

NOTES

The Trouble We Have with the Iraqis Is US*: A Proposal for Alternative Dispute Resolution in the New Iraq

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On May 1, 2003, President Bush announced that major combat operations in Iraq had ended.¹ To the casual observer, the events in Iraq since that time suggest otherwise. There are daily reports of firefights, bombings, and killings. From May 1, 2003 to September 1, 2004, there were 838 American fatalities.² Even the recent June 28, 2004, transfer of sovereign

* Adapted from EDWARD T. HALL, *BEYOND CULTURE* 211 (1976): "Individuals who are willing to let others be themselves without paying a dreadful price for it are very rare indeed. There has been some progress here and there, yet one seldom hears the remark: 'The trouble I have with him is me.'"

** B.S., United States Military Academy, 1998; J.D. Candidate, The Ohio State University Moritz College of Law, 2005. I would like to thank Professors Ellen E. Deason and Mary Ellen O'Connell for their comments and suggestions on my work. Most importantly, I must thank my beautiful wife Laura for patiently tolerating the large amount of time I put into this Note. As a final comment, the situation in Iraq changes every day and every effort has been made to keep pace with current events. Indeed, from the commencement of this Note in November 2003 until publication in March 2005, the changes in Iraq are staggering. Due to publication and editorial constraints, neither the recent battles in Fallujah and Najaf, nor the January 2005 elections were discussed, but these events will certainly provide valuable insight into how culture affects dispute resolution in Iraq. I hope that these recent events will help provide more practical insight on how Americans can better resolve conflict with the Iraqis, so that ultimately, a peaceful democracy exists in Iraq.

¹ David E. Sanger, *Bush Declares 'One Victory in a War on Terror'*, N.Y. TIMES, May 2, 2003, at A1. Bush flew to the aircraft carrier U.S.S. Abraham Lincoln and announced to returning sailors from the Persian Gulf that "major combat operations in Iraq have ended," and that "in the battle of Iraq, the United States and our allies have prevailed." *Id.*

² This casualty total is current as of September 1, 2004. See Operation Iraqi Freedom (OIF) U.S. Casualty Status, at <http://www.dod.mil/news/Sep2004/d20040901cas.pdf> (last visited Sept. 17, 2004); see also Iraq Coalition Casualty Count, at <http://icasualties.org/oif/> (last visited Sept. 17, 2004); Special Report: War in Iraq: Forces: U.S. & Coalition/Casualties, at <http://www.cnn.com/SPECIALS/2003/iraq/forces/casualties/index.html> (last visited Sept. 17, 2004). There are a number of statistics available on American casualties in Operation Enduring Freedom and this number (838) reflects the total number of American fatalities.

power to the Iraqi Interim Government did not quell the bloodshed.³ Against this background of violence and apparent unrest, reconstruction efforts in Iraq receive little media coverage.⁴ Media reports from Iraq tend to have a “police blotter” mindset, often ignoring positive reports of reconstruction and democratic progress in Iraq, and contributing to the perception that Iraq is a lawless society.⁵

Those who study and practice law might question the status of the justice and legal systems in Iraq. Those who have spent time in the Middle East or anticipate journeying there as part of an American or international operation might want to know more about the intricacies of the government and legal system. In a country that is divided among various ethnic and religious groups, how are everyday conflicts resolved between the local population and the American-led Multi-National Force (MNF)?

This Note discusses the need for mediation as an alternative dispute resolution (ADR) mechanism in Iraq, the role that dispute resolution plays in Islamic society, and how persons from a non-Islamic background should approach mediation in predominately Islamic Iraq. This Note discusses why mediation is the most suitable method for ADR in Iraq, and proposes traditional Muslim *sulh* as a means for resolving disputes between Iraqis and non-Iraqis.⁶ This Note focuses on Iraq, but it is also applicable to

Operation Iraqi Freedom (OIF) U.S. Casualty Status, *supra*. Six hundred twenty-one (621) of these fatalities are from hostile fire, 217 are non-hostile fire casualties. *Id.*

³ From June 29, 2004 to July 30, 2004, there were 58 Americans killed in action in Iraq. Iraq Coalition Casualty Count, *supra* note 2; See Somini Sengupta, *Violence Surges in Baghdad and Sunni Area to the West*, N.Y. TIMES, July 23, 2004, at A8.

⁴ See Christopher Marquis, *U.S. Plans to Offer Official Coverage of Iraq Directly to Viewers*, N.Y. TIMES, Dec. 17, 2003, at A26 (discussing a Pentagon plan to make briefings from Iraq directly available to networks, cable stations, and government agencies in order to help inform the American public about the progress in Iraq).

⁵ See Jeff Johnson, *Democrats Say Establishment Media's Iraq Reporting Biased*, CNSNews.Com, Sept. 24, 2003, at <http://www.cnsnews.com/ViewPentagon.asp?Page=\\Pentagon\\archive\\200309\\PEN20030924a.html> (last visited Sept. 17, 2004); Hans Nichols, *Press Slants Iraq News*, THE HILL, Sept. 23, 2003, available at <http://www.hillnews.com/news/092303/press.aspx> (last visited Sept. 17, 2004); see also Bob Sherwood, *Legal Reconstruction: Investors Want Reassurance Over Iraq's Framework of Commercial Law*, FIN. TIMES (London), Nov. 3, 2003, at Law & Business 14, available at LEXIS, News Library, Fintme File.

⁶ See *infra* Part II.A for a discussion about *sulh*. For the sake of simplicity, from this point forward, this Note will incorporate all references to non-Iraqis (all foreign military, governmental workers, and non-governmental workers) into the term “Americans.” The author recognizes that there are numerous foreigners in Iraq, and that this Note may not apply to all non-Iraqi cultures.

Afghanistan and other predominantly Muslim countries where the United States (U.S.) military might operate.

Part I discusses the need for ADR in Iraq, and provides a summary of the government in Iraq, including a focus on the emerging Iraqi legal system. Iraq's existing legal system, coupled with new Western principles, will form a complex system based on Islamic law, Muslim culture, civil law, common law, and a new Iraqi constitution. Familiarity with this legal system clarifies the role ADR can play to help provide efficient outcomes in a traditional manner as Iraq revamps its legal system. Part II examines the role of dispute resolution in Islam, including some traditional forms of dispute resolution. Part III provides a theoretical discussion of American and Muslim cultural norms from individualist, low-context and collectivist, high-context perspectives, and how these cultural norms affect mediation. Part IV proposes the role that mediation should play in Iraq's future, and examines other cross-cultural mediations for lessons.

I. WHAT ROLE WILL ADR PLAY IN IRAQ?

A. *Need for ADR in Iraq*

In a complex and diverse country like Iraq, with a presence of thousands of foreign troops and, until recently, governed by an international organization, there are wide-ranging numbers and types of disputes, ranging from local disagreements to international policy differences. In southern Iraq, British military officers have found themselves mediating tribal feuds.⁷ U.S. soldiers have been stationed at gasoline stations to manage disputes resulting from fuel shortages.⁸ Military attorneys (Judge Advocate Generals or JAGs, for short) have handled many disputes, such as negotiating the return of

⁷ Alex Berenson, *British Mediate Hatfields and McCoys, Iraqi-Style*, N.Y. TIMES, Oct. 12, 2003, at A18. British soldiers had to intervene when rival tribes in Basra began killing one another. *Id.* The mediation methods the British used are similar to the methods proposed in this Note.

⁸ See Mitch Potter, *Delays Fuel Rage at Iraqi Pumps*, TORONTO STAR, Dec. 6, 2003, at A1; Carol J. Williams & Samir Zedan, *Drivers Become Gas Sellers as Lines Grow at Pumps in Iraq: A Sudden Shortage Spurs Black Marketeers to Action. They Can Charge 20 Times as Much for Quick Roadside Service*, L.A. TIMES, Dec. 9, 2003, at A3. Coalition soldiers have to keep Iraqis from getting out of hand at gasoline stations where the wait to use a pump is about six hours. *Id.* Drivers have become so outraged at the long waits that they have burned tires and started shouting at coalition soldiers. *Id.*

seized property and negotiating contracts.⁹ Sunni, Shi'ite, and Kurdish organizations are in dispute over the type of government that will be formed in Iraq, what role Islam will play in that government, and what kind of legal structures will guarantee citizens' rights.¹⁰ Iraqi lawyers, judges, citizens, and victims and relatives of victims of the Ba'ath Party's punishment and torture are in dispute as to how to handle the prosecution and punishment of Saddam Hussein and his followers.¹¹ The new Legal Department of the Ministry of Justice must resolve disputes on international claims against Iraq, which total \$326 billion.¹²

⁹ See Charles J. Dunlap, Jr., & Paula B. McCarron, *Negotiation in the Trenches: In War Zones, Military Attorneys Use Negotiation to Resolve a Wide Variety of Disputes*, 10 DISP. RESOL. MAG., Fall 2003, at 4–5. Air Force JAG officers at Baghdad International Airport had to negotiate with Iraqi business owner after soldiers seized one of his bulldozers. *Id.* The JAG officers also had to negotiate contracts for supplying construction supplies. *Id.*

¹⁰ Anne Barnard, *New Factions Struggle for a Say in Politics*, BOSTON GLOBE, Jan. 4, 2004, at A12; Bartle Breese Bull, *Will the Kurds go Home?*, N.Y. TIMES, June 9, 2004, at A23; Dexter Filkins, *Kurds Threaten to Walk Away From Iraqi State*, N.Y. TIMES, June 9, 2004, at A1; Steven R. Weisman, *Holding Iraq Together, By Tending to Its Parts*, N.Y. TIMES, May 30, 2004, at D5; Steven R. Weisman, *The Shape of a Future Iraq: U.S. Entangled in Disputes*, N.Y. TIMES, Jan. 9, 2004, at A10. The Kurds and Sunni minorities are seeking guarantees of representation in the new Iraqi government. *Id.* There is also a dispute over religion—the Shi'a majority wants Islam and Islamic law as the official religion and law of Iraq. *Id.*

¹¹ Evan Osnos, *Iraq's Bind: Revenge or Justice?: Tribunals Could Heal or Open Wounds*, CHI. TRIB., Dec. 22, 2003, at A1. After the transfer of sovereign power to Iraq on June 28, 2004, the new Iraqi government was quick to move forward with charging Saddam Hussein and his top aides with various crimes. See Ian Fisher & John F. Burns, *Court Hands Legal Custody of Saddam Hussein to Iraq*, N.Y. TIMES, July 1, 2004, at A10; John F. Burns, *Defiant Hussein Rebukes Iraqi Court for Trying Him*, N.Y. TIMES, July 2, 2004, at A1.

¹² Bloomberg News, *Iraq's \$326 Billion Debt, War Claims May Complicate Rebuilding* (May 8, 2003), available at <http://quote.bloomberg.com/apps/news?pid=nifea&&sid=ajN.4f0LBB08> (last visited Sept. 21, 2004). Among other nations, Iraq owes sovereign debt to Russia (\$9 billion), France (\$1.8 billion), Saudi Arabia (\$25 billion), and Germany (\$4.3 billion), as well as claims relating to the 1990 invasion of Kuwait (\$199 billion). *Id.* The United States has led efforts to reduce Iraq's foreign debt, and in December 2003, President Bush sent James A. Baker, III to numerous countries to negotiate debt reduction. See Elisabeth Bumiller, *Baker Briefs Bush on Trip on Reducing Iraq's Debt*, N.Y. TIMES, Dec. 20, 2003, at A8; Craig S. Smith, *France and Germany Join U.S. in Effort to Reduce Iraq's Debt*, N.Y. TIMES, Dec. 17, 2003, at A1; Steven R. Weisman, *Baker to Press Arab Lands to Forgive Huge Iraqi Debt*, N.Y. TIMES, Jan. 5, 2004, at A11. Despite the United States' diplomatic efforts, discussions with several of the nations, including France, continue.

These wide varieties of disputes demonstrate the need for both interim and permanent ADR methods in Iraq. Interim ADR is needed to help the Iraqis deal with coalition and international organizations and each other. ADR has proven useful thus far as the Iraqis develop their constitution, draft laws, and reform their judiciary.¹³ ADR can continue to serve as a useful mechanism to help resolve conflict, both during the formation of a “new” Iraq, and after the establishment of the permanent government.

Dispute resolution in Iraq is vital interpersonally, locally, nationally, internationally, and across ethnic, religious, and cultural backgrounds.¹⁴ Because Iraq is approximately 97% Muslim,¹⁵ an awareness of Islamic law and culture is important to understanding the important role dispute resolution traditionally plays in Iraq and the Middle East.¹⁶ Awareness of American ADR (the predominant country helping to rebuild Iraq) will help Americans develop approaches to bridge cultural and religious gaps.¹⁷ To first comprehend the effective role that ADR can fill in Iraq, it is necessary to have an understanding of the current state of the government and legal structures in Iraq.¹⁸

Richard W. Stevenson & David E. Sanger, *Bush Doesn't See NATO Sending in Troops for Iraq*, N.Y. TIMES, June 11, 2004, at A1; see, e.g., Detlev F. Vagts, *Sovereign Bankruptcy: In Re Germany (1953), in Re Iraq (2004)*, 98 AM. J. INT'L L. 302 (2004).

