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An Evaluation of Online Dispute Resolution's Interplay with Traditional Theories of Justice

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Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.

Martin Luther King, Jr. Letter from a Birmingham Jail (1963)

1 INTRODUCTION

In the offline world, the economics and politics of one country can impact and influence those of surrounding countries, as well as countries across the world. Revolutions in Egypt and Libya by individuals frustrated at their governments' domestic policies, for example, drive up the price of gas for a farmer living in Kansas who may never have heard of either Egypt nor Libya, let alone the plight of their citizens.¹ In the online world, this concept is all the more salient because online relationships obey political and geographic boundaries even less than offline interactions. While language barriers and computer literacy can often affect access to online interactions, people are now, more than ever, connected globally through the internet and other Information and Communication Technologies (ICTs).²

The ever increasing hyper-connectivity of the online world demands a new system of "rules of interaction" to ensure that people not only treat one another fairly in the online setting, but that they will continue to have faith in and interact within that world.³ In this chapter,

1 CNN Money, *Oil Surges 6% as Libya Tension Intensifies*. By Ben Rooney, 21 February 2011. Available at <http://money.cnn.com/2011/02/21/markets/oil_world_markets/index.htm?iid=EL>.

2 Secretary Clinton put this point very eloquently in her speech on Internet Freedoms, see H.R. Clinton, *Internet Rights And Wrongs: Choices & Challenges In a Networked World*. Speech delivered at George Washington University, 15 February 2011: "The Internet has become the public space of the 21st century, the world's town square, classroom, marketplace, coffee house, and nightclub. We all shape and are shaped by what happens there. All two billion of us and counting."

3 See *id.*: "To maintain an Internet that delivers the greatest possible benefits to the world, we need to have a serious conversation about the principles that guide us. What rules exist and should not exist and why; what behaviors should be encouraged and discouraged, and how. The goal is not to tell people how to use the Internet, any more than we ought to tell people how to use any public space, whether it's Tahrir Square or Times Square. The value of these spaces derives from the variety of activities people can pursue in them, from holding a rally to selling their wares to having a private conversation. These spaces provide an open

we analyze the interaction between traditional concepts of justice and fields in which Online Dispute Resolution (ODR) has flourished and is burgeoning. We then explore the ways in which justice as traditionally conceptualized is adapting to the digital environment, and ask the question: Are traditional notions of justice relevant to contemporary online interactions between individuals, businesses, and governments?

2 JUSTICE

To understand the impact that ODR has on justice, one must first understand what justice means. This is no simple task as there are many different philosophical conceptions of justice. Most conceptions of justice incorporate “action in accordance with the requirements of some law.”⁴ Whether these rules are grounded in religious, political or cultural norms, they exist to ensure fair treatment of all members of society. A scholar of conflict resolution at the University of Colorado, Boulder, describes the complex interplaying factors of justice as such:

Issues of justice arise in several different spheres and play a significant role in causing, perpetuating, and addressing conflict. Just institutions tend to instill a sense of stability, well-being, and satisfaction among members of society, while perceived injustices can lead to dissatisfaction, rebellion, or revolution. Each of the different spheres expresses the principles of justice and fairness in its own way, resulting in different types and concepts of justice: distributive, procedural, retributive, and restorative. These types of justice have important implications for socio-economic, political, civil, and criminal justice at both the national and international level.⁵

The author also identifies certain general goals of justice that are generally accepted by most scholars and implementers of justice, mainly: that justice ensures that people receive their “fair share” of goods and services available, that people receive “fair treatment from society’s institutions, that people’s actions conform to rules of “fair play”, and that any injustices are adequately addressed.⁶ *How* each of these goals is reached (*i.e. how* to fairly

platform and so does the Internet. It does not serve any particular agenda, and it never should. But if people around the world are going to come together every day online and have a safe and productive experience, we need a shared vision to guide us.”

4 M. Maiese, “Types of Justice”, in Guy Burgess and Heidi Burgess (eds.), *Beyond Intractability*, Conflict Research Consortium, University of Colorado, Boulder. Posted: July 2003. <www.beyondintractability.org/essay/types_of_justice>.

5 *Id.*

6 *Id.*

distribute goods, *how* to ensure that injustices are adequately addressed) remains a question open to interpretation, controversy and debate by justice scholars.

Our aims are therefore two-fold: firstly to outline briefly the relevant Justice vocabulary and theories in order to familiarize readers with the framework through which we, the authors, are evaluating systems (the “hows” referred to above) and then to evaluate whether existing ODR systems are capable of ensuring that people receive their “fair share” of goods and services available, that people receive “fair treatment from society’s institutions”, that people’s actions conform to rules of “fair play”, and that “any injustices are adequately addressed.”

2.1 *Categories and Definitions of Justice*

In this section, we shall describe several major categories of Justice: Justice as Freedom; Distributive Justice; Procedural Justice; Retributive Justice; Restorative Justice and finally Transformative Justice. As ODR is largely a way of resolving disputes using age-old methods such as negotiation, mediation, arbitration or conventional litigation, but with new tools, we shall focus largely on the way the new tools, or new *procedures*, introduced by ODR change *procedural justice*. The other major categories of justice shall be discussed in lesser detail, although they too are influenced by new technologies in dispute resolution. These occur, however, mainly through procedural differences between ODR and offline methods of dispute resolution.

2.1.1 **Justice as Freedom**

Two of the most fundamental concepts that come to mind when we think of justice are *fairness* and *freedom*. One generally thinks of fairness as action that takes into account the rights, property and safety of one’s fellows.⁷ Freedom is seen as the right of an individual to do (or not to do) whatever one would like. When discussed in the context of individuals’ relationship to governments, freedom is called *liberty*. This right is often classified in two categories – *positive liberty* and *negative liberty*.⁸

Positive liberty is the ability or opportunity of an individual to do things. In society, positive liberty may refer to an individual’s economic opportunities (e.g. to undertake whatever job he or she is qualified for; to earn a salary equal to his or her output; to use his or her

⁷ N. Rescher, *Distributive Justice*, Washington, D.C., University Press of America, Inc., 1982, p. 5.

⁸ This particular nomenclature of classification was first conceived by Isaiah Berlin in his book, *Two Concepts of Liberty*, which resulted from a lecture Berlin gave at Oxford University in 1958. The two concepts of which he speaks, however, we conceived long before him by John Stuart Mill. Mill explored these concepts in his book, *On Liberty* (originally published in 1959).

salary to purchase whatever he or she wants) or to political opportunities (e.g. to speak, gather or agitate with others on whatever social issue, in whatever location and at whatever time one wishes).⁹ Purely theoretical positive liberty is therefore an individual's ability to undertake any action he or she desires, regardless of race, gender, age or any other social or political status.

Negative liberty is an individual's freedom from the interference of others in his or her ability to do or be things.¹⁰ A lack of political freedom in this sense would mean that an individual is prevented from attaining a political goal because of the actions of other individuals (or government). A lack of economic freedom in this sense would mean an individual is unable to do something because he or she is prevented from undertaking the action because of poverty or a lack of financial resources to do so. As Isaiah Berlin, one of the leading scholars on the theory of liberty, points out, "if a man is too poor to afford something on which there is no legal ban – a loaf of bread, a journey round the world, recourse to the law courts – he is as little free to have it as he would be if it were forbidden him by Law".¹¹ Negative liberty is therefore freedom from tyranny and arbitrary actions by government that would take away an individual's rights (both political and economic) to do what he or she would otherwise be able to do, as well as freedom from levels of poverty that would prevent a person from accessing basic necessities of living.

In the real world, *positive* and *negative* freedoms are never present in their total forms for any individual. An individual's freedom to act within society is often curtailed insofar as it infringes on other individuals' freedoms, because to allow one individual to exercise absolute freedom in all actions might cause interference in others' freedoms. Governments must often impose restrictions on individuals' liberties to ensure that the liberties of the strong (*i.e.* the richer, the more politically influential) do not suppress the liberties of the weak (*i.e.* the poorer, and those lower in social rank).¹²

The balance of freedom against other concerns such as equal distribution of wealth, social order, security and the protection of the minority (to name a few) is an essential function

9 See I. Berlin (edited by Nigel Warburton), *Two Concepts of Liberty* in *Arguments for Freedom*, Open University 1999, pp. 155-165. Berlin frames this category with a question: "What, or who, is the source of control or interference, that can determine someone to do, or be, one thing rather than another?" See Berlin, p. 155.

10 See *id.*, pp. 155-165. Berlin frames this second category with the question: "What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?" See Berlin (1999), p. 155.

11 *Id.* at p. 156.

12 *Id.* at p. 157: "Because they [governments] perceived that human purposes and activities do not automatically harmonize with one another; and, because (whatever their official doctrines) they put high value on other goals, such as justice, or happiness, or culture, or security, or varying degrees of equality, they were prepared to curtail freedom in the interests of other values and, indeed, of freedom itself."

of society as a whole, whether that society is governed by a higher authoritative entity (*i.e.* a central government) or is self-policing and self-governing (*e.g.* open-source programming groups on the internet).¹³

One way in which individual freedoms may be preserved *within* the process of their curtailment by society for the preservation of the freedoms of others and other societal goals is through the establishment of *due process mechanisms*. Due process within the realm of legal discussion refers to the rules of procedure governing how substantive laws are administered in a judicial system. Procedural justice also applies to the ways in which society and governments provide individuals with a predictable, transparent and reasonable process through which society or government goes about activities that curtail individuals' rights. For example, rules of eminent domain (also called *compulsory action* or *expropriation*)¹⁴ and adequate compensation require in most countries that should a government need to take over an individual's land for the sake of a public use, the government must follow a set of pre-determined rules on notification, negotiation, payment of a fair price to the owner of property and, should the owner refuse to allow purchase of their property, rules on court action to resolve the issue. Such rules of procedure ensure that even if an individual's rights are infringed upon by society, the infringement is neither arbitrary nor tyrannical as justification of the acquisition must be made by the government in a court of law, and the property owner has some recourse in court against the government if he or she feels unjustly treated.

Another way in which philosophers and scholars of justice have justified curtailing individual freedoms over the last two centuries is through *social contract theory*. Jean-Jacques Rousseau, a seminal philosopher whose theories gave birth to both the French and American Revolutions, eloquently described the relationship between liberty and social contract as follows:

What man loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses. If we are to avoid mistake in weighing one against the other, we must clearly distinguish natural liberty, which is bounded only by the strength of the individual, from civil liberty, which is limited by the general will; and possession, which is merely the effect

¹³ See generally O. Brafman & R.A. Beckstrom, *The Starfish and the Spider: The Unstoppable Power of Leaderless Organizations*, Penguin 2008.

