and training opportunities; and cooperation on law enforcement, counterterrorism, counternarcotics, combating organized crime and arms trafficking, countering Weapons of Mass Destruction proliferation, and terrorism, intelligence, peacekeeping, and humanitarian efforts.
3. Promote universal values, such as good governance, transparent and accountable oversight of security forces, rule of law, transparency, accountability, delivery of fair and effective justice, and respect for human rights.
4. Strengthen collective security and multinational defense arrangements and organizations, including by helping to build the capacity of troop- and police-contributing nations to United Nations and other multilateral peacekeeping missions, as well as through regional exercises, expert exchanges, and coordination of regional intelligence and law enforcement information exchanges.

Fact Sheet: U.S. Security Sector Assistance Policy, OFFICE OF THE PRESS SEC'Y, WHITE HOUSE (Apr. 5, 2013), <https://fas.org/irp/offdocs/ppd/ssa.pdf>.

There is a strong tendency to try to restore judicial systems to their prior state at the conclusion of hostilities because it is the “way it has always been done.” This approach squanders the hard-won knowledge and skills of new mediators and arbitrators, wasting the opportunity for genuine, permanent improvement as part of the judicial reset.

VII. OPTIMIZING TECHNIQUES TO DISPUTES AND TRANSITION CHALLENGES

In analyzing the use of specific Alternative Dispute Resolution techniques, and their relative advantages in key situations, it is important to understand that high threat environments favor simplicity. Complexity adds personnel, creates additional logistical requirements, and increases movement security difficulties. As a result, it is this unique blend of sufficient problem solving capacity, coupled with a light footprint, which makes Alternative Dispute Resolution an especially valuable tool in post-conflict environments.

That said, even within the realm of Alternative Dispute Resolution, there are clear differences between methods that make one technique more suitable than others for a given threat condition. Typically, the spectrum of support required in terms of personnel, facilities and transportation runs from negotiation to mediation, and then to arbitration.

Obviously, these are broad generalizations, but negotiation can be conducted in very austere conditions, and may be supported with as little as one facilitator.⁹³ In contrast, ideally mediation favors a facility with the capacity for a joint session and caucus rooms, and requires a trained mediator to get the most out of the process.⁹⁴ Here, the need for a facility should not be constrained any further than the creative field expedients of tents, separate vehicles, or a series of clearings in the woods. Nevertheless, mediation is still a more involved process than elemental negotiations, with slightly greater overhead.

93. UNITED NATIONS, GUIDANCE NOTE OF THE SECRETARY-GENERAL ON DEMOCRACY 5 (2009), http://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/file_attach/UNSG%20Guidance%20Note%20on%20Democracy-EN.pdf. Political facilitation can take many forms, including mediation and negotiation, convening forums for policy discussion, supporting inclusive processes and national dialogue based on democratic values and principles. This can help lower tensions and stabilize political discourse, thereby easing the way to democratic transition and consolidation. The UN, with its ability to provide support in an impartial manner, is particularly well placed to play this role. *Id.*

94. *See generally* DEP'T OF THE AIR FORCE, OFFICE OF THE GEN. COUNSEL, AIR FORCE MEDIATION COMPENDIUM: HOW TO MEDIATE CIVILIAN PERSONNEL WORKPLACE DISPUTES (3d ed. Sep. 2004), <http://www.au.af.mil/au/awc/awcgate/adr/af-mediation-compendium2004.pdf>.

At the other end of the spectrum is arbitration. Arbitration is best served with a significantly more stable environment and should properly be sourced with counsel for all parties and one or more trained arbitrators. Arbitration may involve written motions, formal rules of evidence, and is greatly facilitated with some support staff.⁹⁵ Although none of these issues represent a hard and fast rule, it is fair to surmise that of the three dispute resolution techniques mentioned, arbitration requires the greatest support. The following optimization matrix at Table 1 provides a compact guide as a starting point for considering which dispute resolution method may work best in a particular threat environment.

ADR Technique	High Threat	Medium Threat	Low Threat	Movement Requirement	Dispute Complexity
Negotiation	Requires secure enclave; Small movement footprint	Requires local security	Highly flexible	Low	Low
Mediation	Requires secure enclave; Medium movement footprint (including counsel)	Requires local security	Highly flexible	Moderate	Medium
Arbitration	Very difficult due to staffing and movement requirements	Possible, but best with some facility support and secure enclave	Best option for a streamlined, formal forum, trying complex issues	High	High
Traditional Court	Impracticable and slow to establish	Impracticable and slow to establish	Possible, but slow to establish and likely focused on major crimes only	Extremely High	High

Table 1. Alternative Dispute Resolution Threat Optimization Matrix

Assumption: Initially, local tensions are too extreme to accommodate resolution by an indigenous tribunal. Note: Alternative Dispute Resolution techniques remain useful across the entire threat spectrum.

VIII. CONCLUSION

Undoubtedly, there are clear gains for coalition forces if they plan and implement a bridging strategy utilizing Alternative Dispute Resolution

95. See generally JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES (Jul. 1, 2014), http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf.

as a transitional path to speed the reestablishment of the institutions of civil justice.

More specifically, by embracing a new paradigm for conflict resolution in societies facing anarchy in the immediate aftermath of kinetic hostilities, the speed and success of governance initiatives will be dramatically increased. Currently, coalition forces (often the U.S. and other partners) have well-developed Rule of Law initiatives, but these efforts require a protracted period of time to construct, can be extremely difficult to adequately staff, and often slow the progress of reestablishing civil society in post-kinetic environments.

From a military point of view, the Rule of Law initiatives must be directed at criminal law in order to create a sense of security within the local populace. However, when there is a substantial insurgency, and security efforts may take a period of years, every other aspect of the activities of daily living must also be simultaneously addressed to speed recovery efforts during the rebuilding phase. Too often, these other aspects of civil society are considered a low priority, and as a result, are neglected, hindering broader efforts in reestablishing the rule of law. Further, military planners should write Alternative Dispute Resolution scenarios into tabletop and field exercises, so that combatant commanders and their staffs reflexively integrate these techniques into their post-conflict operations.

Importantly, Alternative Dispute Resolution efforts should be programmed to run concurrently with an overarching Rule of Law initiative, as opposed to supplanting it. This line of reasoning recognizes the benefits of reestablishing a fully functioning judiciary as a stabilizing societal factor, while harmonizing the expediency and efficiency of Alternative Dispute Resolution to fill the void as an interim solution.

Depending on the type of dispute resolution techniques, the cultural acceptance, and the skill of implementation, there is a strong potential to dramatically increase the speed of stabilization by resolving differences before they lead to additional strife in an already chaotic environment. It is this combination of simplicity, efficiency, and light footprint that makes Alternative Dispute Resolution a potentially powerful tool in post-kinetic environments.