¹³ In February 2004, President Bush asked the United Nations to send a delegation to Iraq to help the various Iraqi factions reach an agreement on the transfer of power to Iraq. Steven R. Weisman, *Bush Presses U.N. to Mediate Iraqi Clash on Rule*, N.Y. TIMES, Feb. 4, 2004, at A1. The U.N. sent Lakhdar Brahimi to help the Iraqis and the Coalition Provisional Authority (CPA) develop a plan for the transition of power to Iraq. The task proved challenging for Mr. Brahimi, but the end goal—a sovereign Iraq—seems to validate the use of a third party to mediate conflict in Iraq. See Dexter Filkins, *A Worn Road for U.N. Aide*, N.Y. TIMES, May 31, 2004, at A1; Warren Hoge, *U.N.'s Envoy for Iraq Takes the Spotlight*, N.Y. TIMES, Apr. 27, 2004, at A12. But see William Safire, *Brahimi's Two Mistakes*, N.Y. TIMES, Apr. 26, 2004, at A19. See generally Dexter Filkins & Steven R. Weisman, *After a Flurry of Negotiations, a Leading Candidate Emerges for the Presidency of Iraq*, N.Y. TIMES, June 1, 2004, at A8.

¹⁴ There are substantial numbers and varieties of disputes in Iraq. ADR processes are imperative in Iraq for efficient settlement of claims between Iraqis, between Iraqis and coalition occupation forces, and between Iraq and the many nations it is indebted to, especially considering the transition and rebuilding process that Iraq is enduring.

¹⁵ See Central Intelligence Agency (CIA), *The World Factbook: Iraq*, available at <http://www.cia.gov/cia/publications/factbook/geos/iz.html> (last visited Feb. 27, 2005).

¹⁶ See discussion *infra* Part III.

¹⁷ See *id.*

¹⁸ The transitional nature of Iraq, especially the revitalization of the Iraqi courts, makes ADR an effective tool to resolve disputes. See discussion *infra* Part I.B.

B. Current State of the Legal System in Iraq

1. The United Nations and the Coalition Provisional Authority

As coalition forces advanced on Baghdad in April 2003, the U.S. announced plans for reconstruction in Iraq.¹⁹ Initially, the Office of Reconstruction and Humanitarian Assistance led reconstruction efforts.²⁰ In May 2003, responsibility for reconstruction shifted to an interim authority led by the U.S.²¹ On May 22, 2003, the United Nations (U.N.) reaffirmed its previous resolutions concerning Iraq and recognized the “specific authorities, responsibilities, and obligations under applicable international law of these states [the U.S.-led coalition] as occupying powers under unified command.”²² The Coalition Provisional Authority (CPA) governed Iraq until June 28, 2004.²³

¹⁹ See Office of the Press Secretary, *Dr. Condoleezza Rice Discusses Iraq Reconstruction* (Apr. 4, 2003), available at <http://www.whitehouse.gov/news/releases/2003/04/20030404-12.html> (last visited Feb. 27, 2005). Dr. Rice announced the role of the United States, coalition partners, and the United Nations in the reconstruction of Iraq. *Id.* She also explained the organization of the Office of Reconstruction and Humanitarian Assistance (ORHA), its mission, and its authority. *Id.*

²⁰ *Id.* Retired General Jay Garner initially led the ORHA. *Id.*

²¹ See Ambassador L. Paul Bremer, III, *Statement from Baghdad, Iraq* (May 15, 2003), available at <http://www.defenselink.mil/transcripts/2003/tr20030515-0186.html> (last visited Sept. 20, 2004). Ambassador Bremer assumed leadership of the CPA because of his diplomatic and counterterrorism credentials. James Dao, *At the Helm in Shattered Iraq: Lewis Paul Bremer III*, N.Y. TIMES, May 8, 2003, at A16. It is not entirely clear why Ambassador Bremer replaced General Garner in Iraq, but some believe General Garner’s invisibility to Iraqis, clashes with top military commanders in Iraq, and inability to gain control over the chaos in Iraq are to blame. See Patrick E. Tyler & Edmund L. Andrews, *U.S. Overhauls Administration to Govern Iraq*, N.Y. TIMES, May 12, 2003, at A1; see also Coalition Provisional Authority Regulation Number 1, Doc. CPA/REG/16 May 2003/01 (describing the role of the Coalitional Provisional Authority), at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf (last visited Sept. 20, 2004).

²² S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc S/RES/1483 (2003); Fredric L. Kirgis, *Security Council Resolution 1483 on the Rebuilding of Iraq*, ASIL Insights: The American Society of International Law (May 2003), available at <http://www.asil.org/insights/insigh107.htm> (last visited Sept. 21, 2004). International legal scholars understand the reference to “applicable international law” to refer to The Hague Regulations of 1907 and Geneva Conventions of 1949 that confers obligations on an occupying power and limits the changes the occupying power can make to a nation’s laws. See Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and*

Although the CPA was led by the U.S. and the United Kingdom (U.K.), some 63 different nations were part of the rebuilding effort.²⁴ On July 13, 2003, CPA Administrator, L. Paul Bremer, III, appointed the Iraqi Governing Council—an important step towards Iraqi self-government.²⁵ The U.N. welcomed the establishment of the Governing Council on August 14, 2003, and established the U.N. Assistance Mission for Iraq in order to carry out the duties and responsibilities of the U.N. as defined in U.N. Security Council Resolution 1483 and the July 15, 2003, report of the Secretary-General.²⁶

The U.N. Security Council passed Resolution 1511 on October 15, 2003, outlining the roles of the U.N., the CPA, and the Iraqi Governing Council, and calling for the Iraqi Governing Council to submit a timeline for drafting a constitution.²⁷ On November 15, 2003, the Iraqi Governing Council agreed to a timeline for restoring Iraqi self-government, creating a constitution, and

Relevant Responsibilities Under the Laws of War, ASIL Insights: The American Society of International Law (April 2003), available at <http://www.asil.org/insights/insigh102.htm> (last visited Sept. 20, 2004).

²³ The CPA was a temporary governing body designated by the United Nations as the lawful government of Iraq until Iraq was politically and socially stable enough to resume its self-government. Coalition Provisional Authority, *Overview*, at <http://www.cpa-iraq.org/bremerbio.html> (last visited Aug. 14, 2004); S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc. S/RES/1511 (2003).

²⁴ See Coalition Provisional Authority, *Countries Eligible to Compete for Contracts Funded with U.S. Appropriated Funds for Iraq Reconstruction*, at http://www.cpa-iraq.org/pressreleases/20031211_Coalition_Country_List.pdf (last visited Sept. 20, 2004).

²⁵ See Coalition Provisional Authority, *Iraqi Governing Council*, at http://www.cpa-iraq.org/government/governing_council.html (last visited Sept. 21, 2004); Coalition Provisional Authority Regulation Number 6, Doc. CPA/REG/13 July 2003/06, at http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf (last visited Sept. 21, 2004). See also Patrick E. Tyler, *Leadership; Iraqi Factions Agree on Members of Governing Council*, N.Y. TIMES, July 13, 2003, at A10.

²⁶ See S.C. Res. 1500, U.N. SCOR, 58th Sess., 4804th mtg., U.N. Doc. S/RES/1500 (2003); *Report of the Secretary-General Pursuant to Paragraph 24 of Security Council Resolution 1483*, U.N. Doc. S/2003/715 (2003), available at <http://www.un.org/Docs/sc/sgrep03.html> (last visited Sept. 20, 2004); Press Release, U.N. Security Council, Security Council Establishes U.N. Assistance Mission in Iraq, Welcomes Creation of Governing Council as 'Important Step' (Sept. 20, 2003), available at <http://www.un.org/News/Press/docs/2003/sc7843.doc.htm> (last visited Sept. 20, 2004).

²⁷ See S.C. Res. 1511, *supra* note 23; United Nations News Centre, *Security Council Outlines Roles in Bringing Peace, Stability to Iraq* (Oct. 16, 2003), available at <http://www.un.org/apps/news/storyAr.asp?NewsID=8579&Cr=iraq&Cr1=> (last visited Sept. 21, 2004). U.N. Security Council Resolution 1511 was a major step in clarifying and guaranteeing a U.N. role in the rebuilding of Iraq. *Id.*

holding national elections.²⁸ The Iraqi Governing Council signed the interim constitution on March 8, 2004.²⁹

A critical action came on June 8, 2004, when the U.N. Security Council approved Resolution 1546, a plan for the transfer of full sovereignty to Iraq, by a vote of 15–0.³⁰ On June 28, 2004, the CPA transferred full sovereignty to the interim Iraqi government.³¹ Transfer of sovereign power to Iraq marked the end of the American occupation of Iraq. Now, America's most important role in Iraq is to provide security and assist the Interim Government in electing the Transitional Government in January 2005 that will lead to a permanent democracy.

2. *The Iraqi Interim Government*

The Iraqi Interim Government's primary responsibility is to oversee Iraq's affairs, particularly preparing for national elections to be held by January 31, 2005.³² The Interim Government is led by a president, two deputy presidents, and a prime minister who leads the Council of Ministers.³³

²⁸ The proposed timeline called for the creation of a transitional administrative law by February 28, 2004, the election of delegates to a Iraqi Transitional National Assembly by May 31, 2004, the Iraqi Transitional National Assembly assuming full power by June 30, 2004 (to include the dissolution of the CPA and Iraqi Governing Council), the election of a constitutional convention by March 15, 2005, and national elections for a new Iraqi government by December 31, 2005 (coinciding with the dissolution of the Transitional National Assembly). See *The November 15 Agreement: Timeline to a Sovereign, Democratic and Secure Iraq*, at <http://www.cpa-iraq.org/government/AgreementNov15.pdf> (last visited Sept. 21, 2004).

²⁹ Dexter Filkins, *Iraq Council, With Reluctant Shiites, Signs Charter*, N.Y. TIMES, Mar. 9, 2004, at A1.

³⁰ Warren Hoge, *Security Council Backs Resolution on Iraq Turnover*, N.Y. TIMES, June 9, 2004, at A1. See S.C. Res. 1546, U.N. SCOR, 58th Sess., 4987th mtg., U.N. Doc. S/RES/1546 (2004). Resolution 1546 calls for elections for a national assembly to be held by January 31, 2005. *Id.* The assembly will then form a transitional government, which will draft a permanent constitution leading to direct elections for a permanent government by December 31, 2005. *Id.* Resolution 1546 is also significant in that it addresses the relationship between Iraq and the American-led MNF. *Id.*

³¹ Dexter Filkins, *U.S. Transfers Power to Iraq 2 Days Early*, N.Y. TIMES, June 29, 2004, at A1.

³² See *Iraqi Interim Government Announcement Ceremony Press Packet 2*, available at http://www.cpa-iraq.org/government/press_packet.pdf (last visited Sept. 21, 2004).

³³ *Id.* The President of the Iraqi Interim Government is Sheik Ghazi al-Yawwer, and the two Deputy Presidents are Dr. Ebrahim Jaafari al-Eshaiker and Dr. Rowsch Shaways. See Press Release, Coalition Provisional Authority, Listing of the Iraqi Interim Government, at

The Transitional Administrative Law (TAL) is the law that the Interim Government must follow.³⁴ The Interim Government also includes an Interim National Council and a Judicial Authority.³⁵ The Judicial Authority is independent of the executive branch of the Interim Government and includes a Federal Supreme Court, a Court of Cassation,³⁶ courts of appeal, and the Central Criminal Court of Iraq.³⁷ There is also a Higher Judicial Council that supervises the federal judiciary and administers its budget.³⁸

The appointment of an Interim Government and the eventual election of a Transitional Government are important steps in Iraq's legal system as Iraq's new body of constitutional and statutory law will emerge over the next few years from this process. While the government of Iraq is formed, the Ministry of Justice is also restructuring and is slowly gaining the ability to oversee litigation and prosecutions in Iraq.

3. *The Ministry of Justice*

Before the war in Iraq began, the Ministry of Justice oversaw three different court systems: civil courts, courts of personal status (governing Muslim marriage, family, and inheritance law), and criminal courts.³⁹ Iraq's

http://www.iraqcoalition.org/pressreleases/20040602_government_list.html (last visited Sept. 21, 2004) [hereinafter Listing]. The Prime Minister of the Iraqi Interim Government is Dr. Ayad Allawi. *Id.*

³⁴ See Listing, *supra* note 33, at 2. The TAL provides a bill of rights for the Iraqi people and a roadmap to the permanent Iraqi constitution. *Id.* The TAL Annex describes the powers of the Interim Government and contains laws that pertain specifically to the Interim Government, many of which are limiting. *Id.* at 4. See Coalition Provisional Authority, *Law of Administration for the State of Iraq for the Transitional Period*, at <http://www.cpa-iraq.org/government/TAL.html> (last visited Sept. 21, 2004); Coalition Provisional Authority, *Annex to the Law for the Administration of Iraq in Transitional Period*, at http://www.cpa-iraq.org/government/TAL_Annex.html (last visited Sept. 21, 2004).

³⁵ See Iraqi Interim Government Announcement Ceremony Press Packet 2, *supra* note 32, at 3.

³⁶ The Court of Cassation is the highest judicial body in Iraq. It sits in Baghdad and its jurisdiction covers all of Iraq. Sabah Al Mukhtar, *The Rule of Law in Iraq: Does it Exist?*, in *THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS* 76 (Eugene Cotran & Mai Yamani eds., 2000).

³⁷ See Iraqi Interim Government Announcement Ceremony Press Packet 2, *supra* note 32, at 4.