¹⁴ Eminent domain is the term used in the United States, whereas compulsory action and expropriation are used in other countries such as the UK, Australia and India to describe the same government action.

of force or the right of the first occupier, from property, which can be founded only on a positive title.¹⁵

The relationship between individuals and society (*i.e.*, a group of individuals that operate together) in terms of liberty is therefore a relationship of mutual benefit, according to social contract theorists. Individuals surrender some of their innate natural rights (positive liberties) to society in exchange for an understanding that society at large will help protect them against arbitrary or unfair infringements by others (*i.e.* will provide them with negative liberties).¹⁶

Justice may therefore be seen as one side of a coin, and liberty the other, when discussing *fairness* in society's relation to individuals. When people give up their liberties and freedoms for the sake of society at large, they seek to have society compensate them with justice¹⁷ in return.

2.1.2 Distributive Justice – Fair Outcomes

Distributive justice theory parses out how and why “wealth, duties and rights, powers and opportunities, offices and honors”,¹⁸ to name a few things individuals seek from society, are distributed to individuals within society.¹⁹

Egalitarianism is one of several major distributive justice theories, and is based on the concept of equality, *i.e.* that every person receives an equal share. Egalitarian justice can be seen as equality of original positions, equality of opportunity, equal proportions of goods and equal rights.²⁰ Equality of opportunity, equal portions of goods and equal rights therefore often require redistribution by society at large, or by government, as they do not naturally occur without outside interference.

15 J.J. Rousseau, *On The Social Contract*, New York, Dover Publications, Inc. 2003, p. 12

16 *Id.*, p. 15: “The common element in these different interests is what forms the social tie; and, were there no point of agreement between them all, no society could exist. It is solely on the basis of this common interest that every society should be governed”.

17 *I.e.* their “fair share” of goods and services available, “fair treatment from society’s institutions”, guarantees that people’s actions conform to rules of “fair play”, and guarantees that “any injustices are adequately addressed”. See Maiese (2003).

18 M. Sandel, *Justice: What’s the Right Thing to Do?*, New York, Farrar, Straus, and Giroux 2009.

19 J. Rawls, *A Theory of Justice*, Harvard University Press 1999, p. 4

20 J. Konow, “Which is the Fairest of Them All: A Positive Analysis of Justice Theories”, *Journal of Economic Literature*, (2003) Vol. XLI, pp. 1188-1239, 1194.

A second major theory of distributive justice is utilitarianism. Utilitarianism, sometimes referred to as “the greatest happiness principle”,²¹ is a theory of distributive justice that argues for the greatest amount of good for the greatest number of people.

The difficulties with egalitarianism and utilitarianism are often cited as such: both favor the overall good for the population but do not cater to the individual’s sense of justice. Both doctrines sacrifice the right of the individual to choose what his or her idea of a fair outcome is, and instead condone the decision by a higher power (society in general, governments or governing bodies in particular) for the greater good. Another problematic aspect of utilitarian and most egalitarian theories is that measurement of justice is often done through simplistic measurements of wealth (when measuring access to resources) or of policy and laws (when measuring access to rights), which excludes the complex interrelation of other factors that lead to these indicators.

One contemporary justice theorist who offers a more holistic approach to measuring justice is Amartya Sen.²² Sen, who was awarded the Nobel Prize in 1998 for his work in welfare economics and social choice theory, posits that measurement of justice (and its converse, injustice) must take into account all the factors that lead to a certain outcome. His approach, which is shared by other theorists such as Martha Nussbaum, is called the “Capabilities Approach” to social justice.²³ According to this approach, justice is not just about fair outcomes but about the capabilities of individuals within a social system to achieve their political, social and economic goals and satisfy their needs. The factors contributing to a just outcome consist, for example, of an individual’s standing in society (gender, race, age and social class are factors contributing to social standing), an individual’s health, education (or access to education), ability to move freely from place to place, ability to freely engage in political activities, ability to hold property and seek employment freely, etc.²⁴ Sen and Nussbaum argue that in order to really understand just outcomes and the steps necessary to achieve them, we must first understand injustice and the multi-various factors that lead to it in societies. The path to achieving justice, according to Sen, involves governmental and societal focus on individual’s freedoms (both positive and negative), with an emphasis on providing individuals with enough of the basic needs (food, shelter, health and education) to be able to make their own individual choices as to other freedoms and opportunities.²⁵

21 This term comes from Jeremy Bentham, one of the first and most influential philosophers on Utilitarianism.

22 See generally, A. Sen, *Development as Freedom*, Anchor Books 1999.

23 *Id.*

24 These are just a few factors listed by Martha Nussbaum, Sen’s co-creator of the Capabilities Approach, in her book, see M.C. Nussbaum, “Capabilities as Fundamental Entitlements: Sen and Social Justice”, *Feminist Economics*, (2003) 9 (2/3), pp. 33-59.

25 See, generally, A. Sen, *The Idea of Justice*, Belknap Press of Harvard University Press 2009; Sen (1999).

2.1.3 Procedural Justice – Fair Processes

Distributive justice concerns how “wealth, duties and rights, powers and opportunities, offices and honors”,²⁶ and other things individuals desire from society, are distributed, and to whom. It therefore deals with *fair outcomes*. Procedural justice concerns fairness in the *process* (rather than the outcome) by which things are distributed or decisions are made. Procedural justice in the legal context is the way in which decisions are made on legal issues before courts of law or other decision-making bodies.

There are many characterizations and categorizations of procedural justice, but for the purposes of this analysis, we shall use a three part model of procedural justice posited by Lawrence Solum, a professor of legal philosophy at the University of Illinois and an internationally renowned philosophy of law expert.²⁷ Solum divides views and approaches to procedural justice into three models: the *accuracy model*, the *participation model*, and the *balancing model*.²⁸

The Accuracy approach to procedural justice requires “the correct application of the law to the facts”.²⁹ Those that approach procedural justice from the accuracy perspective therefore see a set of decision-making rules within government or courts as successful only if those rules ensure that an outcome of a proceeding is the same as that called for by the substantive law upon which decisions are made. This approach requires a consistency of decisions, the neutrality of the decision-maker, transparency in the process of decision-making, correctability of incorrect decisions (*i.e.* an appeals process allowing for correction of errors at lower levels of decision-making hierarchy), and strong discovery and evidence procedures (as these contribute to a better ability to make a decision based on applying substantive law to the facts of the case).

The primary aim of those approaching procedural justice from an accuracy approach is therefore that the correct outcome, based on substantive laws, is reached. This approach

26 Sandel (2009).

27 Professor Solum’s biography may be found at <<https://www.law.illinois.edu/faculty/profile/LawrenceSolum>>, last accessed 19 March 2011.

28 L.B. Solum, “Procedural Justice”, (23 February 2004). *U San Diego Law & Econ Research Paper* No. 04-02; *U San Diego Public Law Research Paper* No. 04-02, p. 111. Available at SSRN: <<http://ssrn.com/abstract=508282> or doi:10.2139/ssrn.508282>.

29 *Id.* at p. 55, citing P. Johnston, “Civil Justice Reform: Juggling Between Politics And Perfection”, (1994) 62 *Fordham L. Rev.* 833, n. 1 (“I will use the term ‘procedural justice’ broadly to suggest an assessment of the quality or success of procedural law in providing dispute-resolution participants what we think they are due.”).

can be said to fall within the *positive liberties* field of justice, as it prioritizes the accurate determination of each party's legal rights over all other concerns.³⁰

The Participation approach to procedural justice focuses primarily on the ability of all interested stakeholders to have a voice in the decision-making process concerning that issue. This model therefore encompasses several procedural requirements, such as notice,³¹ opportunity to be heard,³² fair representation of absent parties,³³ fair value of procedural justice,³⁴ and the ability to appeal. While the accuracy approach focuses primarily on an accurate outcome of a proceeding, based on substantive law, the participation model prioritizes the ability of all interested parties to be heard in a proceeding. These approaches overlap in some aspects, *e.g.* the right to appeal, but diverge on others. For example, while proponents of the *accuracy approach* might favor the expenditure of limited time and resources in a court proceeding on the collection and review of non-testimonial evidence over testimony (especially if this is called for in the applicable substantive law), proponents of the *participation principle* would argue for all persons who would be subject to a final binding adjudication or who otherwise have a substantial interest in the case to be able to testify if they desired.

The Balancing approach ensures a balance between the accuracy of a substantive outcome with practical concerns like the costs of adjudication, requirements of fairness, participation, and so on. In real-world decision-making proceedings, procedural justice is achieved by balancing cost (in monetary and temporal terms) against accuracy. A legal system operating purely on accuracy or participatory concerns would allow re-litigation of issues in courts until the parties are satisfied with the outcome. However, in most dispute resolution systems, the resources of courts are preserved using legal procedural doctrines and principles, such as *res judicata*, which arguably preserve access to justice for a larger population, but at the expense of the satisfaction of individual litigants as to their particular cases.

30 Solum (2004), p. 56. Available at SSRN <<http://ssrn.com/abstract=508282> or doi:10.2139/ssrn.508282>, citing Robert G. Bone, "Statistical Adjudication: Rights, Justice, And Utility in a World of Process Scarcity", *Vand. L. Rev.*, (1993) 46, 561, 598: "A rights-based theory assumes that the purpose of adjudication is to determine each party's legal rights accurately. Because rights trump social utility, a deprivation of a right cannot be justified by direct appeal to the aggregate social benefits the offending activity makes possible. Thus, if an erroneous result counts as a deprivation of substantive right, procedures that increase error cannot be justified simply by citing the aggregate benefits to all resulting from reduced litigation and delay costs."

31 *I.e.* adequate and timely notice to all interested parties prior to resolution process commencement.

32 *I.e.* equal and meaningful opportunity to present evidence and arguments in the resolution process.

33 *I.e.* the ability for absent parties who are unable to attend hearings for impracticability or other reasons, to be represented fairly by present parties.

34 *I.e.* the right to free/affordable representation in suits for basic liberties.

2.1.4 Retributive Justice – Fair Redress of Harm

Retributive justice is, in general terms, fairness in the rectification of wrongs through punishment. There are several ways in which retributive justice can be implemented. One is *proportional-to-harm punishment*, whereby the wrongdoer is doled out punishment commensurate with the harm exacted on the victim. This is an ancient concept with some of the first recorded examples being the Code of Hamurabi³⁵ and Old Testament.³⁶ In contemporary conventional court systems, examples of this justice concept can be found in fines and prison terms whose policy rationales are based on harms done to the victim. Expectation and reliance damages in breach of contract theory also reflect this kind of retributive justice, where the victim of a contractual breach is rewarded damages proportional to the harm suffered.

A second approach to retributive justice is measuring punishment in terms *proportional to gains by the wrongdoer*. In US breach of contract theory, for example, *restitution damages* call for the wrongdoer to pay damages to the claimant in the amount of the wrongdoer's gain from the wrongful transaction.

