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War in dispute resolution theory and practice

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Editorial

War in dispute resolution theory and practice

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Recent world events have challenged the principles and assumptions of ADR theorists and practitioners. Of particular relevance have been the events taking place in Iraq over the past few months, and the continuing situation there.

Framing and reframing the war rhetoric

For mediators a striking feature of the war was the language used, particularly by the protagonists and media. A central phrase used ad nauseam was 'weapons of mass destruction' (WMD), a term of no clear objective meaning but with strong emotive appeal. It was used extensively by protagonists of the war, in particular the United States. Apart from some irony of the only super-power using this term, it was a convenient sloganistic justification for the 'self-defence' and 'pre-emptive strike' rationales.

The media had daily pages headed 'Count-down to War in Iraq' and carried copy of 'news' articles which had the unmistakable veneer of military public relations.

'Regime change' was another euphemistic phrase used extensively by the perpetrators of the action in Iraq, initially with some caution because of its political connotations, but later, as the WMD pretext became progressively weaker, with increasing regularity.

From the perspective of the peace movement and opponents of the military action this was not a 'war' but an invasion. It was also not the Iraq war, but the American and UK war.

War in dispute resolution theory

Dispute resolution expertise was not much in evidence during the events leading to the military action. There is of course nothing in dispute resolution theory to exclude war as an 'appropriate' intervention in a conflict situation. War is a power-based form of intervention along with its equivalents, such as civil litigation, strikes and lockouts. The appropriateness of a dispute resolution intervention in the particular circumstances of the dispute is always the key issue.

The ADR equivalent of the precautionary principle in environmental law has begun to operate in all dispute resolution systems, from primary school mediation programs to industry dispute resolution systems, processes within modern civil litigation and international disputes such as those in the middle east. This principle calls for the application of low cost interventions which prevent conflict escalation, minimise transaction costs, and reduce potentially damaging effects on future relationships. The commercial world is now accustomed to including in business contracts procedures to deal with disputes early, amicably and without resort to litigation.

There is evidence of significant change within the legal world from adversarial combat towards creative problem solving. This change has been promoted or legislatively mandated by successive governments in all Australian jurisdictions,



Editorial Panel



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leading to a legal process which is decidedly less confrontational and more collaborative. Using a term from environmental biology, it could be argued this is a function of long term survival needs for greater numbers of people using decreasing resources.

If applied to the debates over Iraq the precautionary principle and constructive problem solving would have placed a premium on extensive diplomacy and negotiation, both publicly and behind closed doors. Complete fact-finding, negotiate over procedural issues, maintain multiple sources of conflict and focus on integrative solutions.

Regulating war

Despite war being a power-based intervention attempts have been made for many centuries to 'regulate' it, both in international law and in moral philosophy. Many faith traditions have a doctrine of the 'just war', famously articulated by St Thomas Aquinas, which attempts to provide a moral underpinning to attacks by one country on another. The doctrine emphasises the need for a just cause for any war, for the intention of the perpetrators to be appropriate, and for there to be a degree of proportionality between the end and the means. Many church leaders, including the Pope, invoked the just war doctrine early this year to condemn the planned invasion of Iraq.

In international law and diplomacy doctrines regulate both the outbreak of war and the actions occurring during war. The great 17th century Dutch jurist Grotius was a prolific writer on both topics and his legacy remains in the texts and statutes of the present century. Thus, under United Nations rules, an invasion of one country by another is only warranted in a situation of self-defence or if specifically authorised by a Security Council resolution. Numerous international law conventions, most famously the Geneva convention, attempt to regulate conduct within war, with particular focus on civilians and the treatment of prisoners.

Of course both the just war theory and international law principles fall foul of the first victim in any war, the truth. In the recent conflict in Iraq,

much of this revolved around the question of whether Iraq possessed WMD.

Measuring effectiveness

Modern dispute resolution processes are subject to increasing scrutiny in terms of their effectiveness. Effectiveness is a function of numerous factors, such as cost, timing, user satisfaction, long term durability, effect on relationships and so forth.

In the case of war the effectiveness factors are more complex to identify and evaluate, particularly in the short term. One measure of effectiveness might be the political standing of those who pursued the war. In other words if the motives were seen as mainly political, the leaders of the United States, Britain and Australia would be major beneficiaries. In relation to transaction costs the popular view would be that it was highly successful. Against estimates of six figure casualty numbers, one could, on a utilitarian basis, argue that it was highly successful, though other moral philosophies would not accede to this view. If effectiveness is measured in terms of the benefits to the Iraqi people any assessment will have to be delayed for months, years and even decades.

Pacific interventions

Finally reference can be made to possible non-war options which might have been deployed instead of the invasion. Australia has in the past decade accumulated an enormous amount of experience and expertise in methods of dispute resolution and conflict management and is undoubtedly a world leader in the field.

Interestingly, the Australian Defence Force has also become a leader in this area and at the National Mediation Conference in Canberra last year Peter Cosgrove spoke movingly about its recent involvement in peace-keeping and reconciliation activities.

It is here that Australia's position is significant, as a relatively small country in the international sphere with historic ties to the US and trade links with Iraq. In the current climate mediation may well be scorned as a soft option, not one for the real world of evil despots or

super-charged super powers. However problem solving initiatives do not rely solely on blind faith and good will, and threats of punishment and promises of reward are predictable features.

There is an important dispute resolution principle known as building a 'golden bridge' which allows one or both parties to withdraw have been some degree of face. This seems to have

been behind the willingness of Nelson Mandela, if so requested by the United Nations, to mediate a withdrawal of Saddam Hussein from Iraq. Suggestions of 'regime change' were not compatible with the golden bridge principle.

Ultimately this is a topic on which it is difficult to remain neutral. My own conviction is that the Iraq invasion was not justified in terms of the just war doctrine, international law or

moral philosophy, or good dispute resolution principles.

Readers are invited to submit articles on the topic of war as a dispute resolution option for future issues of the ADR Bulletin. ●

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