³⁸ *Id.*

³⁹ Marcia Coyle, *Toward an Iraqi Legal System: A U.S.-Sponsored Plan in the Works*, NAT'L L.J. (Apr. 25, 2003). Most sources tend to agree that the civil law and civil

Ministry of Justice was part of a “parallel” system of justice where some individual ministries had separate courts, rules, and laws for different factions of the government, such as revolutionary courts, Ba’ath Party courts, intelligence service courts, and military courts.⁴⁰ Ba’ath Party influence on the court system was significant, and the judiciary lacked independence.⁴¹ Perhaps the strongest image of the lack of an independent judiciary was a poster hanging outside the Ministry of Justice depicting Saddam Hussein holding the scales of justice.⁴² However, the Ministry of Justice was not as corrupt as other ministries or courts, because the Ministry of Justice focused on civil litigation, whereas Saddam Hussein repressed Iraqis through the other court systems mentioned above.⁴³

With Saddam Hussein and the Ba’ath Party out of power, the CPA moved quickly to establish an independent judicial system. The major efforts in reforming the Ministry of Justice and the Iraqi legal system include re-establishing the 1969 Iraqi Penal Code, but suspending inhumane and oppressive crimes;⁴⁴ instituting the Central Criminal Court of Iraq;⁴⁵

court system did not operate in contravention of international law or human rights, and that there is little need to overhaul the existing law. *Id.*

⁴⁰ See Eric Slater & Laura King, *Court Back in Session in Baghdad: U.S. Trumpets the Resumption of Legal Hearings Being Conducted by Iraqis*, L.A. TIMES, May 9, 2003, at A1. Most people would assume that the Ministry of Justice was a tool of oppression under Saddam Hussein. *Id.* Actually, Iraqis prosecuted for political crimes or “security offenses” were channeled into the parallel court systems. *Id.*

⁴¹ See Kelly Lucas, *Rebuilding in Iraq Turns to Judiciary*, 14 THE INDIANA LAWYER, Dec. 3–16, at 1. U.S. Army JAG officers found that cleaning Ba’ath party corruption from the court system was their toughest task. *Id.*; Peter Slevin, *U.S. Starts Remake of Iraqi Judicial System; Political Pressure, Graft Were Common During Hussein’s Rule*, WASH. POST, May 9, 2003, at A18 (providing an excellent overview of the corrupt and decrepit state of the Iraqi legal system at the end of the American liberation of Iraq); Alex Wade, *Don’t Cry for Me Just Yet—I May Be Here Some Time*, TIMES (London), May 27, 2003, at Law 5 (noting that one of Ambassador Bremer’s biggest initial tasks was to address the legal system, including the independence of judges).

⁴² *Saddam’s Image and Presence is Omnipresent in Iraq* (NPR radio broadcast, Feb. 5, 2003).

⁴³ See discussion *supra* note 40; Betsy Pisik, *Top Members of Saddam’s Regime Face Trial in Iraq: Chamber to Feature Native Judges*, WASH. TIMES, May 9, 2003, at A1.

⁴⁴ See Coalition Provisional Authority Order No. 7, Doc. CPA/ORD/9 June 2003/7 (affirming the 1969 Iraqi Penal Code with exceptions: capital punishment was suspended and torture and cruel and degrading treatment were prohibited), at http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf (last visited Sept. 21, 2004); Coalition Provisional Authority Order No. 31, CPA/ORD/10 Sep

founding the Judicial Review Committee;⁴⁶ launching the Legal Department of the Ministry of Justice;⁴⁷ and reconvening of the Council of Judges.⁴⁸ The Ministry of Justice also has oversight of notaries public, deeds and records, and the prison system.⁴⁹ The Ministry of Justice is a complex organization, but the history and formation of the Iraqi legal system is even more complex. A discussion of the traditional Iraqi legal system provides valuable insight to the current state of legal affairs in Iraq, what the future legal system might look like, and underscores the effective role ADR can play in resolving disputes in Iraq.

C. *The Iraqi Legal System*

1. *History*

The Iraqi legal system is a mixed system based on both Sunni and Shi'a schools of law, civil law, and common law.⁵⁰ This mixed system of law is

2003/31 (modifying various provisions of the penal code and criminal proceedings law), at http://www.iraqcoalition.org/regulations/20030921_CPAORD31.pdf (last visited Sept. 21, 2004); Lucas, *supra* note 41, at 1.

⁴⁵ See Coalition Provisional Authority Order No. 13 (Revised) (Amended), Doc. CPA/ORD/X 2004/13 (establishing the existence of and procedure for the Central Criminal Court of Iraq), at http://www.iraqcoalition.org/regulations/20040422_CPAORD_13_Revised_Amended.pdf (last visited Sept. 21, 2004).

⁴⁶ See Coalition Provisional Authority Order No. 15, Doc. CPA/ORD/23 June 2003/15 (establishing the Judicial Review Committee to "investigate and gather information on the suitability of [j]udges and [p]rosecutors to hold office"), at http://www.iraqcoalition.org/regulations/20030623_CPAORD_15_Establishment_of_the_Judicial_Review_Committee.pdf (last visited Sept. 21, 2004).

⁴⁷ See Coalition Provisional Authority Order No. 32, Doc. CPA/ORD/4 September 2003/32 (assigning responsibly "for management of international litigation, claims and arbitrations involving the Government of Iraq and its governmental agencies, instrumentalities and companies"), at http://www.iraqcoalition.org/regulations/20030909_CPAORD32.pdf (last visited Sept. 21, 2004).

⁴⁸ See Coalition Provisional Authority Order No. 35, Doc. CPA/ORD/13 SEP 2003/35 (re-establishing "the Council of Judges . . . which is charged with the supervision of the judicial and prosecutorial systems of Iraq"), at http://www.iraqcoalition.org/regulations/20030921_CPAORD35.pdf (last visited Aug. 14, 2004). The Council will function independently of the Ministry of Justice. *Id.*

⁴⁹ See Coalitional Provisional Authority Ministry of Justice Facts-in-Brief, at http://www.cpa-iraq.org/factsheets/MoJ_facts-in-brief.html (last visited Sept. 20, 2004).

⁵⁰ S.H. Amin, *The Legal System of Iraq*, in 5 MODERN LEGAL SYSTEMS CYCLOPEDIA 5.110.18 (Kenneth R. Redden ed., 1990) [hereinafter Amin, CYCLOPEDIA]. This source

unique for two reasons: Shi'a Muslims dominate Iraq, whereas Sunni Muslims dominate other Arab nations⁵¹ and there is a strong influence of both civil law (owing to Ottoman rule from the 1500s until the First World War) and common law (owing to the British Mandate from 1915 until 1932).⁵²

Iraq's history from 1915 until the present day has been instrumental in shaping Iraq's current legal system. From 1921 until the revolution of 1958, Iraq was a monarchy.⁵³ During this time, Ottoman influence dominated civil law and procedure, and British influence dominated penal codes and criminal procedure.⁵⁴ The Iraqi National Assembly enacted many laws during the monarchy that exist today, most notably the 1951 Civil Code.⁵⁵ The July 14 Revolution in 1958 ended the monarchy and established a republic in Iraq.⁵⁶ The period from 1958 until 1968 saw the enactment and amendment of various constitutions.⁵⁷ In July 1968, the Arab Ba'ath Socialist Party came to power through yet another revolution.⁵⁸ Legal reform that began with the 1968 revolution was based on subordinating the private rights of individual citizens to the socialistic priorities of the State.⁵⁹ Included in this "reform"

provides a compact overview of the Iraqi legal system as it existed in 1990. For an in-depth analysis of the Iraqi legal system, see S.H. AMIN, *LEGAL SYSTEM OF IRAQ* (1989). This text is over 600 pages in length, and covers all aspects of Iraqi law.

⁵¹ Amin, *CYCLOPEDIA*, *supra* note 50, at 5.110.18.

⁵² See *id.* at 5.110.13–14. For an excellent summary of Iraqi history, a brief discussion of the rule of law in Iraq, and an overview of the effects of the 1991 Persian Gulf War on Iraq, see Mukhtar, *supra* note 36, at 71–80.

⁵³ Mukhtar, *supra* note 36, at 73, 75; *World War I and the British Mandate, in* LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION, *IRAQ—A COUNTRY STUDY* (Helen Chapin Metz ed., 1988), available at <http://lcweb2.loc.gov/frd/cs/iqtoc.html> (last visited Sept. 20, 2004).

⁵⁴ See Amin, *CYCLOPEDIA*, *supra* note 50, at 5.110.15–16.

⁵⁵ *Id.* at 5.110.16. The 1951 Civil Code was apparently well written as evidenced by its survival through numerous changes in Iraq. See *id.*

⁵⁶ *Republican Iraq, in* LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION, *IRAQ—A COUNTRY STUDY* (Helen Chapin Metz ed., 1988), available at <http://lcweb2.loc.gov/frd/cs/iqtoc.html> (last visited Sept. 20, 2004). A disgruntled group of military officers led soldiers into Baghdad and proclaimed a republic and the end of the monarchy. *Id.* Many members of the royal family were executed. *Id.*; S.H. AMIN, *MIDDLE EAST LEGAL SYSTEMS* 166 (1985). Dr. Amin's work provides an extensive analysis of the Iraqi legal system (although it is dated 1985). Little in terms of the structure of the legal system is expected to change with the new Iraqi government, so Dr. Amin's work provides insight into how the new legal system may be structured.

⁵⁷ AMIN, *supra* note 56, at 223.

⁵⁸ *Id.* at 174.

⁵⁹ *Id.* at 174–78.

was the passage of the 1969 Penal Code that contained numerous oppressive and inhumane laws.⁶⁰

As we now know, since 1968 (and especially during Saddam Hussein's rule from 1979 until 2003), the Ba'ath Party bypassed established laws and used a parallel "judicial" system to oppress those who would challenge or threaten the government.⁶¹ Saddam Hussein is no longer in power, and the legal system is reforming in Iraq, but one can anticipate that the basic sources of Iraqi law will not change.

2. Sources of Iraqi Law

The "[p]rimary sources of Iraqi law, in order of significance, can be described as follows: (1) Islamic law; (2) constitutional law; (3) legislation and statutory provisions."⁶² Islamic law, also known as "Shari'a," "path," or the "right path," is a complicated law in itself, among which there are several different schools of law.⁶³ As mentioned, Iraq is 60–65% Shi'a.⁶⁴ The Shi'a

⁶⁰ See *supra* text accompanying notes 40–41.

⁶¹ See Coyle, *supra* note 39; see also Anthony McDermott, *Intervention, Sovereignty and Iraq: Absorbing and Deflecting the Blows*, in OIL AND WATER: COOPERATIVE SECURITY IN THE PERSIAN GULF 233–35 (Bjorn Moller ed., 2001) (discussing the authoritarian rule in Iraq by the Ba'ath Party and the cult of personality of Saddam Hussein); Robert G. Rabil, *The Making of Saddam's Executioners: A Manual of Oppression by Procedures*, 7 MIDDLE EAST R. INT'L AFF. 38 (March 2003), available at <http://meria.idc.ac.il/journal/2003/issue1/rabil.pdf> (last visited Aug. 20, 2004) (providing an in-depth analysis of how Saddam Hussein and the Ba'ath Party came to power and examines how the Ba'ath Party used numerous procedures of oppression to rule Iraq through intimidation and fear).

⁶² See AMIN, *supra* note 56, at 222.

⁶³ The Sunni sect of Islam includes four schools of law: Hanafi, Maliki, Shafi'i, and Hanbali, each of which relies on different sources of law to varying degrees (e.g., the Koran, the prevailing *sunna* (customary law, which can be based on many different local and tribal customs), reason, and analogy). Majid Khadduri, *Nature and Sources of Islamic Law*, 22 GEO. WASH. L. REV. 3 (1953), reprinted in ISLAMIC LAW AND LEGAL THEORY 87, 94–104 (Ian Edge ed., 1996). This brief article provides an excellent and brief overview of the basics of Islamic law. The rest of the book has extensive analysis of the development of the Sunni and Shi'a schools of law. Khadduri is also noteworthy for his translation into English of Shaybani's *siyar*. MAJID KHADDURI, *THE ISLAMIC LAW OF NATIONS: SHAYBANI'S SIYAR* (Majid Khadduri trans., 1966). Shaybani was a jurist who compiled the *siyar*, literally meaning the conduct of the ruler, which is a specialized set of traditions and commentary on the conduct of war and affairs of state by the early Muslims. *Id.* at 22–26, 38–41; see WILLIAM M. BALLANTYNE, *A Short Introduction to the Shari'a*, in ESSAYS AND ADDRESSES ON ARAB LAWS 33–42 (2000); Christopher Melchert, *Islamic Law*, 23 OKLA. CITY U. L. REV. 901 (1998) (discussing how early Muslims

Muslims believe that the *imamate* (caliphate) must not only be from the tribe of Quraysh, but must also be a descendant of Ali, the son-in-law of Mohammed.⁶⁵ Shi'ites follow three basic schools of law: Zaydis, "Twelvers" (which the majority of Shi'ites follow), and "Seveners."⁶⁶ The differences between Shi'ite and Sunni law are matters of detail (aside from the doctrine of the *imamate*); the Shi'ite concept of law is more authoritarian and detached from social reality than that of the Sunnis.⁶⁷ In modern Iraq, Islamic law fills in any gap in secular civil law, but even the Iraqi Civil Code of 1951 is roughly based on the Ottoman Civil Code (*Majallat*), which was a codified version of traditional Islamic law.⁶⁸ In short, Islamic law is the dominant source of substantive private law in Iraq.⁶⁹ Following the July 14 Revolution in 1958, various constitutions were enacted in Iraq. The most recent, the Constitution of 1968, describes the Iraqi state, the fundamental foundations of the society, civil rights and duties, and the distribution of authority within the government.⁷⁰ Theoretically, Islamic law was the major source of law in Iraq, but, in reality, secular legislation passed by the National Assembly and approved by the Revolutionary Command (in the name of the people) was the main source of law in Iraq.⁷¹

derived the law from the Qur'an, hadith, and other indications of God's will). Melchert also discusses some criticisms of the traditional history of Islamic law and the effect of following Islamic law in everyday life. Melchert, *supra*, at 908–09; C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* 46–58 (1998). Weeramantry's work provides an excellent analysis of Islamic law, from the origins of Islamic law, to basic Islamic legal ideas, to a discussion of Islamic international law. See also David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819, 823–31 (1993) (providing a good overview of Islamic law, including a glossary of terms). More importantly, and outside the scope of this article, Westbrook examines Islam's view on international public law, arguing that Islam has not articulated an international law, and examines the possibilities for the formulation of an Islamic international law. *Id.*

⁶⁴ See CIA, *The World Factbook: Iraq*, *supra* note 15.