A third approach is *punitive punishment*, where the policy justification for the punishment doled out to a wrongdoer is not to rectify wrong to the victim nor to deprive the wrongdoer of the gains from his/her wrongdoing, but to deter the wrongdoer and future wrongdoers from committing the same or similar offenses again. Examples of punitive punishment include the death penalty in criminal cases for certain crimes, and punitive damages in breach of contract theory, whereby the wrongdoer is required to pay considerably higher damages than what is necessary to compensate the victim for their loss or to match the amount gained by the wrongdoer.

2.1.5 Transformative and Restorative Justice – Addressing the Cause Behind the Wrong

An alternative to redressing harms by punishing wrongdoers, transformative and restorative justice both seek to achieve fairness by addressing the causes behind the crime or dispute and seeking relational and educational opportunities for victims *and* perpetra-

35 Babylonian codes of law, written circa 1700 BC under the rule of Hamurabi, the sixth king of Babylon.

36 Leviticus 24: 19-21: "If you break a bone, one of your bones shall be broken; if you put out an eye, one of your eyes shall be put out; if you knock out a tooth, one of your teeth shall be knocked out. Whatever injury you cause another person shall be done to you in return."

tors.³⁷ Transformative justice has been applied in the fields of ethnic conflict resolution³⁸ and in domestic criminal rehabilitation³⁹ in some states. In many ways, offline alternative dispute resolution methods incorporate similar ideas of justice to transformative and restorative justice. Negotiation and mediation methods often take parties beyond positions to the interests that lie behind positions. While the adversarial aspects of litigation tend to drive parties to stick to their positions uncompromisingly, most ADR methods encourage the cooperation of parties in finding a middle ground that satisfies all interested parties. As we discuss below, ODR may also provide similar advantages over courtroom civil and criminal proceedings in terms of redressing harms fairly.

2.2 Conclusions

The evolving online justice system will require all stakeholders in this new “digital society”, whose members comes from all around the globe, to create a justice framework within which they must interact. This online justice system is, in a sense, a chance to redefine the way people interact with each other. One option is to attempt to overlay national justice frameworks on the online setting, which results in the potential for conflicts of laws, as has been seen in numerous areas from privacy to music. This approach is ineffective as it attempts to place geographic jurisdictional boundaries onto an emerging global digital society that is not geographically-bound.

A better approach, in our opinion, would be to create a new set of laws and procedures governing online interactions that take into account the nature of online interactions. In the words of John Rawls:

³⁷ See, generally, International Center for Transitional Justice, *What is Transitional Justice*, available at <www.ictj.org/en/tj>, last accessed 19 March 2011; Heather Strang & John Braithwaite (eds.), *Restorative Justice and Civil Society*, Cambridge University Press 2001; R. Morris, *Stories of Transformative Justice*, Canadian Scholars Press Inc. 2000; J. Shapland *et al.*, “Situating Restorative Justice Within Criminal Justice”, *Theoretical Criminology*, Vol 10(4), pp. 505–532.

³⁸ Two relatively successful African examples of its application are the Truth and Reconciliation Commission in South Africa and the Gacaca Courts Rwanda. To learn more about these, please visit <www.justice.gov.za/trc> (the official website of the South African TRC) and <www.inkiko-gacaca.gov.rw> (the official website of the Gacaca courts of Rwanda), last accessed 19 March 2011. In both instances, the approach taken in healing nations attempting to recover from decades of racial prejudice, human rights abuses, and even genocide, was to attempt to reconcile victims and perpetrators of crime through the processes of dialogue, public confession and forgiveness.

³⁹ See J. Shapland *et al.*, “Situating Restorative Justice Within Criminal Justice”, *Theoretical Criminology*, Vol. 10(4), pp. 505-532, for an accounting of three major restorative justice schemes in England and in Wales that included processes of apology, rehabilitation, reparation, healing, restoration, and reintegration into society.

Men are to decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, that is, the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust.⁴⁰

This is no easy task. We believe the creation of a new set of rules for online interactions will require not only extensive research and global consensus building on what differences exist between online society and offline society (research which is currently being undertaken by many eminent scholars),⁴¹ but also the development of best practices in offline legal infrastructure that are best-suited to the online atmosphere *and* innovative legal research on new ways to structure the online legal system.⁴² The field of ODR, as we shall detail below, began in the e-commercial sector as an innovative way of dealing with new kinds of human interactions. The growth and success of ODR in the e-commercial field, as well as in other fields such as e-government and e-diplomacy, will require continued innovation and willingness to experiment with new ways of bringing centuries-old ideas of justice from the offline world online. ODR has the potential to transfer existing justice delivery mechanisms to a new social order, but more importantly, it has the potential to *improve* justice delivery in many ways. We shall explore both potentials of this powerful legal tool in the following pages.

40 J. Rawls, *A Theory of Justice*, Harvard University Press 1999, p. 11

41 To name just a few, see L. Lessig, *Code*, Basic Books 2006; Saul Levmore & Martha C. Nussbaum (eds.), *The Offensive Internet: Speech, Privacy and Reputation* 2010; E. Morozov, *The Net Delusion: The Dark Side of Internet Freedom*, PublicAffairs 2011; J. Goldsmith & T. Wu, *Who Controls the Internet?: Illusions of a Borderless World*, Oxford University Press 2006; H. Abelson *et al.*, *Blown to Bits: Your Life, Liberty and Happiness After the Digital Explosion*, Pearson Education, Inc 2008; D. Tapscoott & A.D. Williams, *Wikinomics: How Mass Collaboration Changes Everything*, Penguin 2006.

42 Once again, John Rawls' evaluation of what needs to be done in order to achieve a stable and functional society is extremely relevant to the organization of online society. See Rawls (1999), pp. 5-6: "There are other fundamental social problems [besides the problem of agreeing on a conception of justice], in particular those of coordination, efficiency and stability. Thus the plans of individuals need to be fitted together so that their activities are compatible with one another and they can all be carried through without anyone's legitimate expectations being severely disappointed. Moreover, the execution of these plans should lead to the achievement of social ends in ways that are efficient and consistent with justice. And finally, the scheme of social cooperation must be stable: it must be more or less regularly complied with and its basic rules willingly acted upon; and when infractions occur, stabilizing forces should exist that prevent further violations and tend to restore the arrangement."

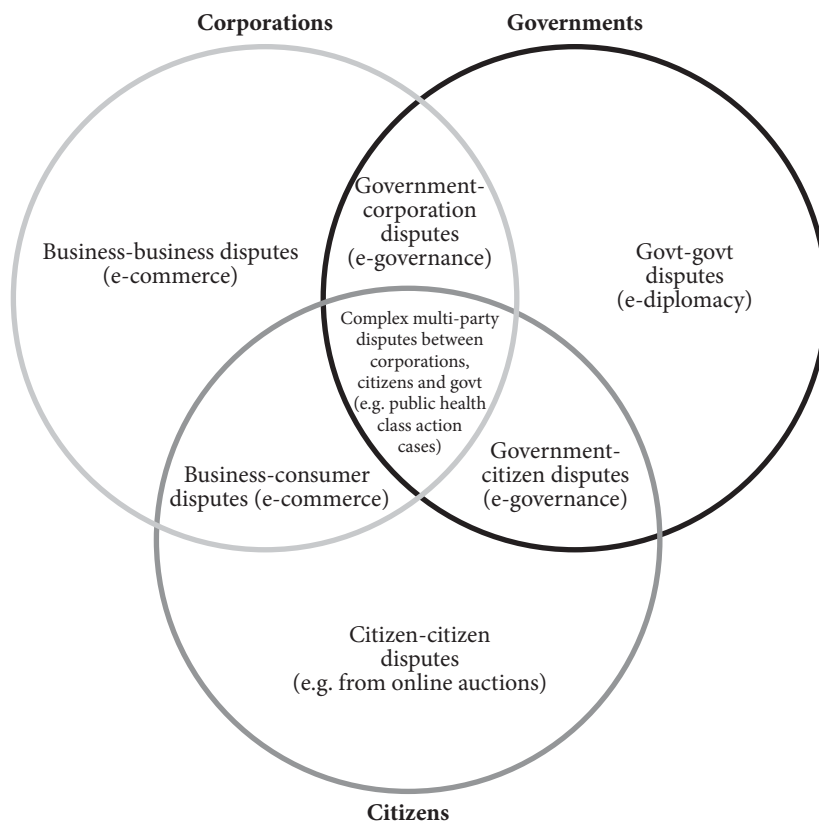
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The potential field of Online Dispute Resolution (ODR) has seen extensive study and commentary.⁴³ Most discussion surrounding ODR focuses, however, on its application within the area of e-commerce, that is, commercial interactions between businesses and consumers in the online setting. E-commerce ODR covers dispute resolution in B2B, B2C and C2C situations (business-to-business, business-to-consumer and consumer-to-consumer, respectively). E-commercial ODR has also seen the most implementation and success, compared to ODR in other fields.⁴⁴ We shall therefore begin our discussion of the interaction between justice and ODR with a short overview of e-commercial ODR. The potentials for ODR extend, however, beyond e-commerce to the fields of e-governance and e-diplomacy, as other chapters in this book detail. Our analysis therefore turns next to these other potential areas for implementation. We shall end the chapter with a discussion of the potentials of the ODR field in comparison to conventional litigation and offline dispute resolution systems, especially for the next billions – those in developing nations soon to enter digital society.

43 For a list of articles and books on ODR (updated till 2006), please visit <<http://odr.info/library.php>>, last accessed 23 February 2011.

44 A. Ramasastry, "Government-to-Citizen Online Dispute Resolution: A Preliminary Inquiry", 79 *Wash. L. Rev.* 159 (2004), p. 160.

Figure 6 Overview of E-commercial ODR



In most ODR discussions, the concepts of access to justice, fairness and efficiency emerge as the main advantages over conventional, offline litigation and ADR methods. In discussions of potential ODR drawbacks, again issues of fairness, due process and accessibility arise.⁴⁵ Aspirational principles appearing in statements by the commercial ODR community about best practices reflect similar concepts, and as Professor of Law, Anita Ramasastry

45 See generally, Ramasastry (2004); S. Schiavetta, *Online Dispute Resolution, E-Government and Overcoming the Digital Divide*, 20th British & Irish Law, Education and Technology Association Conference, April 2005, Queen's University of Belfast; M. Wahab, *Online Dispute Resolution and Digital Inclusion: Challenging the Global Digital Divide*; UNCTAD E-Commerce and Development Report 2003, Chapter 7: *Online Dispute Resolution – E-Commerce and Beyond*, available at <www.unctad.org/en/docs/ecdr2003ch7_en.pdf>, last accessed 10 February 2011.

points out, if the word “government” is substituted for “business”, the principles would apply just as well to G2C ODR.⁴⁶

Table 3 Justice Aspirations of ODR providers

Transparency	ODR programs should provide readily accessible information about all aspects of their services.
Independence	ODR programs should operate independently of business interests.
Impartiality	ODR programs should operate without bias favoring business interests.
Effectiveness	There should be mechanisms to ensure business compliance with ODR outcomes.
Fairness and Integrity	ODR programs should observe due process standards ensuring, that each party to a dispute has equal opportunity to express its point of view.
Accessibility	ODR programs should facilitate easy use by consumers.
Flexibility	ODR programs should permit adaptation of their procedures to suit the circumstances of the particular dispute at hand; recourse to courts by consumers should not be precluded unless by prior and equitable agreement.
Affordability	ODR programs should be affordable for citizens or consumers, particularly in light of the amount of compensation being sought.