⁶⁵ See Khadduri, *Nature and Sources of Islamic Law*, *supra* note 63 at 104–07. The caliph is "[t]he person acting in Muhammad's place after his death, i.e., the leader of Islam (sunni)." Caliph, *ENCYCLOPEDIA OF THE ORIENT*, available at <http://www.lexicorient.com/e.o/> (last visited Sept. 20, 2004).

⁶⁶ Khadduri, *Nature and Sources of Islamic Law*, *supra* note 63, at 105.

⁶⁷ *Id.* at 106–07.

⁶⁸ AMIN, *supra* note 56, at 221–22; see Mukhtar, *supra* note 36, at 75.

⁶⁹ AMIN, *supra* note 56, at 221–22.

⁷⁰ *Id.* at 223–24.

⁷¹ *Id.* at 224.

Transitional law currently rules Iraq and the country is moving towards adopting a new constitution, but the importance of that constitutional law in Iraq will continue. The new constitution will likely define the functions of the Iraqi State, the fundamental foundations of the government, and the civil rights of the people. The Iraqi Governing Council and the CPA drafted and approved an interim constitution that, similar to the U.S. Constitution, contains many guarantees of fundamental liberties.⁷² However, the Transitional Administrative Law is just that—transitional. The temporary and uncertain nature of the law in Iraq makes ADR an important tool to provide Iraqis with a reliable and familiar method for resolving disputes with Americans and other foreigners.

II. DISPUTE RESOLUTION IN ISLAMIC SOCIETY

A. *The Concept of Sulh*

There is a strong tradition in Islamic culture that encourages the peaceful resolution of disputes between Muslims.⁷³ The Qur'an gives Muslims many explicit instructions on how to resolve their disputes, one being

if two groups of believers fought with each other, you shall reconcile them. If one group aggresses against the other, you shall fight the aggressing group until they submit to God's command. Once they submit, you shall reconcile the two groups equitably. You shall maintain justice; God loves those who are just.⁷⁴

⁷² Dexter Filkins, *Iraqis Receive U.S. Approval of Constitution*, N.Y. TIMES, Mar. 2, 2004, at A1; Filkins, *supra* note 29. The constitution guarantees broad freedoms for individuals, including freedom of religion (although Islam is the State religion, and no law may undermine Islam), and the rights of free speech, assembly, and press. *Id.* The constitution also provides for an independent judiciary, civilian control of the military, and a system of checks and balances on all branches of the government. *Id.*

⁷³ See Mohammed Abu-Nimer, *Conflict Resolution in an Islamic Context: Some Conceptual Questions*, reprinted in PEACE AND CONFLICT RESOLUTION IN ISLAM 128 (Abdul Aziz Said et al. eds., 2001) (“[Negotiation, mediation, and arbitration] have been applied to settle interpersonal, community, and inter-religious disputes in Islamic societies for hundreds of years.”).

⁷⁴ Qur'an 49:9 in The Holy Qur'an. This reference to the Qur'an comes from Walid Iqbal's excellent article on ADR and Islam. Walid Iqbal, *Dialogue and the Practice of Law and Spiritual Values: Courts Lawyering, and ADR: Glimpses Into the Islamic Tradition*, 28 FORDHAM URB. L.J. 1035 (2001).

This quotation foreshadows the importance of *sulh* (compromise, settlement, or agreement between parties to a dispute) in Islam.⁷⁵ “[T]he purpose of *sulh* is to end conflict and hostility among believers so that they may conduct their relationships in peace and amity.”⁷⁶ *Sulh* is a legally binding form of a contract.⁷⁷ The purpose of *sulh* appears consistent with the Western concept of ADR, but the process that leads to *sulh* is usually different between the two systems. Under Islamic law, ADR and the court systems are essentially mixed, but, historically, the court systems have relied on the concept of *sulh* to dispense justice more efficiently than court-ordered mediation in Western systems.⁷⁸

B. The Qadi

In the Islamic legal tradition, the *qadi* (Islamic judge) often helped disputants reach *sulh*.⁷⁹ The Ottoman legal system demonstrated the proper

⁷⁵ See Iqbal, *supra* note 74, at 1035; Abu-Nimer, *supra* note 73, at 136 (“[I]n Arab society the process of ‘Sulh’ . . . is an essential part of reaching an agreement.”); George E. Irani & Nathan C. Funk, *Rituals of Reconciliation: Arab-Islamic Perspectives*, in PEACE AND CONFLICT RESOLUTION IN ISLAM: PRECEPT AND PRACTICE 182 (Abdul Aziz Said et al. eds., 2001) (“One of the most important unofficial responses to conflict in Middle Eastern societies is *sulh* . . .”).

⁷⁶ Iqbal, *supra* note 74, at 1035 (quoting M. Khadduri, *Sulh*, in 9 THE ENCYCLOPEDIA OF ISLAM, NEW EDITION 845 (Clifford Edmond Bosworth et al. eds., 1997)).

⁷⁷ *Id.*

⁷⁸ See *id.* at 1035–36. Iqbal does not explicitly state why Islamic systems are more efficient than Western ones, but one can infer that the ability of the *qadi* to apply religious leverage to the parties is part of the reason. *Id.* at 1037–39, 1040–42.

⁷⁹ See Iqbal, *supra* note 74, at 1036–39. One definition of the *qadi* is:

Judge in Islam, whose responsibility is restricted to issues connected to religion. A *qadi* must be a man educated in Islamic science, and his performance must be totally congruent with *Sharia* without using his own interpretation. In a trial in front of a *qadi*, it is the plaintiff who is responsible to bring evidence against the defendant in order to have him or her convicted. There are no appeals to the judgements [sic] of a *qadi*. A *qadi* must not receive gifts from participants in a trial and he must be careful in engaging himself in trade. Despite the rules for the office, Muslim history is full of complaints about *qadis*. Often it has been a problem, that *qadis* have been managers of *waqfs*, religious endowments. The origin of the institution of *qadi*, is the old Arab arbitrator, the *hakam*, but qualities from officials in areas conquered by Arabs have been added to the structure.

ENCYCLOPEDIA OF THE ORIENT, available at <http://www.lexicorient.com/e.o/> (last visited Sept. 20, 2004).

role of the *qadi* under Islamic law.⁸⁰ In the Ottoman system, the *qadi* was independent from the government, although the imperial authority appointed and removed *qadis*, and set limits on their jurisdiction. The *qadi* applied both substantive and procedural law to the cases before him, could consider and admit evidence, and had the cooperation of the police to enforce decisions.⁸¹ *Qadis* preferred reconciliation between the parties instead of enforcement of a judgment.⁸² Many cases were settled through mediation.⁸³ Through mediation, the parties reached *sulh* on "mutually acceptable terms and surrendered all rights to further claim on the matter."⁸⁴

One final item to consider is the preference for simplicity and informality in the *qadi* courts.⁸⁵ The *qadi* courts focused on determining the truth and administering justice through minimal procedural intricacies.⁸⁶ Lawyers (*wakils*) were seldom appointed or used in court.⁸⁷ There was a preference for self-representation, supplemented, when necessary, with procedural and substantive guidance from the *qadi*.⁸⁸ The confrontation of the defendant by the plaintiff, the presence of reliable witnesses, and the use of oaths were indispensable to the process.⁸⁹ In sum, the *qadi* courts were simple, personal, and unbiased.

C. Sulh and Qadis in Modern Saudi Arabia

Under the regime of Saddam Hussein, Iraq was a secular society.⁹⁰ The future Iraqi government is likely to retain its secular nature, although some

⁸⁰ See Iqbal, *supra* note 74, at 1036–39.

⁸¹ See *id.* at 1035–36 (referring to Ronald C. Jennings, *Kadi, Court, and Legal Procedure in 17th Century Ottoman Kayseri*, 48 *STUDIA ISLAMICA* 133 (R. Brunschvig & J. Schacht eds., 1978); Ronald C. Jennings, *Limitations of the Judicial Powers of the Kadi in 17th Century Ottoman Kayseri*, 50 *STUDIA ISLAMICA* 151 (R. Brunschvig & J. Schacht eds., 1979)).

⁸² *Id.* at 1037.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See *id.* at 1040–42.

⁸⁶ See *id.* at 1038.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1038.

⁸⁹ See *id.* at 1038–39.

⁹⁰ See, e.g., Amin, *LEGAL SYSTEM OF IRAQ*, *supra* note 50, at 77, 100–02.

clerics in Iraq have urged an Islamic state.⁹¹ However, the legal system in Saudi Arabia, which adheres to the traditional Islamic-state model, may provide a model for ADR in the new Iraqi government. The “great majority” or “99%” of all civil cases in Saudi Islamic courts end in reconciliation, demonstrating the Saudi adherence to the maxim “*sulh* is best.”⁹² One reason why so many cases result in compromise in Saudi Arabia is the informal approach to trial. There is an opposition to the use of professional lawyers; instead, the *qadi* protects the parties from unfair practices and helps guide them through the adjudicatory process.⁹³

There are some disadvantages to the reliance on a *qadi* in the Saudi system. An incompetent *qadi* may abuse the system, or an unjust result may occur that might not have occurred under customary law.⁹⁴ *Sulh* also keeps *qadis* from applying their intellect to actual legal problems and principles, preventing them from exercising independent and interpretive judgment in complex cases, all of which may lead to an absence of solid substantive and procedural rules to address modern problems.⁹⁵

D. Modern ADR Mechanisms in Muslim Culture

As highlighted above, mediation has historically been the primary source of dispute resolution in the Muslim world. Muslim culture places a high value on honor and self-respect, and mediation provides a more dignified

⁹¹ E.g., *Iraqi Cleric Wants an Islamic State*, UNITED PRESS INT’L, Oct. 11, 2003. Many Shi’ite clerics, led by Muqtada al-Sadr, are seeking an increased role for Islamic law in the new Iraqi state. *Id.* See also discussion *supra* note 72 and *infra* notes 137 & 159.

⁹² Iqbal, *supra* note 74, at 1040 (quoting Frank E. Vogel, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 154 (2000)).

⁹³ *Id.* at 1041. In Saudi Arabia, the *qadis*

are not mere adjudicators; they possess great skills as mediators and conciliators. For example, if a *kadi* believes that a settlement or compromise would yield a just outcome, he will aim—sometimes even forcefully—to persuade the parties before him to come to an agreement and settle their disputes amicably. *Kadis* do not rely on religious exhortations alone, but also press practical considerations into service such as that *sulh* may have advantages beyond religious benefits for both parties in that it can avoid harsh outcomes. As always, however, the *kadi* must remain completely impartial, showing no more favor to an affluent party than to an indigent one. He also must clarify rather than direct.

Id. at 1041–42.

⁹⁴ See *id.* at 1042.

⁹⁵ *Id.*

approach to dispute resolution than confrontation in an open courtroom.⁹⁶ This may be why, in the United States, many Muslim-Americans turn to family or their local *imam* to resolve disputes through mediation, avoiding public confrontation and allowing the parties to achieve reconciliation on their own while preserving long-term relationships of the parties.⁹⁷ Often times, these disputes involve marriage or family conflict.⁹⁸ Mediation of these types of family conflicts provides insight into general Muslim mediation and gives a model for resolving disputes:

In a marriage conflict an attempt should first be made to resolve the dispute at the family level, before it is aggravated and leads to the disruption of the matrimonial tie

The procedure to be followed is that two persons, one on behalf of each family, should be nominated to look into the matter together and devise means whereby the misunderstanding between the spouses may be brought to an end.

...

The parties would be free, for instance, to decide that the mediators be nominated either by the spouses themselves or by the elders of their respective families or in the absence of close relatives, close friends or other trusted individuals.

Historically if the dispute was brought in an Islamic court, the courts used the right to nominate mediators, representing the families of both parties, before referring the matter for judicial verdict.