Ramasastri emphasizes the hope that many place in ODR, citing major potential improvements to the justice system: “The thought of resolving a dispute between parties in different corners of the globe using personal computers and an Internet connection is appealing... The fact that one might be able to sit at a computer in one’s pajamas and have a contract dispute mediated with an Internet merchant sounds quite attractive.”⁴⁷ She also explains that ODR offers parties similar potential advantages over litigation to offline ADR methods (*e.g.* negotiation, mediation and arbitration) of greater efficiency, greater party control, and lower costs, and in fact *increases* these advantages compared to conventional ADR.⁴⁸ If ADR improves access to dispute resolution by making it quicker, cheaper and

⁴⁶ The text in this table was taken from Ramasastri (2004), p. 173; see also Pablo Cortes, *Building Legal Standards in the EU for ODR Services*, 2009 International Workshop on ADR/ODRs, UOC, Barcelona. The text of this table reflects general consensus amongst many ODR providers and policy makers. The European Commission’s recommendations on the handling of out-of-court disputes online, for example, reflect many of these criteria for ODR. See 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (Text with EEA relevance), available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998H0257:EN:NOT>>.

⁴⁷ Ramasastri (2004).

⁴⁸ *Id.*

easier for parties to control, then ODR makes the resolution of disputes *even* quicker, cheaper and easy to conduct, with or without third-party help.

The earliest applications of ODR occurred within the realm of the earliest Internet activity – interactions between Internet Service Providers and their subscribers, and between domain name owners.⁴⁹ The Virtual Magistrate⁵⁰ and the Online Ombuds Office⁵¹ were the earliest ODR projects created to resolve online disputes using online tools. Both these websites offered online access to mediators for parties to a dispute, and the ability to resolve the dispute through the submission of information via email.⁵²

As online communications technologies have advanced, so has the sophistication of ODR mechanisms, and yet the aspects of *procedural justice* (i.e. the fair process of administering justice) and *retributive justice* (i.e. the fair redress of harm) detailed in Table 3 are reflective of the age-old societal expectations of conventional judicial systems we have detailed in the first half of this chapter. This is because the fundamental expectation we, as individuals, have of the societies we participate in do not change drastically, even if the new societies in which we engage (e.g. digital societies) are in many ways revolutionary and groundbreaking. How ODR systems measure up to these familiar expectations of transparency, accessibility, flexibility and affordability is therefore explored below. We have added three additional categories to those detailed in Table 3, to reflect the complete justice analysis we have outlined in this chapter. The three additional categories are: freedom, distributive justice, and transformative justice, all of which constitute staples of mainstream conceptions of justice, and which should therefore be used as evaluative benchmarks for the ability of ODR to deliver justice in a digital society.

3.1 *Transparency – ODR Programs Should Provide Readily Accessible Information About All Aspects of Their Services*

As ODR is a relatively new form of dispute resolution in comparison to conventional courtroom and ADR methods, an important aspect of accessibility of this mechanism is transparency – the ready availability of information about this kind of dispute resolution,

49 UNCTAD E-Commerce and Development Report 2003, Chapter 7: *Online Dispute Resolution – E-Commerce and Beyond*, available at <www.unctad.org/en/docs/ecdr2003ch7_en.pdf>, last accessed 10 February 2011, p. 181.

50 Virtual Magistrate, available at <www.vmag.org>.

51 The Online Ombuds Office was a project of the University of Massachusetts National Center for Technology and Dispute Resolution. See <www.ombuds.org/center/ombuds.html>.

52 See UNCTAD E-commerce and Development Report 2003, Chapter 7: *Online Dispute Resolution – E-commerce and Beyond*, p. 183.

and its associated processes, costs and advantages over the more traditional forms of dispute resolution. This kind of information is also necessary for first-time litigants in a court of law, who may be in need of guidance through the steps of the process, and courts of law often provide step-by-step guides and instructions, both in-person and online.⁵³ In terms of transparency, we believe much can be done to improve existing ODR platforms. Most ODR service providers in existence today give very minimal information to end-users about the steps and procedures involved in resolving a dispute through their systems until, perhaps, the end user has signed up to use their services. While this is most probably a result of desires to protect proprietary information as to system design from competitors, what this lack of transparency does is alienate potential users who may already be wary of using a new and alternative dispute resolution mechanism to those they are used to, *i.e.* the courts and conventional offline ADR services.

It is, for instance, surprisingly difficult to glean much concrete information about the *process* of ODR from ODR providers which, as briefly mentioned above in this chapter, is the most significant difference between ODR and offline ADR methods. The processes of ODR can change with different ODR providers, as each utilizes a different combination of computer-assisted and human-assisted processes to arrive at a resolution for parties.⁵⁴ Most information on the history, kinds of ODR and instances of application is available not on ODR websites but in articles, books and reports on the industry. While there is information available about the field, therefore, it appears to be available only to industry insiders and academics, and not to the general public.

It could be argued that transparency of ODR processes is not a necessary element of the system that a disputant does not care what technological steps are taken between the registering of a dispute and its resolution, as long as the resolution is agreeable to the disputant. The reality, however, is that a disputant's sense of fairness in a given dispute resolution is dependent on both the outcome and the process of dispute resolution. They may not want to know what kinds of algorithms work to produce recommended outcomes, but, in order to trust that an outcome is fair to them, disputants desire some knowledge on who is deciding the outcome of their dispute, what and how much information this mediator is evaluating (whether it be a person reviewing the case electronically or a computer program), and whether the decision process is uniform and predictable.

53 See, *e.g.*, Massachusetts Superior Court Department, *Self Help Center for the Massachusetts Court System*, available at <www.mass.gov/courts/selfhelp/index.html>, last accessed 20 May 2011.

54 See UNCTAD E-commerce and Development Report 2003, Chapter 7: *Online Dispute Resolution – E-commerce and Beyond*.

ODR, like ADR, is not a public process, but a private one. Therefore case histories and decisions are often not published. This makes the process more opaque than conventional litigation and disputants may feel due process is compromised because they do not know who is deciding their case, or how the person or entity is making their decision (based on past decisions). While this aspect of ODR may never change, more transparency regarding the decision-making process would, in our opinion, greatly improve public uptake of ODR and therefore improve access to a system that offers many advantages over conventional courts and offline ADR mechanisms.⁵⁵

3.2 *Independence and Impartiality – ODR Programs Should Operate Independently of Business and Government Interests and Should Operate Without Bias Favoring Those Interests*

In order for participants in a dispute resolution mechanism to trust that the outcome is fair, the mechanism must be perceived as impartial and independent of all participating disputants. ODR holds the potential to be much more independent and impartial than conventional courtroom proceedings, as the online mediator is operating remotely, could remain anonymous to the parties, and is never in the same room as disputants, whereas in offline proceedings, proximity of the mediator/judge provides opportunity for influence and bias. A further strength of ODR over offline dispute resolution may be that the mediator, if it is a person, is not chosen by disputants, whereas in offline ADR, mediators and arbitrators are usually agreed-upon by the parties to the dispute. Finally, in cases where ODR is completely technology-mediated (e.g. Cybersettle),⁵⁶ there is no person to be influenced, and the proceedings are therefore most likely to be impartial. In cases such as this, technology can be used as a separate tool to bring the parties to consensus, with or without a mediator.⁵⁷

Often, however, especially in the case of e-commercial disputes between businesses and consumers (B2C) and governmental-to-citizen dispute resolution processes (G2C), the

55 eBay's *Resolution Center* is an exception to the general lack of transparency and information provided by ODR services regarding the ODR process. Within its Customer Support section, eBay guides potential disputants through step-by-step instructions on resolving potential disputes on their own or contacting the Resolution Center for help. A series of "Help" sections also guide users through the stages of dispute resolution. See, generally, eBay Resolution Center, available at <<http://resolutioncenter.ebay.com>>.

56 UNCTAD E-commerce and Development Report 2003, Chapter 7: *Online Dispute Resolution – E-commerce and Beyond*, p. 187

57 See E. Katsh and A. Gaitenby, *Introduction to Proceedings of the UNECE Forum on ODR 2003*. Available at <www.odr.info/unece2003>: "What will occur over time will be the development of software that takes advantage of machines to compute as well as communicate, to model and monitor, to lay out options and also evaluate options, to provide data necessary for decisions and also to represent data visually so that it can be understood and employed in new ways."

ODR process is subsidized by the larger entity (the business or government) in order to make the mechanism accessible and affordable to the consumer/citizen. Professor Ramasastry explores in great detail the funding problems of ODR systems in her article on Government-to-Citizen ODR, stating, “generally, the problem with using ODR relates to the economics of ODR”.⁵⁸ She explains that, especially in cases in which ODR is especially effective (high-volume and low-cost e-commercial disputes), consumers have little incentive to pay the fee for an ODR service if this fee is almost equivalent to or greater than the value of the dispute. Businesses are, however, incentivized to pay this fee, even if individual disputes are over low values, as the resolution of high volumes of small disputes efficiently and quickly saves businesses money in the long run.⁵⁹ A similar argument can be made for government’s incentive to subsidize G-2-C dispute resolution.⁶⁰ The problem with this model, as Thomas Schultz points out in an essay on the role of government in ODR, is that

If one party pays exclusively or much more than the other party for a dispute resolution, a real or at least a perceived bias inevitably appears. It is a form of business affiliation that should be avoided, because it lessens trust, and maybe also the quality of justice.⁶¹

While this may be a concern of some users, the tradeoff between a risk of partiality from a largely computerized, remote and automated dispute resolution mechanism may be outweighed in end-users’ minds by the ability to access a resolution of small disputes that is quick, easy and efficient compared to offline litigation or ADR.