⁹⁶ M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 TEX. INT'L L.J. 289, 318 (2000); see R. Seth Shippee, "Blessed Are the Peacemakers": Faith-Based Approaches to Dispute Resolution, 9 ILSA J. INT'L & COMP. L. 237, 245-49 (2002). The many benefits of mediation are why this is the proposed method for resolving disputes in Iraq. Arbitration is not as favored as mediation in the Arab-Muslim world. See, e.g., *id.* at 248 (commenting that arbitration "has received mixed reviews in the Muslim community."). Arbitration is more formal, more time consuming, and gives the parties less opportunity to resolve their disputes jointly than mediation. See, e.g., MOHAMMED ABU-NIMER, NONVIOLENCE AND PEACE BUILDING IN ISLAM: THEORY AND PRACTICE 106-07 (2003) (discussing extra procedures required to make a ruling in arbitration). The shortcoming of negotiation as a method of ADR arises from the adversarial communication patterns inherent in the process itself. HIZKIAS ASSEFA, MEDIATION OF CIVIL WARS: APPROACHES AND STRATEGIES—THE SUDAN CONFLICT 7-8 (1987). Negotiations have a tendency to encourage a contest of wills between the parties. *Id.* Negotiations make it difficult for parties to compromise and reach settlements because they can lead to the perception that a party is weak. *Id.* Direct negotiations between disputing parties are limited in success. *Id.*

⁹⁷ McCary, *supra* note 96, at 318.

⁹⁸ See Shippee, *supra* note 96, at 247.

The Hanafi and Shafi'i schools of Islamic law are of the opinion that these individuals normally have no authority to issue a binding verdict. All they can do is recommend the solution they support, after which the spouses have the right to accept or reject their recommended solution.

However, if the spouses have nominated the mediators to act on their behalf in regard to divorce (either Talaq, divorce initiated by the husband, or Khul, divorce initiated by the wife), they will then be bound by the verdict of their nominated mediators according to Hanafi or Shafi'i schools.

Other scholars, however, argue that the authority of these arbitrators/mediators is limited to deciding how the spouses should reconcile their differences, and it does not extend to the annulment of marriage.

A third group of scholars thinks the mediators have full authority both in respect of reconciliation and annulment of marriage.⁹⁹

The dominance of Islamic law in structuring how Muslims resolve disputes among themselves, coupled with the various schools of interpretation on Islamic law, presents the need for non-Islamic parties to have at least an understanding of the role that Islam plays in dispute resolution.¹⁰⁰ This is in direct opposition to Anglo-American society, where parties will not likely follow the Bible, or procedures in the Bible, for resolving disputes.¹⁰¹ Accordingly, non-Islamic parties seeking to resolve a dispute with a Muslim, or between Muslims, need to understand their own

⁹⁹ See Basics of Family Conflict Resolution in Islam (consolidating discussion from Syed Abul Ala Maududi, TOWARDS UNDERSTANDING THE QURAN (Zafar Ishaq Ansari ed., 1988)), available at <http://www.soundvision.com/info/marriage/conflict/islamicview.asp> (last visited Sept. 20, 2004). This passage highlights the prevalence of mediation as a tool for private dispute resolution in the Muslim world, and demonstrates the complexity of dispute resolution between Muslims. See also Muhammad Faour, *Conflict Management Within the Muslim Arab Family: Observations and Three Case Studies*, in CONFLICT RESOLUTION IN THE ARAB WORLD: SELECTED ESSAYS 175, 183–86 (Paul Salem ed., 1997) (discussing the preferred use of mediators to resolve inter-family disputes between Arab Muslims). Faour also discusses court-annexed mediation and arbitration to resolve conflict between Arab Muslim spouses. *Id.*

¹⁰⁰ See discussion *supra* Part II.

¹⁰¹ See Irani & Funk, *supra* note 75, at 181 (noting that in a mediated conflict, "Western [parties] rely on a secular idiom, guidelines from a special field, and personal experience . . ."). But cf. Hizkias Assefa, *Peace and Reconciliation as a Paradigm: A Philosophy of Peace and Its Implications for Conflict, Governance and Economic Growth in Africa*, in PEACEMAKING AND DEMOCRATISATION IN AFRICA: THEORETICAL PERSPECTIVES AND CHURCH INITIATIVES 42–71 (Hizkias Assefa & George Wachira eds., 1996) (providing a holistic general framework for looking at peacemaking in Africa, and a discussion of reconciliation and conflict resolution as viewed in Christian theology).

system of dispute resolution and how it differs from Islamic dispute resolution methods.

III. CULTURAL NORMS OF AMERICAN AND MUSLIM MEDIATION

Mediation can play a powerful role in resolving disputes in Iraq between Iraqis and Americans, but it is important to understand the similarities and differences between American and Muslim mediation norms. This Note is directed towards the American military and American governmental and non-governmental agencies and is, thus, focused on American norms because they are more readily identifiable than “Western” norms.¹⁰²

A. American Mediation Norms: “Individualist” and “Low-Context”

In order to define American norms in mediations, one has to make the cultural assumption that America is an “individualist” or a “low-context” society.¹⁰³ Some of the characteristics of this type of society are a capitalistic economy, nuclear family domination (one or two parents and a small number of children), urbanization and industrialization, and a tradition of

¹⁰² It is hoped that this Note can assist Americans, especially military members, to resolve disputes with Iraqis. For excellent discussions on the “Americanization” of international dispute resolution, see the 2002 Symposium Issue of the Ohio State Journal on Dispute Resolution, *The Americanization of International Dispute Resolution*, 19 OHIO ST. J. ON DISP. RESOL. 1–282 (2003). A common theme throughout this issue of the journal is that American norms in dispute resolution, particularly the focus on procedure, are influencing the conduct of dispute resolution worldwide. For another synopsis of differences between the American legal system and the rest of the world, see William B. Ewald, *What’s So Special About American Law?*, 26 OKLA. CITY U. L. REV. 1083 (2001).

¹⁰³ “People in low-context cultures prefer to communicate directly. Meaning is on the surface of the message. Information is explicit, without nuance, and relatively context-free.” JEANNE M. BRETT, *NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES* 20–21 (2001); Walter A. Wright, *Mediation of Private United States-Mexico Commercial Disputes: Will it Work?*, 26 N.M. L. REV. 57, 61 (1996) (discussing the benefits of using mediation as a counterbalance to arbitration’s adversarial nature in resolving U.S.-Mexico commercial disputes). Wright examines cultural influences on mediation in the United States, Mexico, and other Latin American countries, and suggests that understanding the cultural norms of each country might allow ADR professionals to take advantage of North American Free Trade Agreement (NAFTA) opportunities to develop more mutually beneficial dispute resolution processes. *Id.*; see also Irani & Funk, *supra* note 75, at 171–73 (assessing the applicability of Western approaches to dispute resolution to Arab-Islamic dispute resolution norms).

individualist thinking and action.¹⁰⁴ Some consequences of these characteristics are that individuals feel responsibility for their own economic destinies, there are opportunities to question authority, freedom of the press is dominant, and the political system is balanced and stable.¹⁰⁵ As a result, individuals focus on their rights and responsibilities as individuals, and conflict arises when there are perceived infringements of individuals' rights.¹⁰⁶ These characteristics of an individualist or low-context society lead to a preference for directness, specificity, frankness in stating demands, confrontation, and open self-disclosure when resolving disputes.¹⁰⁷ Individualists initially resolve disputes by negotiating directly with their perceived adversaries following the aforementioned preferences.¹⁰⁸ Individualists prefer direct negotiation as an initial dispute resolution mechanism, and they do not usually bring in third-party mediators until direct negotiations fail.¹⁰⁹

The involvement of a mediator changes the dynamics of a negotiation, but individualist cultural preferences continue to influence the mediation. In the American model, mediation is a formal process with a defined structure for discussing issues, which provides stability and channels the parties

¹⁰⁴ Wright, *supra* note 103, at 61.

¹⁰⁵ *Id.* at 61–62.

¹⁰⁶ *Id.* at 62; *see also* Abu-Nimer, *supra* note 73, at 130–31 (describing assumptions regarding conflict resolution in the Western context).

¹⁰⁷ DAVID W. AUGSBURGER, *CONFLICT MEDIATION ACROSS CULTURES: PATHWAYS AND PATTERNS* 28 (1992). Walter A. Wright, in his article, explains the usefulness of Augsburg's work in this way:

At the outset of a discussion of any nation's culture, particularly that of the United States, it is important to acknowledge that cultural diversity exists. In the United States, a nation of immigrants, the universe of cultural values is as diverse as the peoples who inhabit the Earth; there is no single negotiating style or universally accepted dispute resolution method. Having said that, it is equally important to acknowledge that dominant U.S. cultural values affect a preponderance of U.S. negotiating styles and constitute the foundation on which most U.S. mediation models are built.

Wright, *supra* note 103, at 61 n.24. In the United States, "indirect language is strongly disliked; 'straight from the shoulder' talk is admired. 'Get to the point' is the heartfelt reaction to small talk and evasive formulations." Raymond Cohen, *Negotiating Across Cultures*, in *TURBULENT PEACE: THE CHALLENGES OF MANAGING INTERNATIONAL CONFLICT* 472 (Chester A. Crocker et al. eds., 2001).

¹⁰⁸ Wright, *supra* note 103, at 62.

¹⁰⁹ *Id.*

towards constructive goals.¹¹⁰ The mediator and the individual prefer direct confrontation and communication, and the mediator facilitates the session by establishing “rules of speaking” that control and direct the flow of communications.¹¹¹ The mediation is a structured, task-oriented, and goal-directed process that seeks to reach agreement on issues by focusing on the autonomy and individualism of each party’s choices, goals, and satisfactions.¹¹² The mediator is a technical specialist who has a professional, anonymous, and impersonal relationship with the parties, and once the parties reach an agreement, the mediator is out of their lives.¹¹³ These characteristics of American mediation are almost entirely different from what is found in Muslim culture, and it is thus important to understand Arab-Muslim theoretical norms to find a common ground for resolving disputes between the two cultures.

B. Muslim Mediation Norms: “Collectivist” and “High-Context”

In the Arab-Muslim world, the cultural assumption is that people are “collectivist” and “high-context.”¹¹⁴ Collectivist cultures are found in countries with non-capitalist economies and lower industrial and economic

¹¹⁰ AUGSBURGER, *supra* note 107, at 204 tbl.10; DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 4 (1996) (describing mediation as “a process in which a neutral person, the mediator, helps people involved in a dispute to negotiate effectively with each other”); GARY GOODPASTER, *A GUIDE TO NEGOTIATION AND MEDIATION* 203 (1997) (“Mediation is a problem-solving negotiation process in which an outside, impartial, neutral party works with disputants to assist them to reach a satisfactory negotiated agreement.”); *see also* Abu-Nimer, *supra* note 73, at 132 (describing the main features of Western third party interventions); Diane LeResche, *Comparison of the American Mediation Process with a Korean-American Harmony Restoration Process*, 9 *MEDIATION Q.* 323, 326–28 (1992) (offering a comparison between the formal mediation process used by community-based mediation centers in the United States and the informal process for handling conflicts used by Korean-Americans).

¹¹¹ AUGSBURGER, *supra* note 107, at 204, tbl.10.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Persons in high-context cultures “prefer to communicate indirectly. Meaning is embedded in the context of the message and must be inferred to be understood.” BRETT, *supra* note 103, at 20; Mitchell R. Hammer, *Negotiating Across the Cultural Divide: Intercultural Dynamics in Crisis Incidents*, in *DYNAMIC PROCESSES OF CRISIS NEGOTIATION: THEORY, RESEARCH, AND PRACTICE* 105, 110 (Randall G. Rogan et al. eds., 1997) (relying on EDWARD T. HALL, *BEYOND CULTURE* (1976) to identify Arab cultures as high-context).

development.¹¹⁵ Other characteristics of collectivist cultures are a smaller degree of social mobility, a weaker middle class, and a dominance of extended families or tribal structures with families containing larger numbers of children.¹¹⁶ Some of the consequences of these characteristics are low occupational mobility, less income equality throughout the economy, fewer opportunities to question authority, reduced or nonexistent freedom of the press, and “less balanced and more unstable” political systems.¹¹⁷ Collectivists tend to place greater value on the cultural norms of the primary groups they belong to and on compliance with those cultural norms.¹¹⁸ Within these groups, collectivism and harmony are valued, and the interests of individuals may be sacrificed or subordinated for the benefit of the group.¹¹⁹ Because of the emphasis on harmony, collectivists tend to work through communications and relationships in an indirect, ambiguous, non-confrontational, cautious, and subtle way.¹²⁰ When criticism is required, it is given “cautiously and indirectly in order to ‘save the face’ of the criticism’s recipient.”¹²¹ Because it threatens group harmony, conflict is often viewed negatively, and it is often ignored in the hope that it will settle itself.¹²²

Conflict can be seen as an instrument of preserving the status quo rather than as a device of social change, and it often arises in collectivist cultures when there is a perceived violation of group norms.¹²³ Compared to

¹¹⁵ Wright, *supra* note 103, at 64.

¹¹⁶ *Id.* at 64–65 (citing GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* 148–75 (abr. ed. 1984)).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 65 (citing AUGSBURGER, *supra* note 107, at 28).

¹¹⁹ *Id.*; see also John Ford, *Cross Cultural Conflict Resolution in Teams*, MEDIATE.COM (Oct. 2001) (providing a brief overview of individualism, collectivism, and the role of mediators in resolving conflicts across these types of cultures), available at <http://mediate.com/articles/ford5.cfm> (last visited Sept. 10, 2004).

¹²⁰ AUGSBURGER, *supra* note 107, at 28. In a high-context culture, speakers “feel acutely uncomfortable about delivering a blunt no. They want to please others and prefer inaccuracy and evasion to painful precision: the substantive element of a message, though elliptical and encoded, will be unmistakable to insiders.” Cohen, *supra* note 107, at 472.

¹²¹ Wright, *supra* note 103, at 65 (citing AUGSBURGER, *supra* note 107, at 33). Face is “people’s image of themselves.” ROXANE S. LULOFS & DUDLEY D. CAHN, *CONFLICT: FROM THEORY TO ACTION* 294 (2d ed. 2000).

¹²² Wright, *supra* note 103, at 65; see also Abu-Nimer, *supra* note 73, at 131 (describing social and cultural assumptions that influence Middle Eastern conflict resolution processes and stating that, in Arab-Muslim communities, “conflict is negative” and “should be avoided”).

¹²³ Wright, *supra* note 103, at 65.

individualistic cultures, where direct confrontation is preferred, collectivist cultures rely on third-party mediators for objectivity, experience, balancing of power, witnesses to attest to the validity of the process, and, perhaps most importantly, to protect face and honor.¹²⁴ Neutrality of the mediator is not a primary concern, and there is a trend towards seeking out respected members of the disputant's social network who have familiarity with the context of the dispute.¹²⁵ Using an insider as a mediator allows greater insight into potential solutions to the conflict and gives the mediator an interest in the outcome.¹²⁶ Mediators in collectivist cultures are generally not specialists and act informally without compensation.¹²⁷ Communications between the parties are informal and indirect, and oftentimes the conflict may be resolved without the parties ever meeting face to face.¹²⁸ The parties may request advice from the mediator as to how the dispute should be resolved.¹²⁹ Once the dispute is resolved, it is normally not reduced to writing, and the parties will likely maintain contact with the mediator.¹³⁰

C. The Significant Differences Between American and Muslim Mediation Norms

There are two important concepts that are imperative to understanding the difference between Arab-Muslim and American mediation. First, in each culture, why are the parties using a mediator? In the Muslim culture, which places a high value on honor, dignity, and self-respect, mediation allows the parties to avoid public confrontation in a courtroom.¹³¹ In the American culture, mediation allows the parties to avoid the courtroom as well, but for

¹²⁴ AUGSBURGER, *supra* note 107, at 33; *see also* Abu-Nimer, *supra* note 73, at 132 (detailing the unique features of a Middle Eastern mediation as the importance of credibility and gaining access to the conflict and listing the characteristics of a Middle Eastern mediation).

¹²⁵ Wright, *supra* note 103, at 65.

¹²⁶ *Id.* at 65–66.

¹²⁷ *Id.* at 66.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *See* discussion *supra* notes 96, 121, 124.

different reasons. In America, mediation is viewed as a cheaper, faster, and less formal process than litigation.¹³²

Second, in each culture, what is the role of the mediator: How do the parties view the mediator, and how does the mediator view his or her role?¹³³ As discussed above, Americans are concerned with procedure—fairness, neutrality, and a process that leads to what is perceived as an acceptable solution. This prioritization of procedure drives the role of the mediator as a referee. In contrast, Muslims are concerned with honor and dignity, and, thus, the mediator is someone who can help resolve the conflict while maintaining honor and group harmony.¹³⁴ Understanding these two concepts, and the differences that arise between American and Arab-Muslim mediation, allows us to develop a solution to mediating conflicts in Iraq between the predominantly Muslim Iraqis and the predominantly American reconstructionists. This solution is based on theory and the experience of ADR in other countries such as Bangladesh, China, and South Korea.

IV. PROPOSAL FOR MEDIATING DISPUTES IN IRAQ

The foregoing theoretical analysis of individualist, low-context American mediation and collectivist, high-context Arab-Muslim culture provides broad generalizations of Americans and Iraqis. Those looking to mediate disputes in Iraq must keep in mind the diversity of the country. Honor and dignity are of great importance in Iraq, and that means every person and every dispute cannot be treated in the same manner.¹³⁵ Iraqi Shi'ites, Sunnis, Kurds, and Christians might all view conflict differently depending on a variety of factors. This Note attempts to define a starting point for mediation of disputes between Iraqis and Americans. The author is mindful that actual

¹³² See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 153–58 (4th ed. 2003) (examining public encouragement of mediation).

¹³³ For another comparison of Western and Arab-Islamic approaches to dispute resolution, see Irani & Funk, *supra* note 75, at 180–81. See also Dania A. Dialdin & James A. Wall, Jr., *Third Parties and Culture*, 15 *NEGOT. J.* 381 (1999) (reporting how culture influences third-party intervention and examining why culture has an effect on third-party processes).

¹³⁴ See AUGSBURGER, *supra* note 107, at 193. “In the Middle East, mediation is a process of resolving and minimizing interpersonal conflict that is intimately connected to the social fabric of people’s everyday lives.” *Id.* (quoting CATHIE WITTY, *MEDIATION AND SOCIETY: CONFLICT MANAGEMENT IN LEBANON* 6 (1980)).

¹³⁵ See discussion *infra* note 136.

experience will provide a more detailed model of how to mediate disputes in Iraq.

A. Recommended Steps for Mediation

1. Identify Which Approach (Individualist or Collectivist) is Appropriate

The first step in mediating disputes is to identify which approach (individualist or collectivist) to use.¹³⁶ There are no statistics to tell us what percentage of Iraqis are collectivist or individualist, but it is probably safe to assume that the majority of Iraqis are collectivist.¹³⁷ Also noteworthy is the

¹³⁶ See Wright, *supra* note 103, at 73–74. Although Wright’s work focuses on using U.S. mediation models to resolve commercial disputes between U.S. and Mexican citizens, the general approach provides a useful basis with which to begin. See also Abu-Nimer, *supra* note 73, at 123–41. Those seeking to mediate a dispute should examine the local customs of dispute resolution before implementing a new program. *Id.* at 124. Abu-Nimer advises those seeking to resolve conflict in the Middle East to

be aware of, investigate, and understand the existing procedures of conflict resolution which have been implemented in the local community. In the Middle East, adopting such a perspective means the acceptance and recognition of the proposition that Islam and Islamic societies contain beliefs, customs, attitudes, and a history which can serve as rich bases for identifying constructive conflict resolution frameworks and processes.

Id. at 124–25.

¹³⁷ See Hammer, *supra* note 114, at 110 (categorizing Arab society as collectivist or high-context); see also George E. Irani, *Islamic Mediation Techniques for Middle East Conflicts*, 3 MIDDLE EAST R. INT’L AFF. 1 (June 1999), available at <http://meria.idc.ac.il/journal/1999/issue2/irani.pdf> (last visited Sept. 10, 2004) (reviewing traditional Islamic techniques for resolving disputes and encouraging conciliation as tools applicable to contemporary regional conflicts). Irani identifies Iraq as an Arab Middle East country dominated by the “powerful role patriarchy plays in decisionmaking.” *Id.* at 7. While making this cultural assumption allows some simplicity in this analysis, one should not assume that homogeneity exists within the Iraqi culture. There are six ideas to keep in mind when studying culture and conflict resolution in Iraq. ABU-NIMER, *supra* note 96, at 8. First, “there are many internal paradoxes and subcultures within every Muslim community.” *Id.* Second, “Islamic culture is not a ‘thing’ that can be reified into a single object or dimension.” *Id.* Third, “Islamic culture is not uniformly distributed among all Muslims or members of a Muslim community.” *Id.* Fourth, a Muslim may “possess[] many subcultural identities at the same time.” *Id.* Fifth, tradition is but one of the factors in Islamic dispute resolution. *Id.* Sixth, “the values, norms, and practices of Muslims may keep their form but change dramatically in significance over time.” *Id.*; see, e.g., Kevin Avruch, *What Do I Need to Know About Culture? A Researcher Says . . .*, in A HANDBOOK OF INTERNATIONAL PEACE BUILDING: INTO THE EYE OF THE STORM 78–86

seemingly widespread anti-American sentiment of the Iraqis.¹³⁸ Most mediations should take a collectivist approach, but those looking to mediate a conflict should carefully consider an individual disputant's social characteristics and negotiating preferences before choosing an approach.¹³⁹ One should also remember that mediation in the Middle East is fundamentally different from American-styled mediation and try not to confuse the two procedures.

In light of the Iraqi preference for self-determination, the need to "win the hearts and minds" of Iraqis, and the likelihood that American troops are not entrenched in American-styled mediation, a collectivist approach to mediation is favored over an individualistic approach, and this Note follows

(John Paul Lederach & Janice Moomaw Jenner eds., 2002) (telling the reader cultural traps and miscues to avoid, including oversimplification, stereotyping, and thinking of culture as prescriptive); James K. Sebenius, *Caveats for Cross-Border Negotiators*, 18 NEGOT. J. 121-33 (2002) (suggesting that cross-cultural analysis is susceptible to four fallacies, including stereotyping, over-attribution, skewed perceptions and information processing, and "when in Rome, do as the Romans do.").

¹³⁸ See Edward Wong, *New Pressures over U.S. Plan for Iraqi Rule*, N.Y. TIMES, Jan. 24, 2004, at A1; Edward Wong, *The Struggle For Iraq: Shiite Protest; Huge March Backs Cleric Over U.S. Plan*, N.Y. TIMES, Jan. 20, 2004, at A10; *Thousands Demonstrate Against Coalition Forces in Iraq* (CNN Live Today broadcast, Jan. 15, 2004). Thousands of Iraqis gathered in massive demonstrations in January 2004 to protest the American plan to implement caucus-style elections in the election of the transitional Iraqi National Assembly. *Id.*; see also discussion *infra* note 160.

¹³⁹ Wright, *supra* note 103, at 73. American-styled mediation should be developed and offered as a choice. For a thorough and excellent reference on American mediation, see JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* (2001); GOLANN, *supra* note 110. *But see* Sally Engle Merry, *Mennonite Peacebuilding and Conflict Transformation: A Cultural Analysis*, in FROM THE GROUND UP: MENNONITE CONTRIBUTIONS TO INTERNATIONAL PEACEMAKING 203, 208-10 (Cynthia Sampson & John Paul Lederach eds., 2000) (noting that one of the distinctive features of Mennonite mediators was to empower others to resolve the dispute, and emphasizing how this practice runs counter to the mediation culture in the United States). If American-styled mediation were developed in Iraq, it would seem wise to follow the Mennonite practice of empowering Iraqis to use the process to resolve disputes, rather than having the American mediators wielding control over mediations. By not taking charge in using American-styled mediation, Americans could show a respect for the Iraqis and their culture. *Id.* at 209. Put another way, during training, Americans should work on changing their view from one of providing expertise to a role of accompanying discovery. *Id.* Information about American mediation can be passed to Iraqis by demonstrating the model to professional organizations, providing courses of instruction at universities and other institutions of higher learning, and using the Iraqi media to promote its use. See Wright, *supra* note 103, at 73. Education could facilitate understanding and use of the American model of mediation by Iraqis.

that assumption.¹⁴⁰ Using this type of approach could offer a few advantages to both Iraqis and non-Iraqis. It could give the mediation a sense of legitimacy by using a method with which Iraqis are familiar. Using a collectivist-styled mediator (including trusted and respected Muslim clerics and educators) should also lend credibility to the process and outcome, which could enhance trust between Iraqis and Americans.¹⁴¹ Allowing Iraqi citizens to use an approach with which they are familiar could help promote friendlier relations with Americans and other non-Muslims. Using this type of mediation could help promote the idea that reconstructionists are in Iraq to help rebuild the country and re-establish Iraqi self-determination, and not to develop an American colony.¹⁴² For non-Iraqis, this approach could facilitate

¹⁴⁰ See discussion *supra* note 138.

¹⁴¹ The current Iraqi sentiment towards American forces was recently expressed by Ghazi Ajil al-Yawar, deputy chief of one of Iraq's largest Sunni tribes, a former member of the Iraqi Governing Council, and President of Iraq's Interim Government:

The United States is using excessive power . . . [t]hey round up people in a very humiliating way, by putting bags over their faces in front of their families. In our society, this is like rape. The Americans are using collective punishment by jailing relatives. What is the difference from Saddam? They are demolishing houses now. They say they want to teach a lesson to the people . . . You cannot win the hearts and minds of the people by using force. What's the difference between dictatorship and what's happening now?

Peter Maass, *Professor Nagl's War: Can The Lessons of History Help Defeat the Insurgency in Iraq? Dodging Bullets, Taking Prisoners and Trying to Win Hearts and Minds*, N.Y. TIMES MAG., Jan. 11, 2004, at 29. Interestingly, al-Yawar is a moderate who wants to see the American occupation succeed. *Id.*

¹⁴² See *id.* at 28. One Army major in Iraq expressed his feelings by stating:

Across this divide they're looking at us, we're looking at them from behind barbed wire, and they're trying to understand why we're here, what we want from them. Almost inconceivable to a lot of them, I think, that what we want for them is the right to make their own decisions, to live free lives. It's probably hard to understand that if you have lived your entire life under Saddam Hussein's rule. And it's hard for us to convey that message, particularly given the fact that few of us speak Arabic.

Id.; see, e.g., SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 247-52 (1996) (describing the ideological "clash" between America and Muslim nations in the Persian Gulf during the Persian Gulf War. Huntington details the prevailing anti-American sentiment in the Arab world); see also Abu-Nimer, *supra* note 73, at 135 (warning that Middle Easterners may perceive dispute resolution processes that are associated with Western governmental and nongovernmental agencies with antagonism and skepticism); Steven R. Weisman, *A Foreign Policy of Try, Try Again*, N.Y. TIMES, Jan. 18, 2004, at D5 (describing the American occupation in Iraq as "one of relentless trial and error."). Weisman also compares the U.S. efforts in Iraq to earlier efforts in the Philippines, Germany, and Japan. *Id.*

understanding of the Iraqi culture, one that is baffling to many Americans.¹⁴³ In sum, choosing the collectivist approach to mediation should have many benefits to both Iraqis and non-Iraqis. The next step is structuring the mediation to ensure fairness and legitimacy to both sides.