3.3 *Effectiveness – There Should Be Mechanisms to Ensure Compliance with ODR Outcomes*

The enforceability of ODR outcomes is crucial to a sense of retributive fairness for participants in the process. This speaks to one of the fundamental aspects of justice that we mentioned at the beginning of the chapter: the requirement that injustices are adequately addressed. To engage with a system in hopes of redressing one’s harms, proceed through all necessary steps, receive a conclusive decision with which one is satisfied, and then to

⁵⁸ Ramasastry (2004), pp. 162-167.

⁵⁹ Instead of paying ODR service fees per transaction, businesses and government have the option of arranging membership fees with ODR providers, which constitute a unilateral fee payment for their services. *Id.*, at p. 165.

⁶⁰ *Id.*, pp. 162-167.

⁶¹ T. Schultz, *An Essay on the Role of Government for ODR, Theoretical Considerations About the Future of ODR*. ADROnline Monthly, August 2003, p. 7. Available at <www.odr.info/unece2003/pdf/Schultz.pdf>.

have that decision go un-enforced would severely undermine confidence, trust and repeated engagement with the system. The fact that ODR is, like negotiation and mediation in offline ADR services, completely voluntary, means that compliance with ODR decisions is based on the parties voluntarily agreeing to terms of service with ODR providers that give them the power to enforce their decisions within the framework of a specific online community.

Therefore, one of the main issues facing the organizers of an online justice system is how to enforce decisions that are rendered in an ODR environment outside of the community in which the decisions have been rendered. In one sense, by way of comparison, arbitral decisions in the offline world that have cross-border implications also face a hurdle in the enforcement setting. To enforce cross-border decisions, one has to resort to the use of international treaties, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),⁶² which applies only to States that have adopted the Convention.⁶³ Clearly, the legal costs associated with the use of an international treaty will limit its utility to high value cases. When dealing with high-volume, low-value disputes (which constitute the most successful application of ODR methods so far),⁶⁴ it may not be worth taking an un-complied-with ODR decision to a conventional court system for resolution. While low-value losses may be less harmful to users (both businesses and consumers), a lack of enforcement of resolutions with such disputes, especially because the volume of these kinds of disputes tend to be high, damages the trust and reputation of the ODR system at hand and the e-commercial or e-government system at large.

Examples of online service systems which use their terms of service to enforce ODR decisions within their service platforms are eBay and ICANN. eBay uses PayPal, an electronic payment system, for all transactions occurring on its site and can freeze funds and unilaterally transfer them in accordance with a dispute resolution decision, thereby unilaterally

62 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York" Convention) 1958. The text of the convention is available at <<http://untreaty.un.org/cod/avl/ha/crefaa/crefaa.html>>, accessed 21 March 2011.

63 See New York Convention, Article III: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

64 eBay's ODR mechanism is by far the most successful implementation of ODR. This is because, in instances of low-value and high-volume commercial disputes (as is typical of disputes arising out of sales on eBay), users would much rather resolve their disputes quickly and online, within the platform on which the dispute arose, than deal with small-claims court or arbitration to resolve their disputes. See C. Rule, V. Rogers & L. Del Duca, *Designing a Global ODR System for Cross-Border Small Value - High Volume Claims - OAS Developments*, UNCITRAL 2010.

enforcing the decision.⁶⁵ Similarly, ICANN, the Internet Corporation for Assigned Names and Numbers, manages all domain name registration and transfers, and, once a dispute between domain name owners and claimants is resolved, can unilaterally change domain name registrations, thereby ensuring effective and quick enforcement.⁶⁶

Because of the current lack of an overarching extrajudicial enforcement mechanism, ODR providers have largely been left to find their own innovative ways to compel the parties using their systems to accept and comply with decisions. Groups that have developed successful online marketplaces such as eBay and PayPal, have understood the need to develop trusting environments to encourage people to use them, and made similar choices as the UDRP by requiring new users to accept terms of service mandating the use of ODR to resolve disputes. Strong incentives are also put in place to create seller feedback mechanisms in addition to the availability of ODR, which makes buyers more comfortable to make their purchases.⁶⁷ Compliance with ODR decisions has also been enforced, to a certain degree, by the threat of expulsion from the community within which the non-conforming disputant's harmful behavior was perpetrated.⁶⁸

For disputes relating to goods and service transactions that occur offline, and especially for those occurring in a cross-border setting, enforcement is more difficult, as ODR decisions either must be enforced by domestic judiciaries, or new extrajudicial enforcement mechanism (such as those used by eBay and ICANN) must be invented. Significant steps have already been taken by UNCITRAL to do this by convening States worldwide in an effort to develop Model Rules for high-volume low-value cross border e-commerce.⁶⁹ In

⁶⁵ *Id.*, p. 7.

⁶⁶ The UDRP domain name system is one of the most successful examples of this. When someone acquires a domain name, there is a global enforcement mechanism built into the process. This has a great deal to do with the fact that when the domain name system was created, it was built with an ultimate off/on switch that was kept in place as the demand for domain names proliferated worldwide. Even though the resolution process for domain name disputes was decentralized geographically, the ultimate enforcement power was kept in this on-off switch environment. The parties acquiring domain names had acquiesced to this process by accepting it through compulsion when they accepted terms of service at the outset; see *id.*

⁶⁷ On eBay, for example, sellers receive ratings from buyers completed transactions, which eBay posts on each new item sold by sellers. This is a quick and easy way for buyers to select amongst multiple sellers selling the same or similar products, the one with the most positive ratings from previous buyers. This mechanism, in addition to the availability of an easy-to-understand ODR mechanism (eBay offers both "Buyer Protection" and "Seller Protection" which include an ODR mechanism in a suite of tools to help buyers and sellers feel safe in transacting online), helps build trust and confidence in a system, based entirely on extrajudicial enforcement of resolution, should something go wrong with transactions. See eBay website at <www.ebay.com>.

⁶⁸ See E. Katsh *et al.*, *E-commerce, E-disputes and E-dispute Resolution: In the Shadow of "eBay Law"*, available at <www.umass.edu/cyber/katsh.pdf>.

⁶⁹ See Pace Law School Institute of International Commercial Law, *UNCITRAL Assigns ODR to a Working Group*, available at <www.cisg.law.pace.edu/cisg/ODR/working_group.html>.

developing such a system, the foundational idea is that ODR decisions can be enforced in a judicial setting across borders similar to the way that the New York Convention allows judicial enforcement of arbitral decisions. However, enforcement mechanisms for ODR decisions should and most likely will eventually capitalize on the increasing digitization of financial transactions, court proceedings and government records for enforcement. As governments around the world increasingly build their e-government capacities, the enforcement of decisions via ODR could seamlessly occur by communicating decisions directly to relevant government sectors, and updating records to reflect decisions. Similarly, as corporations and citizens increasingly conduct financial transactions online, the use of charge-back mechanisms such as those used by credit card companies and PayPal will make enforcement of ODR decisions easier to realize.⁷⁰

3.4 *Flexibility – ODR Programs Should Permit Adaptation of Their Procedures to Suit the Circumstances of the Particular Dispute at Hand; Recourse to Courts by Consumers Should not Be Precluded Unless by Prior and Equitable Agreement*

One disadvantage of conventional court systems is that there is little flexibility in the procedures used to handle cases arising in different contexts. While courts are divided somewhat into subject-matter-specific jurisdictions (e.g. family courts, small-claims courts, criminal courts), the procedures for resolving disputes through the formal system remain very similar, and can be a drain on the resources of those that desire quick and inexpensive settlement of their disputes. When dealing with cross-border disputes, which arise ever more frequently in the online setting between citizens of different countries (or different states within a country), the use of conventional courts is even more of a burden, as at least one party must travel to the jurisdiction of the other to adjudicate the claim. Alternative dispute resolution mechanisms such as negotiation, mediation and arbitration offer disputants flexibility in the settlement of their disputes, and disputants often select which resolution mechanism works best for them based on their relationship with each other, the issue at dispute, the value at dispute (if it is a monetary dispute) and their locations. Therefore, negotiation is common between small parties to disputes of small amounts

70 See PayPal, *Understanding Chargebacks*, available at <<https://www.paypal.com/cgi-bin/web-scr?cmd=xpt/seller/ChargebackRisk-outside>>: A chargeback occurs when a buyer asks their credit card company to remove a charge from their credit card statement. The credit card company will ask the buyer to provide an explanation about why they are disputing the charge.

Two common reasons for reversals or chargebacks are:

- A buyer's credit card number is stolen and used fraudulently
- A buyer makes a purchase, but believes that the seller failed to fulfill their side of the agreement (e.g. did not ship the item, shipped an item that was very different from the seller's description, or the item was damaged when the buyer received it).

because it is quickest and cheapest. Mediation is common in the family law context, where parties want their needs and interests heard and want flexibility in selection of outcomes. Arbitration is common in maritime law, where parties are often large shipping and vessel-owning companies, dealing with multi-million-dollar damages, and seeking court-like proceedings that can occur between parties that are often not from the same national jurisdiction.

As Pablo Cortes outlines in his article on building legal standards for ODR in the European Union,⁷¹ there are several kinds of ODR possibilities reflecting several levels of dispute, contextual factors and willingness and desire of disputants to come to a resolution, just as detailed above regarding the offline ADR context. Disputes resolvable by ODR range from B2B, B2C, C2C, G2C and G2C, as detailed in Figure 6. In addition, there are differences in ability and willingness to settle disputes online between parties whose disputes arose over online transactions (*e.g.* in e-commerce) and those that arose offline (*e.g.* a parking ticket, based on which a citizen seeks to resolve the issue with his or her government online). Additional factors are the size and perceived power balance between the two parties to the dispute, and the amount or value of the thing in dispute – for example, a consumer going up against a large corporation over a large-value claim may be uncomfortable with the use of an automated bidding system to resolve the dispute and may seek a more formal adjudication of the dispute in order to feel a greater sense of control over the process. Finally, the digital divide between developed communities and less-developed ones may mean that certain kinds of ODR are not accessible to local populations in certain areas.

Cortes lays out the various ODR possibilities which, like offline ADR, offer far more flexibility for users than conventional courts would, and indeed offer greater flexibility than offline ADR because operating online reduces geographical restrictions on dispute resolution and also eliminates the need for resolution processes to be synchronous – dispute resolution processes may take place in steps, as parties and mediators interact asynchronously on an online platform.⁷² Just like offline ADR methods accommodate various needs of disputants, the variety of ODR methods available today accommodate and can be tailored to the disputes at hand:

[A]utomated negotiation, *e.g.* CyberSettle, can be very useful in settling economic disputes. Assisted negotiation and online mediation, *e.g.* SquareTrade, eBay and PayPal, have been successful targeting large numbers of similar dis-

⁷¹ Cortes (2009).