2. Selection of the Mediator(s)

Assuming that most mediations will have a collectivist, high-context character to them allows us to concentrate on the essential step of selecting the mediator(s). Fairness in this process is likely a primary concern to both sides. Iraqis will want a mediator that they know (either personally or through reputation) and respect.¹⁴⁴ Americans, or other foreigners, will probably consider the use of a fellow outsider as the only means of

¹⁴³ See John Tierney, *Baffled Occupiers, or the Missed Understandings*, N.Y. TIMES, Oct. 22, 2003, at A4. This article truly highlights the need for an understanding of the collectivist, high-context Iraqi culture. American soldiers can identify with the fact that preserving personal and family honor is of supreme importance to Iraqis, but they are largely unable to understand why this is so, and worse yet, because Iraqi culture is "unfathomable" to American soldiers, they routinely offend Iraqis by "plunging bluntly into business instead of paying respects to the [Iraqi] and asking questions about his well-being and that of his family." *Id.* The importance of honor in Arab-Muslim society cannot be understated, and it must be addressed in the mediation. ABU-NIMER, *supra* note 96, at 98 (identifying values associated with Muslim tribal dispute resolution, including honor, saving face, valor, wisdom, generosity, respect, dignity, and forgiveness).

Americans and other non-Arab Muslims seeking to resolve or mediate a dispute with an Iraqi must understand this important concept and act appropriately in order to make the mediation effective. To use an example from the Tierney article, say that American soldiers catch an Iraqi, who reeks of alcohol, breaking into a liquor store in the middle of the night. To the Americans, the reason why the man was breaking into the liquor store is obvious—to obtain more alcohol. The Iraqi man and his family will swear that he was just going into the store to do some work for a friend, and that the man would never drink alcohol because it is forbidden by the Qu'ran. Instead of getting into a heated discussion and telling the Iraqi man and his family that he is lying, the American soldiers might want to contact the man's *imam* or family elder and explain the situation to him. The soldiers could tell the Iraqi man that they understand that he does not want to bring shame to his family, and the soldiers could work with the man and his *imam* or elder to develop a solution where the Iraqi man is punished and accepts responsibility, yet is able to keep from disclosing the offense to his family at all.

¹⁴⁴ See Irani, *supra* note 137, at 5 ("[I]n Arab culture in general, the mediator is perceived as someone having all the answers and solutions . . . 'if [the mediator] does not provide the answers, he or she is not really respected or considered to be legitimate.'"); see, e.g., HUNTINGTON, *supra* note 141, at 291–98 (discussing the resolution of large-scale conflict through mediation and the importance of using secondary and tertiary parties with recognized legitimacy to help bridge cultural gaps).

guaranteeing a fair outcome. In some instances, there may be a local *imam*, mayor, tribal elder, foreign worker, or American military member that both Iraqis and Americans respect.¹⁴⁵ If this is the case, then both sides should be able to agree on the mediator. Each village, or other identifiable local area, could have a standing mediation committee of about ten people. The standing committee should be a diverse mix of well-respected Iraqis, American military members, and foreign aid workers.¹⁴⁶ The parties could choose their mediator from persons on the committee. The problem that will arise is when neither disputant can agree on a mediator.

In instances where the disputants cannot agree on a single mediator, a mediation committee could conduct the mediation. Disputants have used mediation committees to resolve disputes with success in a number of

¹⁴⁵ For a discussion of some characteristics of a mediator, see ASSEFA, *supra* note 96, at 22–25. Assefa identifies seven prerequisites for a mediator: impartiality, independence, respect, knowledge and skill, possession of required physical resources, international support, and leverage. *Id.* at 22–23. Although Assefa’s work addresses mediation between protagonist parties in a civil war, the general principles would apply to mediating disputes in Iraq. Assefa also identifies the importance of leverage as a controversial issue. *Id.* at 23. The ability to apply leverage to a party could be very effective in Iraq—a mayor or *imam* might be able to apply some sort of pressure to force an Iraqi to accept or reject a proposal. As applied to non-Iraqis like the American military, leverage could be less effective because members of the military take directives from higher commanders. If a high-ranking officer or official tells a subordinate to accept or reject a proposal, the subordinate will have to follow the directive (unless it is an unlawful order). One should take notice of Assefa’s belief that leverage should not be used “automatically,” and that a mediator should exercise “vigorous restraint” in using leverage to avoid casting “doubts upon the neutrality of the mediator.” *Id.* at 23; *see also* ABU-NIMER, *supra* note 96, at 95–96 (“Mediators often use their kinship connections as a tool to exert pressure and gain access when they negotiate with certain parties to the conflict.”). Abu-Nimer also describes the effectiveness of using respected elders as mediators because they are “entrusted to discern the underlying causes of conflict and balance the longer-term interests of the community with the weight, motives, and contexts of the conflict.” *Id.* at 96. An Arab-Muslim in a dispute will obey his elders in accepting or rejecting a settlement. *Id.* at 103.

¹⁴⁶ In some Iraqi cities, there are similar committees acting as city councils. Robert Hodieme, ‘*This Place is Crazy; In Fallujah, It’s Not IF You’ll Get Shot at, But When,*’ ARMY TIMES, Mar. 1, 2004, at 25. In Fallujah, the Fallujah Provisional Authority Commission (“F-Pac”) was comprised of sheiks, *imams*, businessmen, doctors, an Army battalion commander, and the local CPA representative, who is a U.S. State Department veteran. *Id.* Americans carefully selected the members to ensure that a balance was struck between tribal, religious, and professional leaders in the community. *Id.* The F-Pac had 41 members, but the notion behind the careful selection of the committee could serve as a guide for a smaller mediation committee. *Id.*

cases.¹⁴⁷ For small disputes, the mediation committee should have three persons; for larger disputes, there may be up to nine persons.¹⁴⁸ Each party

¹⁴⁷ See CENTER FOR DEMOCRACY AND GOVERNANCE, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS' GUIDE App. B, 1-13 (Mar. 1998), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf (last visited Sept. 10, 2004) (using a community mediation program in Bangladesh as an example of how to increase access to justice for disadvantaged rural groups, especially women). Each village has a mediation committee of eight to ten people. *Id.* The committee members are chosen in consultation with the elites of a given village: "socially influential people, teachers, elected officials, social workers, the imam, or religious leader." *Id.* at 3. Not all committee members are present at each mediation, due to work and family obligations, but they are encouraged to attend when possible. *Id.* Most often, the most respected elder acts as the chairperson. *Id.* Surveys indicate that satisfaction with this type of committee mediation is quite high. *Id.* at 4-5; Deborah Chow, Note, *Development of China's Legal System Will Strengthen its Mediation Programs*, 3 CARDOZO ONLINE J. CONFLICT RESOL. 4 (2002) (discussing the use of People's Mediation Committees in China).

Each village is entitled to establish a mediation committee. *Id.* The local committees consist of three to nine persons elected by the village. *Id.* The role of the committee members is to investigate and analyze the facts, talk to the disputing parties, help the parties understand the facts, and attempt to have the parties reach an agreement. *Id.*; Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People's Republic of China*, 10 TEMP. INT'L & COMP. L.J. 313, 319-27 (1996) (discussing the use of People's Mediation Committees in China and offering a comparison to community mediation in the U.S.). For another article providing an excellent overview of the function of mediation committees in China, see Kwang-Taeck Woo, *A Comparison of Court-Connected Mediation in Florida and Korea*, 22 BROOK. J. INT'L L. 605, 613-14 (1997) (discussing the types of mediation agencies in Korea and describing the use of mediation committees). A mediation committee consists of two neutral non-judge commissioners and one judge who chairs the committee. *Id.* at 614. The commissioners are selected by the chairman from an approved commissioners' list. *Id.* The general recommendation is that the commissioners have some special knowledge and experience in particular fields because their expertise can be persuasive in helping the disputants reach an agreement. *Id.*; Martin Wright, *Peace Committees in Troubled Communities*, Mediate.com (Feb. 2004), available at <http://www.mediate.com/articles/wrightM1.cfm> (last visited Sept. 10, 2004) (describing the use of peace committees in some deprived areas of Cape Town, South Africa as a sort of community restorative justice project). The idea of the peace committee may be practical for use in Iraq, but for the purposes of this article, the use of a committee and a facilitator is what is most important. The committee invites the disputants for an interview, typically within two days. *Id.*; see also ABU-NIMER, *supra* note 96, at 97 (describing the framework of using councils to resolve disputes among Palestinians, particularly in murder cases).

¹⁴⁸ The reason for having at least three members on the committee is to have a "tie-breaker." In Bangladesh, China, and Korea, there are up to nine mediators on a

would choose a mediator, and then the parties could choose the third mediator. If neither party could agree on a mediator, they could agree to allow their chosen mediators to choose the third mediator. The parties could appoint a chairperson of the committee, or the mediators could appoint the chairperson of the committee from amongst themselves. Once the disputants agree to the composition of the committee, the next important step is the mediation itself.

3. Conducting the Mediation

Once the disputants have selected the mediator or the mediation committee, the next step is for the mediator(s) to talk with each disputing party and gather the facts.¹⁴⁹ The mediator(s) should initially meet each disputant outside the presence of the other party. During this time, the mediator(s) should work diligently to establish trust and confidence in the mediator(s) and in the mediation.¹⁵⁰ The mediator(s) should determine the disputants' desired outcomes and begin to formulate alternative solutions to

committee. See discussion of mediation committees *supra* note 147. This seems likely to lead to a breakdown in efficiency for small disputes. However, the disputants, or local mediation committee, should, as needed, always have the ability to appoint more people to a mediation committee. *Id.*

¹⁴⁹ See Irani, *supra* note 137, at 12–13; CENTER FOR DEMOCRACY AND GOVERNANCE, *supra* note 147, at 3–4. Fact-finding and allowing the disputants to tell their story are “a major focus of the mediation process.” *Id.* at 3. The parties should be permitted to bring anyone they choose to the mediation for support and credibility. *Id.* Permitting parties to bring friends or relatives might be particularly useful when the disputant is a female. *Id.* Parties should be given as much time as possible to tell their side of the story. *Id.* at 4. In instances where there is an imbalance of honor, the mediator must address the honor issue before developing compromises on substantive issues. ABU-NIMER, *supra* note 96, at 96.

¹⁵⁰ See AUGSBURGER, *supra* note 107, at 194–200 (describing the various roles of the mediator, including encouraging positive communication and interaction, and establishing bases of personal interaction, trust in goodwill and negotiability, and a base of continuing relationships); LULOFFS & CAHN, *supra* note 121, at 348 (enunciating the basic communication skills that are required of a mediator, including the necessity of the mediator building confidence in the mediation process). In order for this *sulh*-like mediation to work effectively, the mediator should ensure that both parties are convinced that harmony is better than victory, that the mediator is essential, and that the mediation is intended to lead to reconciliation and social harmony. ABU-NIMER, *supra* note 96, at 96. Another consideration in these mediations is language. Mediators will need to work diligently to make sure interpretations are done correctly. See, e.g., Raymond Cohen, *Resolving Conflict Across Languages*, 17 NEGOT. J. 17–34 (2001) (exploring the role of language in negotiations to resolve international and cross-cultural conflict).

the problem.¹⁵¹ Once the mediator has a grasp of the nature of the dispute and the parties' desired remedies, and has formulated some possible solutions, she should decide whether bringing the parties together to discuss the dispute is appropriate.¹⁵² If the mediator does not bring the parties together, the mediator should continue to work with each side to reach a solution.¹⁵³ If the mediator is able to bring the parties together, the mediator should review the proposed agreement with the parties and may facilitate a problem solving session if there are still open issues.¹⁵⁴

In cases where a mediation committee is necessary, the committee should follow the same steps detailed above, but the mediation committee may need to meet on its own to discuss possible solutions before bringing the parties together to reach an agreement. In cases where the nature of the dispute or conflict is larger and continuous, the mediation may become more

¹⁵¹ ABU-NIMER, *supra* note 96, at 101 (the mediator should aim "to have the parties propose and accept a resolution by appealing to the good that resides in all parties."). When working with the Iraqi party, the mediator may want to appeal to the spiritual beliefs of the Iraqi by relying on sayings of the Prophet that focus on the superiority of forgiveness and reconciliation. *Id.* at 100–01.

¹⁵² *Id.* at 104. Some Muslim mediators argue that because "anger clouds people's judgment," they can control the mediation better by not letting the parties meet, often saving the parties potential humiliation or commitment to inflexible positions. *Id.* One Palestinian mediator gives the parties three days to consider the initial meeting before discussing any resolution. *Id.* at 101; *see also* Berenson, *supra* note 8, at A18 (describing how an *imam* in Basra brought two disputing Iraqi tribes together to mediate an ongoing feud). At one point, the mediation fell into disorder as the parties began yelling at each other, and the *imam* took three leaders from each tribe into his office. *Id.* The process the *imam* used, including ordering a five-day truce, gives insight into traditional Arab-Muslim mediation. *Id.*

¹⁵³ In most Arab-Muslim dispute resolution settings, the role of the mediator is to bring the parties to agreement. ABU-NIMER, *supra* note 96, at 103. The mediator does not necessarily need to address "structural injustices or institutional arrangements underlying the conflict." *Id.* If an Iraqi party raises the issue of these perceived injustices, the mediator might remind the party to accept an offered agreement because they are not going to change the world, nor will they get better compensation. *Id.*

¹⁵⁴ AUGSBURGER, *supra* note 107, at 200 ("People are more likely to adhere to agreements they have helped form than to those imposed by external authorities."); BERTRAM I. SPECTOR, POLICY IMPLEMENTATION, CONFLICT, AND DISPUTE RESOLUTION 9–10, *available* [at http://www.usaid.gov/our_work/democracy_and_governance/publications/ipc/wp-11-ms.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/ipc/wp-11-ms.pdf) (last visited Sept. 10, 2004). For an overview of how to "invent options for mutual gain," see ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 56–80 (Bruce Patton ed., 2d ed. 1991); GOODPASTER, *supra* note 110, at 211–13.

of a conflict resolution process.¹⁵⁵ Once the parties have reached a consensus, the mediator should ensure that all details of the agreement, including reconciliation, are complete.¹⁵⁶ The importance of reconciliation in Arab-Muslim society should lead the mediator to ensure that some form of reconciliation will occur between the parties.

4. Reconciliation

In traditional Arab-Muslim dispute resolution, once the parties reach a settlement, the two sides agree to conduct a *sulhah*, or public reconciliation session.¹⁵⁷ The ritual is as much a symbolic expression of the parties' reconciliation as it is an actual acceptance of settlement between the parties.¹⁵⁸ For an American or other non-Iraqi, this ritual is unusual and may

¹⁵⁵ For one approach of conflict resolution, see Ronald J. Fisher, *Social-Psychological Processes in Interactive Conflict Analysis and Reconciliation*, in CONFLICT RESOLUTION: DYNAMICS, PROCESS AND STRUCTURE 81–104 (Ho-Won Jeong ed., 1999). Fisher promotes a process called “Interactive Conflict Resolution” or ICR. *Id.* at 82. Important to ICR is a problem-solving workshop that brings together “a small number of participants (typically four or five from each side) with a third-party panel of skilled scholar-practitioners (typically three to five) for intensive discussions focusing on the nature of the conflict (typically for three to five days).” *Id.* at 86. This approach would work best in larger, more complicated and intense disputes and conflicts. The third-party panel could consist of U.N. workers or other international workers and scholars.

¹⁵⁶ A vital aspect in the process of *sulh* is letting parties vent their frustrations and address the importance of continuing their relationship. Abu-Nimer, *supra* note 73, at 136. Once the parties have settled their dispute, the focus is on conciliation. Irani & Funk, *supra* note 75, at 184.

¹⁵⁷ ABU-NIMER, *supra* note 96, at 98–102. Reconciliation can either bring people back into harmony with each other or have a party publicly accept or submit to an agreement. Louis Kriesberg, *Paths to Varieties of Intercommunal Reconciliation*, in CONFLICT RESOLUTION, *supra* note 155, at 106. Reconciliation can occur between “individuals, peoples, officials, governments, families, or other groups or various combinations of them.” *Id.* Reconciliation can serve various purposes, including getting the parties to acknowledge the dreadful events that occurred between them, recognize and accept each other’s suffering, manifest a belief that wrongs have been redressed, and proclaim that they anticipate having future peaceful relations. *Id.* at 107. In Arab-Muslim society, the most important function of the public ritual is to express the responsibility and dedication of the parties to the settlement and to the reinstatement of peace and harmony among the parties. ABU-NIMER, *supra* note 96, at 108.

¹⁵⁸ *Id.* (discussing one ritual in Galilee where an offender had to walk around the town without his *kaffiyah* (traditional Arabic headdress), a great humiliation and an act that sends a message of repentance and helplessness).

be difficult to accept or comprehend.¹⁵⁹ However, if Americans were to submit to this process, it could help send a powerful message to local Iraqi communities. For example, if the settlement favored the Iraqi party, a public reconciliation could demonstrate that the American party, by submitting to the mediation and reconciliation, is concerned with justice, honor, and fairness. If the settlement favored the American party, the reconciliation ritual could send a message of acceptance by the Iraqis. This demonstration of acceptance could have several meanings, all of which would promote a feeling of cooperation and peacefulness by Iraqis.¹⁶⁰

¹⁵⁹ American mediation is a no-nonsense process that empowers individuals and allows the parties to reach a solution, forget the past, and move on. Irani & Funk, *supra* note 75, at 181.

¹⁶⁰ Recent events in Iraq demonstrate an analogous situation to benefits of reconciliation. The CPA had proposed a system of caucus-style elections for electing delegates to the Iraqi transitional National Assembly. Archie Tse, *In Dispute: The Caucus Plan*, N.Y. TIMES, Dec. 1, 2003, at A11. Many Iraqis, led by the Grand Ayatollah Ali al-Sistani, the most important Shiite cleric in Iraq, believed that direct elections were the best way to elect representative to the transitional National Assembly. Dexter Filkins, *U.N. Team Arrives in Iraq To Study Plans for Elections*, N.Y. TIMES, Feb. 8, 2004, at A11. Ayatollah Sistani refused to meet with CPA officials, but said that he would meet with a U.N. team and would seriously weigh the U.N.'s opinion on elections in making his decision about what ultimate plan he would support. *Id.* In response, the U.S. asked the U.N. to intervene. *Id.* The U.N. sent Lakhdar Brahimi, a well-respected Muslim, to Iraq to assess the possibility of holding direct elections. Edward Wong, *U.N. Envoy, Visiting Iraq, Backs Cleric on Elections*, N.Y. TIMES, Feb. 13, 2004, at A14. When the U.N. team announced that credible direct elections were not feasible, Ayatollah Sistani accepted the U.N.'s assessment. Dexter Filkins, *Iraqi Ayatollah Insists on Vote by End of Year*, N.Y. TIMES, Feb. 27, 2004, at A1. Because Ayatollah Sistani, the spiritual leader of Iraq's Shi'ite Muslims, accepted the U.N. as a legitimate third-party mediator, many Iraqis also accepted the rejection of direct elections. *Id.*; see also John F. Burns, *Cleric May Warn Iraqis to Reject New Government*, N.Y. TIMES, Mar. 28, 2004, at A20; Jeffrey Gettleman, *Top Shiite Cleric Recognizes New Interim Iraqi Government*, N.Y. TIMES, June 4, 2004, at A16; Yousseff M. Ibrahim, *For Iraq's Shiites, Faith Knows No Borders*, N.Y. TIMES, June 23, 2004, at A23; Edward Wong, *Cleric Tells Fighters and Occupiers to Leave Sacred Cities*, N.Y. TIMES, May 19, 2004, at A13; Edward Wong, *Iraq's Path Hinges on Words of Enigmatic Cleric*, N.Y. TIMES, Jan. 25, 2004, at A1. Similarly, if an Iraqi accepts a settlement in mediation as legitimate, other Iraqis might be motivated to accept mediations as a just way to resolve disputes with Americans. This might help Iraqis to see the Americans as fair and respectful of Muslim traditions. This could generate trust and acceptance of the American presence by Iraqis. See also Grand Ayatollah Ali al-Sistani, *Middle East Info. Center*, available at <http://middleeastinfo.org/article3861.html> (last updated Jan. 16, 2004) (last visited Sept. 10, 2004) (providing a summary of Ayatollah Sistani, including his background and views on Iraq).

In the Middle East, the ritual of public reconciliation generally begins with both parties lining up across from one another and then exchanging greetings and accepting apologies.¹⁶¹ The two parties then shake hands under the supervision of a *muslih* or a *jaha*.¹⁶² The offending party visits the home of the aggrieved, and the ritual concludes with a meal hosted by the offending party.¹⁶³ In the context of a settlement between an Iraqi and an American, the ritual could be large or small, depending on the nature of the dispute.¹⁶⁴ One important aspect of the ceremony is the speeches by the mediators and local leaders, which should explain why the parties have reached and accepted a settlement.¹⁶⁵ By explaining the agreement, the mediators and local leaders legitimize the agreement to the community and encourage peace, respect, and honor among the parties.¹⁶⁶ Once the ceremony is concluded, hopefully harmony is restored between the parties, and the Americans and Iraqis can interact in peace and respect.

¹⁶¹ Irani, *supra* note 137, at 13.

¹⁶² *Id.* *Muslihs* or *jaha* are those who have esteem in the community. See Marc Gopin, *Forgiveness as an Element of Conflict Resolution in Religious Cultures: Walking the Tightrope of Reconciliation and Justice*, in RECONCILIATION, JUSTICE, AND COEXISTENCE: THEORY AND PRACTICE 87, 95 (Mohammed Abu-Nimer ed., 2001).

¹⁶³ Irani, *supra* note 137, at 13. The exact nature of the ritual varies from place to place, but “the basic philosophy is based on *sulh* (settlement), *musalaha* (reconciliation), *musafaha* (hand-shaking), and *mumalaha* (‘partaking of salt and bread,’ *i.e.*, breaking bread together).” *Id.* at 109.

¹⁶⁴ For a minor dispute, the parties could meet at a local government building or mosque and perform the ceremony under the auspices of the mediator and local Iraqi and American leaders. For a larger dispute, the parties could conduct the ceremony in a larger public setting under the supervision of the mediator and more senior Iraqi and American leaders. If the Americans were the offending party, they should attempt to host a traditional Iraqi meal, perhaps inviting the aggrieved party to their “home” (forward operating base) if security concerns are negligible. Otherwise, the Americans could host a meal in the community.

¹⁶⁵ ABU-NIMER, *supra* note 96, at 108. Religious and cultural values should permeate their speeches. *Id.* Because the Iraqis and Americans usually practice different religions, the speech should emphasize that all parties are the children of God. *Id.* at 109.

¹⁶⁶ See *id.* at 107–09; see also LULOF & CAHN, *supra* note 121, at 293–314 (examining impression management in conflict). Face and honor are important to all people. *Id.* Therefore, Americans need to work especially hard to maintain face for the Iraqis. When face and honor have been threatened, corrective action needs to be taken. *Id.* at 297. There are a variety of methods in addressing face, and the Lulofs & Cahn text provides ample discussion for the mediator.

B. *Unanswered Questions*

The use of mediation to resolve disputes in Iraq between Iraqis and Americans is appealing, but there are some uncertainties about implementing and using the process. The first problem is convincing Americans and other non-Iraqis to submit to a style of dispute resolution that is foreign and puts some control over the outcome into the hands of an Iraqi. To overcome this issue, Americans must realize that the benefit of using the traditional Arab-Muslim style of mediation is building trust and faith between Iraqis and Americans. The key to ensuring fairness lies in selecting the mediators.

This leads to the second problem: the selection of mediators. How do the parties ensure mediator neutrality? As discussed in Part IV.A above, some mediator partiality is preferred, but how do the parties ensure that the mediators are fair? What kind of training do the mediators receive, and who oversees mediator training? Another important question is determining who the mediators are. As mentioned in Part IV.A above, potential mediators include Iraqi tribal leaders, *imams*, respected professionals, American military members, and foreign aid workers; the U.N. or other foreign countries could also provide mediators. This issue leads to the third problem: Who actually oversees the mediation program? Agencies that could implement and supervise the program include the U.N., the U.S. military, or even a U.S. agency such as the U.S. Agency for International Development.

The fourth problem is ascertaining how the mediation program fits within the Iraqi legal system. Is the mediation process a designated alternative to the court system, or is it independent from the courts? Can the courts order an Iraqi party into the mediation program? Is the mediation settlement appealable, and if so, where do the parties appeal to? Is there a larger regional committee that accepts appeals and disputes that the local mediators cannot resolve? The last question concerns the duration of the program. Does the program terminate when American military forces leave Iraq, or does it transition into a permanent mediation program for the Iraqis? These questions exhibit the need for further development if a mediation program is to be implemented in Iraq.

V. CONCLUSION

Events in Iraq reveal the need for ADR in that country. The American occupation of Iraq has been fraught with violence, contentiousness, and conflict. As Iraq transitions from an oppressed dictatorship to a lawless disorganized nation to a fully functional democracy, there are many disputes between the Iraqis and those helping to reconstruct Iraq that require a system

of ADR. Mediation is a traditional method of dispute resolution between Iraqis, and Americans and other non-Iraqis would benefit from utilizing Arab-Muslim mediation techniques. By using traditional Iraqi mediation, Americans could promote trust and cultural understanding between themselves and the Iraqis. Mediation could bring peace not only through the settlement of a dispute, but through the process of reconciliation.

By using Iraqi cultural methods, Americans could exhibit that their sole purpose in occupying Iraq is returning self-determination to Iraq and could show a genuine concern for learning about Iraqi culture. The wide cultural disparity between the Americans and the Iraqis illustrates the need for foreigners to be aware of cultural norms when working in another country. Of course, not all norms of a culture will apply to all persons within that culture, but understanding the generalities of a culture gives us a starting point when trying to resolve conflict between different parties. In the case of Iraq, the peculiarities of the situation, namely the American military as a foreign security force, demonstrates a situation where not just understanding cultural norms, but also embracing the culture of the other party, can lead to peace. It is hoped that this Note provides instruction on how Americans could adopt Iraqi methods of dispute resolution so that the trouble we have with the Iraqis is *not* ourselves; after all, it is their country.