⁷² For a good description of the possibilities of asynchronous ODR, see C. Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, John Wiley and Sons 2002, p. 47.

putes with highly automated ODR models that recognize patterns from comparable disputes matching them with proposed resolutions....⁷³ Consensual processes, such as online mediation and online negotiation, avoid conflicts of laws, where parties can focus on their respective interests, rather than what rights they have under the law. The main constraint of these consensual processes is that requires all parties to be motivated in resolving their disputes.... Online arbitration has major advantages: it is custom-tailored to the dispute at hand, it is conclusive and it can replace the jurisdiction of the courts. Online arbitration may also be non-binding or appealable. A clear example is the success of the UDRP providers that derives from three aspects: (i) it deals only with blatant disputes, which are abusive registrations of domain names made in bad faith in order to take advantage of the reputation of existing trademarks; (ii) its referral is included through a mandatory contractual clause; (iii) it has incorporated a self-enforcement mechanism, even though its decisions are non-binding if the dispute is brought to court.⁷⁴

It therefore appears that ODR providers have made flexibility and responsiveness to business and consumer needs a priority in shaping their software and platforms. One area in which flexibility is lacking, however, is ODR's applicability to mobile platforms to cater to greater populations, especially in developing countries, that do not have access to personal computers and therefore would find it very difficult to engage with such systems online. As mentioned above in our section on *accessibility*, mobile phone use is much more ubiquitous than computer use in the developing world and, with the advent of smartphones and tablets such as the iPad, it is feasible that developing world consumers may leapfrog to use of these devices for most or all of their digital interactions instead of investing in the more expensive alternative of personal computers.⁷⁵ The use of mobile devices and tablets instead of personal computers to check email, surf the web and even conduct e-commerce is becoming increasingly popular not only in the developing world but in developed countries as well.⁷⁶ Developing mobile and tablet-friendly apps (applications) is therefore crucial to the success of ODR providers in maintaining their appeal to users as a flexible and therefore more accessible option for dispute resolution.

73 See PayPal's Buyer and Seller's Dispute Resolutions page <<http://pages.ebay.com/services/buyandsell/disputeres.html>> and <www.paypal.com/cgi-bin/webscr?cmd=xpt/cps/general/PPDisputeResolution-outside>.

74 Cortes (2009), p. 3.

75 See, generally, UNCTAD *Information and Economy Report 2010: ICT, Enterprises and Poverty Alleviation*, available at <<http://r0.unctad.org/ecommerce>>.

76 See, e.g. *NY Times*, "It's a Mobile Nation as Cellphones and Tablets Take Hold", 10 October 2010, available at <<http://bits.blogs.nytimes.com/2010/10/18/its-a-mobile-nation-as-cellphones-and-tablets-take-hold/>>, citing Pew Research Center's Internet & American Life Project, available at <www.pewinternet.org/topics/Mobile.aspx>.

ODR platforms should also be flexible in the genre of conflict they can be used to resolve. While e-commercial conflicts are the main kinds of conflicts ODR systems are designed around, citizen-to-government, inter-government and ethnic conflict resolution are all potentially powerful applications of ODR tools and techniques.⁷⁷ As of yet, there do not appear to be any ODR platforms designed specifically for ethnic conflict resolution, but several ODR experts, including the authors of this chapter, have been conducting research⁷⁸ on the possible adaptation of existing ODR technologies to conflict- and post-conflict countries such as Afghanistan, where ODR tools may be used to help settle civil disputes that perpetuate the state of insecurity in Afghanistan and often lead to violent resolution of conflict because of a lack of other effective recourses.⁷⁹ M-jirga is an example of one such research project.⁸⁰ The objectives of M-jirga, which began in late 2009, were to create a mediation tool accessible to Afghans by mobile phone. A disputant would be able to call in with an issue, get assigned to a panel of trained Afghan mediators operating remotely, and the other disputant would be contacted for input. Both sides to the dispute would be able to record their case narratives and listen to the narratives of the other side. The panel of mediators (taking the role of Jirga elders) would be convened by phone, listen to all evidence, and then share their opinion with disputants.⁸¹ The development of such flexible approaches to dispute resolution outside of e-commerce and outside of the internet- and computer-based arenas will take creativity and patience, as adoption of new dispute resolutions does not occur overnight. The outcome of the M-Jirga project, for example, appears to be that many think it is a good idea, but few are willing to invest significant resources in piloting such a project. The authors of this chapter, through our organization, the Internet Bar Organization, are currently designing a supporting project to M-Jirga that would use radio platforms to educate the Afghan population, through dramatic narratives, about rule of law issues, and acclimate people to the idea of resolving their issues using technology (calling in to a radio show, for example, is a step towards calling into a mediation

77 For discussion of the potential applications of ODR to ethnic conflict resolution, for example, see S. Hattotuwa, *Mediation from the Palm of Your Hand: Forging the Next Generation ODR Systems*. Available at sites <www.google.com/site/sanjanah/ODR_mobiles.pdf>; see also, Sanjana Hattotuwa, *10 Ideas for Microsoft Humanitarian Systems Group*, InfoShare January 2006, p. 17.

78 M-jirga is a project initiated by Colin Rule, Chittu Nagarajan, Jin Ho Verdonshot, Sanjana Hattotuwa, Jeff Aresty and Daniel Rainey. These ODR experts from varying backgrounds ranging from commercial ODR to commercial and governmental mediation, to ethnic conflict mediators, created a plan to bring ODR services to Afghans via a mobile platform. To learn more about M-Jirga, see C. Rule, "PayPal presentation", *The Mobile Phone Jirga: Supporting Rule of Law in Afghanistan with Online Dispute Resolution*, Available at <www.slideshare.net/crule/the-mjirga-supporting-rule-of-law-in-afghanistan-with-odr/>.

79 For a comprehensive review of Afghanistan's judicial problems, see International Crisis Group, *Reforming Afghanistan's Broken Judiciary*. Asia Report N°195 – 17 November 2010.

80 See Colin Rule, PayPal presentation.

81 *Id.*

panel).⁸² The radio show would also be a way to collect data on the various complex dispute resolution mechanisms employed across the country, the comfort levels of Afghans with different mechanisms, and so on. This, in turn, would do a great deal in helping customize and tailor an M-Jirga platform to the needs of Afghans.⁸³

The payoff of experimenting with new and creative ways of applying ODR outside of e-commerce and outside of developed nations is, in our opinion, well-worth the effort, as there is great potential for growth in technology-assisted dispute resolution in e-government, e-diplomacy and ethnic conflict resolution, and for the improved access to justice that these would provide.⁸⁴

3.5 *Fairness and Integrity – ODR Programs Should Observe Due Process Standards, Ensuring that Each Party to a Dispute Has Equal Opportunity to Express Its Point of View*

The principles expressed by ODR providers on fairness and integrity mirror exactly the principles outlined above in terms of *procedural justice*.⁸⁵ Parties' equal opportunity to express their points of view, for example, reflect traditional participatory justice concepts. Integrity of ODR outcomes reflects a desire for *accuracy* of outcomes, a concept we explored above in our section on participatory justice theories.

Because ODR comes in many shapes and sizes, each ODR system has its own benefits and drawbacks when it comes to due process concerns. For example, the major appeal of ODR mechanisms that offer a simple platform for negotiation between parties is that resolutions are quicker and cheaper. While these platforms may vastly improve access to justice for those who would otherwise be unable to resolve small-value issues, they often do not involve any discovery or evidence gathering, consistency or predictability of decisions (as parties come to their own resolution) are not readily apparent, and absent parties may not be fairly represented. On the other hand, more complex multi-stakeholder and multi-issue ODR mechanisms, such as Smartsettle,⁸⁶ allow for more robust discovery procedures, and allow multiple parties to participate in the procedures, thereby giving all interested parties the opportunity to be heard. Viewing ODR procedures through a *balancing approach*, it

82 IBO's Internet Silk Road Initiative is currently in its project design and fundraising phase. We hope to pilot it, with grant funding, in the summer or fall of 2011.

83 To learn more about the Internet Bar Organization's Afghan project, please visit <<http://internetbar.org/internet-silk-road-initiative>>.

84 We shall discuss some of these possibilities further in the sections below.

85 See our section on *Procedural Justice*, earlier in this chapter.

86 See Smartsettle's website at <www.smartsettle.com/products>.

is clear that as formality and availability of due process elements (such as evidentiary robustness and opportunity for multiple parties to be heard) increase, so too do negative factors such as cost and time involved in the process.

In determining whether to accept ODR as a legitimate alternative to conventional offline litigation, governments will make “demands that e-ADR systems meet basic procedural guarantees, such as independence and impartiality, due notice, transparency, and reasonable time and cost”.⁸⁷

While some kinds of ODR – those that fall within the more formal and sophisticated part of the ODR continuum – certainly incorporate tools to ensure independence and impartiality of mediators, due notice, and reasonable time and cost (for the amount of work put in by all involved), transparency is likely to always be lower in ODR (as it is in ADR) than in conventional brick and mortar court systems as these are private, not public, processes, and disputants often want their cases and resolutions kept private.⁸⁸

In terms of the ability to appeal decisions (another important due process consideration), ODR mechanisms may not have appeals processes built-in to their system, but the key consideration is that ODR is not the end of the road but the beginning. It is an opportunity to settle things quickly and cheaply. If a disputant is not satisfied with the outcome, they can turn to conventional courts to settle the matter.

The balancing between *accessibility* and quick resolution of one’s dispute against due process concerns such as transparency, correctability and consistency of decision is therefore an important process. The availability of multiple options for disputants to choose from is the best solution, and ODR’s multiple platforms, ranging from simple negotiation-based platforms to very complex arbitration-like systems holds the potential to offer users the correct fit. Whether all these platforms are accessible to disputants is the next issue we turn to, and one of the most crucial aspects of this chapter. Without accessibility to ODR’s tools for a wide range of individuals, not just those engaged in e-commerce and limited e-government initiatives, the vast potentials for ODR to transform the justice field will go untapped.

⁸⁷ Schiavetta (2005), p. 6.

⁸⁸ Ramasastry (2004), p. 166.

3.6 *Accessibility – ODR Programs Should Facilitate Easy Use by Consumers*

Accessibility of ODR programs is closely related to their flexibility in catering to users and consumers coming from different technological, socio-economic and cultural backgrounds, as well as in catering to differing kinds of conflicts.

ODR has taken off in the e-commerce context, for example, because it requires both parties to be online and to agree to engage with each other in dispute resolution online. With e-commerce, many of the initial barriers to use of an online justice system are already overcome: those engaged in e-commerce are online, and have enough trust in ICTs to conduct business (and therefore invest their money) that they are likely to use ICTs to resolve disputes arising from that business interaction. Trying to adapt ODR to non-commercial spheres, *e.g.* traditional offline business, family law cases or political conflicts, is subject to several challenges:

- Getting people online (an e-literacy challenge);
- Getting people to trust the online forum;
- Getting people to abide by decisions made online, in the real world.

Trust in the system, respect and standing of the Neutral making the decision (whether this neutral be a computer software or a person/panel of persons) and accessibility of the adjudication interface are all critical prerequisites to uptake of ODR and access to ODR's advantages in justice-delivery. Without ease of access, ODR will not grow to supplement traditional justice mechanisms to its truest potential, however effective, cost-saving or otherwise superior it may be compared to other dispute resolution mechanisms.

ODR systems generally reduce cost and increase speed of dispute resolution, thereby increasing access to justice mechanisms for those who have access to a computer. Not all online environments use ODR, however. Social networks, such as Facebook, do not incorporate dispute resolution mechanisms into the back end of their services,⁸⁹ emphasizing the need for government oversight of their activities, such as monitoring their privacy practices.⁹⁰ Additionally, some commercial environments, such as Craigslist,⁹¹ eschew any form of dispute resolution, letting the buyer know that they use their service at their own

89 Facebook's Terms of Service do contain a section covering Disputes, but this section refers any disputes arising between users and Facebook to conventional offline court resolution, and acts as an Indemnity clause against any other kind of dispute that might occur. See Facebook Terms of Service, available at <www.facebook.com/#!/terms.php>.

90 For Facebook's Privacy Policy, see <www.facebook.com/#!/policy.php>.

91 Craigslist is a very popular hub of online communities, listing free online classified advertisements – with sections devoted to jobs, housing, personals, furniture and discussion forums.

risk.⁹² Therefore, while some online service providers dealing with millions of users have realized the need to address disputes arising out of their online interactions, others have neglected the issue, making disputants' only access to dispute resolution expensive, time-consuming and, for the most part, inaccessible offline court-based adjudication or arbitration, which often require end-users to travel to the State of the business' operation to adjudicate.

This essentially constitutes denial of access to procedural justice, in terms of participatory justice, as it renders dispute resolution too expensive and time-intensive for most end-users to consider using, unless they are forced to (*i.e.* they are the defendants in cases brought by these online businesses). Where online businesses are able to offer ODR services instead of referring end-users to arbitration or court proceedings in geographic locations only convenient to the businesses, both consumers and businesses are best served by offering these services to enhance the opportunity for consumers to be heard, and to reduce the costs of adjudication for all parties concerned (both of which improve procedural justice).⁹³

Additionally, for the millions of individuals who do not have access to computers or are illiterate in the language of ODR systems (either computer-illiterate or speak and write a different language), the access benefits of online (*i.e.* computer-based) ODR do not ring true. Therefore some of ODR's truest potentials for access lie in expanding into mobile ODR, expanding language and translation capabilities, and, especially in the government context, have public-access booths or computer stations where people can resolve their issues online, either with government or with each other, instead of turning to paper-based systems.⁹⁴

It is often seen as a particularly difficult task bringing ODR to developing countries, especially those currently suffering from a lack of rule of law and ineffective formal judicial systems. We take the stance that this may not necessarily be true. There are two real barriers to ODR uptake, regardless of where in the world disputants are asked to use these systems: the first is a technology barrier ("we are not used to using technology in this way to resolve

92 See Craigslist Terms of Use, Section 4 – *Third Party Content, Sites & Services*, available at <www.craigslist.org/about/terms.of.use>: "You agree that craigslist shall not be responsible or liable for any loss or damage of any sort incurred as the result of any such dealings. If there is a dispute between participants on this site, or between users and any third party, you understand and agree that craigslist is under no obligation to become involved."

93 See our section on *Procedural Justice*.

94 *Id.*, p. 170: "By expanding the methods by which citizens can have claims involving the government adjudicated through the use of ODR, one may ultimately expand access to justice by creating greater opportunities for citizens to interact with the state and to have their grievances resolved in a timely fashion."

disputes – we do not trust or understand technology”) and the second is an alternative dispute resolution barrier (“we are not used to using alternatives to the court system to resolve our disputes – we do not trust these alternatives”).

While the technology barrier is certainly the most difficult one to overcome in countries with low literacy and low computer-use (e.g. Afghanistan), the ADR barrier might indeed be one that is more relevant in developed countries, where people have a higher trust and dependence on conventional court systems (e.g. the countries of the EU) than in developing countries. Therefore, while the ADR barrier needs to be addressed in some contexts to build trust in alternative ways of resolving disputes, in others, people are accustomed to resolving their disputes without the courts, and there may be less of a mental and psychological block regarding ADR. Both ODR and informal or customary justice systems operate *outside* of the formal justice system. Both seek to resolve disputes without layers of bureaucracy that create ambiguity, time-delay, unpredictability, and unresponsiveness. Both also often operate to resolve disputes not in a zero-sum manner but in a way that both or all parties to the dispute come away with compromise.

In Afghanistan, for example, most rural Afghans do not turn to courts to resolve disputes, but trust traditional community courts, comprised of community elders, making decisions based on communal understandings of justice, equity and fairness.⁹⁵ When asked in a poll why they choose the informal over formal court systems, respondents said they chose Jirgas to resolve their problems because they were accessible (85% responded this), because they felt the Jirgas were fair and trustworthy (73% responded this), because they followed local norms and values (70%) and because they were effective at delivering justice (69%) and resolving cases promptly (66%).⁹⁶ These are many of the characteristics we have argued ODR displays in relation to traditional courts (efficiency, accessibility and promptness), and that ADR offers over litigation (reflecting disputants’ norms and values). The areas in which ODR must struggle to win over populations in offline communities are, of course, ease of use, trustworthiness, fairness and effectiveness in delivering justice.

If ODR could be accessed via mobile phones, which are nearly ubiquitous in most developing countries,⁹⁷ and ODR platforms were designed to offer lower-literacy users high

95 For an in-depth research article on the Jirga and Shura systems of Afghanistan, see A. Wardak, *Jirga – A Traditional Mechanism of Conflict Resolution in Afghanistan*. [Unpublished research paper] University of Glamorgan, UK. See also J. Dempsey, *Traditional Dispute Resolution and Stability in Afghanistan*, USIP Peacebrief 10, 16 February 2010

96 Asia Foundation: *Afghanistan in 2010*.

97 Mobile phone access in Afghanistan lies somewhere between 50 and 60%, for example, whereas internet access languishes at 12%. See *Telecoms Network: Afghanistan Telecommunications Profile*. Available at <www.telecomsnetworks.com/regions/africa-middle-east/afghanistan>, last accessed 23 March 2011.

visual, oral and aural interactivity, for example, the technological and literacy barrier to ODR uptake could be reduced. Similarly, while most web-based interaction takes place in English, language flexibility in both web-based and mobile-based ODR platforms would do a great deal in improving access to ODR by a much greater variety of users for whom English is not a native language.

Finally, transparency about ODR processes is something that is currently lacking in mainstream consciousness. Greater clarity and understanding about how ODR works, in laymen's terms, would help improve access and uptake of the technology. Focus on the similarity between ODR and dispute resolution mechanisms that populations are already accustomed to and comfortable with would help build trust and affinity with ODR as a tool. Similarly, explanations detailing how and why ODR is quicker, cheaper and more effective in resolving some disputes than courts, will help attract more users to the system. Finally, affordability, which we address in the following section, is absolutely key to access and uptake, especially by customers in e-commerce or citizens engaged in disputes with their governments, whose disputes are not over values large enough to warrant court-based or even ODR that cost more than the value of their disputes (which average, according to one source, at USD 100 per dispute).⁹⁸

3.7 *Affordability – ODR Programs Should Be Affordable for Citizens or Consumers, Particularly in Light of the Amount of Compensation Being Sought*

ODR systems offer a much cheaper alternative to court-based dispute resolution and even offline ADR providers, because they reduces or eliminates costs of travel, lawyers' fees (as some ODR providers guide users through a series of steps in resolving the dispute themselves, thereby eliminating the need for counsel), costs of meeting rooms and court document filing fees. The main costs associated with providing ODR services are those of the technology (this cost occurs mostly at the front-end of an ODR provider's existence, for software development) and the costs of mediators and staff required to run the platforms. Because ODR platforms can offer a much more light-weight legal framework, costs of dispute resolution can be drastically reduced.⁹⁹ eBay's ODR system, for example, offers two options to disputants for resolving their disputes, one of which is free (a web-based

⁹⁸ See Rule, Rogers & Del Duca (2010).

⁹⁹ The cost-effectiveness of the ODR platform in comparison to offline ADR or courtroom dispute resolution may decrease when comparing cyber-courts and online adjudicatory bodies with offline processes, because here we deal with more complex platforms, needing more staff and mediator involvement, therefore driving prices up. Nevertheless, the elimination of travel expenses and physical meeting space expenses can still significantly reduce cost of dispute resolution.

forum which allows users to attempt to resolve their differences on their own).¹⁰⁰ The paid option costs the end-user USD15, which buys a mediator to guide disputants through the negotiation process. eBay covers the remainder of the cost.¹⁰¹

As we mentioned in our section 3.2 on *Independence and Impartiality*, businesses dealing in high-volume and low-value disputes find it in their interest to subsidize dispute resolution processes with customers, and, in the same vein, customers are not likely to pay much to resolve a dispute with a business over a small value. The arrangement eBay employs may therefore be the most effective not only for businesses dealing with high-volume and small-value disputes, but also for governments dealing with high volumes of small infractions. Running court bureaucracies to handle high volumes of, for example, traffic and parking violations, is very costly to governments and siphons resources away from more complex cases that require the courts' attention. Subsidies from businesses and governments may therefore benefit both these entities and citizens/consumers by providing an alternative dispute resolution mechanism that is more affordable for all and provides greater access to justice overall.

As mentioned in section 3.4 on *Flexibility*, the creation of mobile-based ODR systems could reduce the cost barrier for citizens and consumers even further, especially in the developing world. Development of apps that translate web-based functionalities to mobile-based formats is a thriving industry today,¹⁰² and the recent release of HTML5, which allows for much richer multimedia content design and easier cross-over between web-and mobile-based platforms, have made the coding of sophisticated and robust mobile-based ODR platforms feasible and affordable for ODR companies.¹⁰³

3.8 *Freedom – ODR Programs Should Improve Liberties of Individuals Engaged in Online Society*

The Internet is seen by many as a beacon of freedom – of speech, culture and consumption. It has broken down geographical barriers and allowed people to communicate with, transact with and argue with their counterparts at the farthest corners of the world in a

¹⁰⁰ See *eBay Dispute Resolution Overview*, available at <<http://pages.ebay.com/services/buyandsell/disputeres.html>>.

¹⁰¹ *Id.*

¹⁰² See GoMo News (Strategic Mobile News), *Mobile Web Application Development Platforms will Generate USD 2.6 billion by 2015*, 24 March 2011. Available at <www.gomonews.com/mobile-web-application-development-platforms-will-generate-2-6-billion-by-2015>.

¹⁰³ *Id.*

way that could never have been imagined fifty years ago.¹⁰⁴ Internet Freedom has also been held up as a force to promote human rights and democracy by Western governments such as the United States government and the European Parliament, and by international bodies, both from the global north and the global south. The World Summit on the Information Society (WSIS), which brings together many nations and supranational organizations in a common goal to promote Information and Communication Technologies,¹⁰⁵ states in its founding charter, for example:

We ... reaffirm our commitment to the provisions of Article 29 of the Universal Declaration of Human Rights, that everyone has duties to the community in which alone the free and full development of their personality is possible, and that, in the exercise of their rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations. In this way, we shall promote an Information Society where human dignity is respected.¹⁰⁶

The language used by the WSIS in its support of internet freedoms, limited only insofar as the limitations serve to protect the freedoms of others, is classic social contract theory applied to this new “society” formed online. We are today witnessing the effort by this new digital society to invent a framework within which individuals shall interact with each other. Rousseau noted in 1762 that the evolution of a social contract between the governed and the government is inherently based on the notion of reciprocal duties between individuals and the government. While it is agreed by many that there must be a new social

104 Secretary of State Hilary Clinton addressed this phenomenon in her remarks on Internet Freedom on 15 February 2011: “Two billion people are now online, nearly a third of humankind. We hail from every corner of the world, live under every form of government, and subscribe to every system of beliefs. And increasingly, we are turning to the Internet to conduct important aspects of our lives.” See Clinton (2011).

105 The organizers of the WSIS include: International Telecommunication Union, a specialized agency of the United Nations, which had the lead role in organizing the Summit. To assist ITU in its work, the UN Secretary-General appointed a High-level Summit Organization Committee (HLSO) comprising of Executive Heads of the FAO, IAEA, ICAO, ILO, IMO, ITU, UNCTAD, UNDP, UNEP, UNESCO, UNFPA, UNHCHR, UNHCR, UNIDO, UNU, UPU, WFP, WHO, WIPO, WMO, WTO, UN Regional Economic Commissions, and the World Bank. HLSOC also includes IADB, OECD, UNITAR and UNV as observers. A Bureau of the Preparatory Committee, composed of 17 Governments in the Geneva phase and of 32 Governments in the Tunis phase, representing the various regions of the UN System, guided the President of the PrepCom in the preparations of the Summit.

106 See *World Summit on the Information Society Geneva Declaration of Principles 2003*, Article 5. Document WSIS-03/GENEVA/DOC/4-E. Available at <www.itu.int/wsis/docs/geneva/official/dop.html>.

contract,¹⁰⁷ what kind of social contract will emerge in the digital age, and who will be responsible for its drafting, is a subject of a constant debate. Thomas Schultz's take on the government's role in regulating the "Internet is that we must keep government out of it, that government would kill the Internet through regulation... that self-regulation by private players could do without any form of regulation".¹⁰⁸ Yet, others, such as Jonathan Fried of the International Monetary Fund, make a good argument that governments underpin confidence and trust that laws will be just, fairly administered and enforced.¹⁰⁹ Fried has noted as between private actors, laws and administrative frameworks provide certainty to market participants that parties are who they say they are, that documents are authentic, and that contracts will be enforced. Further, as between private actors and government, governments provide the necessary oversight of the framework for policy implementation, which can be especially important internationally when the pace of economic, social and technological changes are rapid.¹¹⁰

ODR, in all its shapes and forms, offers one way online societies can regulate themselves – both by providing fair and effective redress mechanisms when individuals violate rules set out by online communities, and by providing deterrence to violations (*i.e.* a conflict prevention mechanism) by ensuring that violations will not go unpunished. It therefore ensures that users of the Internet can continue to interact more freely, and with greater trust, than they would be able to in an online society that is anarchic and open, and leaves them vulnerable to harmful attacks.

3.9 *Distributive Justice – ODR Programs Should Improve the Distribution of Resources Amongst Individuals Online*

The Internet and its accompanying tools have, over the last fifteen years, revolutionized the way people socialize, do business and organize their lives. This has led to an incredible new era of efficiency, communication and collaboration, for example through crowd-sourcing.¹¹¹ It is now not uncommon for entrepreneurs to start a small business from the comfort of their living rooms – to purchase the domain name of their website, learn about

107 See, *e.g.* Schultz (2003), p. 7; Notes from Fried presentation at the American Bar Association 2007 Spring Meeting, on *The Importance of Business Law to Economic Development*; World Summit on the Information Society Geneva Declaration of Principles 2003, Art. 5. Document WSIS-03/GENEVA/DOC/4-E.

108 *Id.*

109 Notes from Fried presentation at the American Bar Association 2007 Spring Meeting, on *The Importance of Business Law to Economic Development*.

110 *Id.*

111 Crowd-sourcing, a term coined by author and journalist, Jeff Howe, is a phenomenon that has, like the Internet, blossomed seemingly overnight. It refers to the outsourcing of a task traditionally handled by one or a defined group of workers to the general public through a call for input.

registering their trademarks with the US Patent and Trademark Office, purchase raw materials online, set up a virtual storefront, market and promote products with social networking sites, sell products to customers, field complaints through email or an online complaint form, and resolve issues, virtually all without leaving the couch. This sort of e-commerce is taking place not only in the US and Europe, but in countries like India, where, for example, *India Shop*, a virtual shopping mall, allows craftspeople to sell their wares online.¹¹² India Shop operates through e-marketers, who promote the goods on the Internet through chat-rooms and mailing lists. Upon receiving sales enquiries, they liaise with the handicraft makers and arrange for the delivery of goods to purchasers.¹¹³ Enterprises such as this one have the potential to activate and engage hundreds of thousands of un- and underemployed individuals all around the world, as new markets open up to them through the internet.

In order to increase opportunities for all individuals around the world to access these technology tools, certain steps must be taken by national governments and others working in underserved communities. At a conference on Internet governance in Egypt in 2009, several experts called for an organized approach to building out infrastructure to support ICT uptake in areas where ICT use is low.¹¹⁴ Recommendations included understanding that the next billions of Internet and mobile users will not come from developed nations but from “a sizable but less affluent population spread mainly in rural and semi-rural areas, economically not strong, young, with aspiring futures, maybe having limited exposure to Internet or computer or ICT applications”.¹¹⁵ It was also acknowledged that in order to increase Internet access, there needs to be both sufficient supply and effective demand. Increasing demand will have to involve education, awareness and incentives, on top of the necessary build-out of infrastructure (e.g. increased network coverage in rural areas) and governmental regulations.¹¹⁶

These recommendations have been made by many practitioners and scholars of ICT development around the world, and have been acknowledged on national and supra-

112 UNDP Asia-Pacific Development Information Programme (UNDP-APDIP), *Information and Communication Technologies for Poverty Alleviation/Development Strategies and ICTs Report* (2003), p. 5

113 *Id.*

114 *Internet Governance: Creating Opportunity for All* - The Fourth Internet Governance Forum, Sharm el Sheikh, Egypt, 15-18 November 2009 (Ed. William J. Drake). Available at <www.intgovforum.org/cms/images/2010/book/igf.sharm.book.final.pdf>, last accessed 19 March 2011.

115 K. Karnik, founder-director of ISRO's Development and Education Communicational Unit, speaking at the Fourth Internet Governance Forum. See *Internet Governance: Creating Opportunity for All* - The Fourth Internet Governance Forum 2009, p. 39.

116 P. Hellmonds, head of corporate social responsibility, Nokia Siemens Networks, speaking at the Fourth Internet Governance Forum. See *Internet Governance: Creating Opportunity for All* - The Fourth Internet Governance Forum 2009, p. 39.

national levels. Most countries have an ICT policy, which lays out and directs strategies to build information, communications and technology infrastructures for their societies. Supranational organizations such as the World Summit on the Information Society (WSIS),¹¹⁷ the United Nations Conference on Trade and Development (UNCTAD),¹¹⁸ the United Nations Commission on International Trade Law (UNCITRAL)¹¹⁹ and the United Nations Educational, Scientific and Cultural Organization (UNESCO)¹²⁰ have held conferences, written reports and constructed ICT departments within their bureaucracies to analyze and implement best practices in building ICT infrastructure globally. The WSIS, for example, is a conglomeration of many nations and supranational organizations.¹²¹ It promulgated a plan of action in 2003 to improve access to ICTs across the world. The organization views access to ICTs as a fundamental right, under the Universal Declaration of Human Rights,¹²² declaring:

“Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone, everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers.”¹²³

In Articles 8-10 of its Geneva Declaration of Principles, the WSIS lays out the general moral and philosophical approach taken by most governments and non-profits engaged in ICT infrastructure-building and education throughout the world, recognizing “that education, knowledge, information and communication are at the core of human progress,

117 See World Summit on the Information Society website. Available at <www.itu.int/wsis/index.html>.

118 See UNCTAD, *Information and Communications Technologies for Development*. Available at <<http://r0.unctad.org/ecommerce/>>.

119 See UNCITRAL, *Electronic Commerce – What (More) Needs to Be Done in Asia?*, available at <www.uncitral.org/pdf/english/whats_new/11_2010/1123_9_FERNANDO.pdf>.

120 See UNESCO, *ICT in Education*, available at <www.unescobkk.org/education/ict/>.

121 The organizers of the WSIS include: International Telecommunication Union, a specialized agency of the United Nations, which had the lead role in organizing the Summit. To assist ITU in its work, the UN Secretary-General appointed a High-level Summit Organization Committee (HLSOC) comprising of Executive Heads of the FAO, IAEA, ICAO, ILO, IMO, ITU, UNCTAD, UNDP, UNEP, UNESCO, UNFPA, UNHCHR, UNHCR, UNIDO, UNU, UPU, WFP, WHO, WIPO, WMO, WTO, UN Regional Economic Commissions, and the World Bank. HLSOC also includes IADB, OECD, UNITAR and UNV as observers. A Bureau of the Preparatory Committee, composed of 17 Governments in the Geneva phase and of 32 Governments in the Tunis phase, representing the various regions of the UN System, guided the President of the PrepCom in the preparations of the Summit.

122 The Universal Declaration of Human Rights, Article 19, states: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. See Universal Declaration of Human Rights Article 19, available at <www.un.org/en/documents/udhr/index.shtml>, last accessed 21 March 2011.

123 See World Summit on the Information Society Geneva Declaration of Principles 2003, Article 4. Document WSIS-03/GENEVA/DOC/4-E. Available at <www.itu.int/wsis/docs/geneva/official/dop.html>.

endeavor and well-being” and that ICTs have the capacity to “open new opportunities to higher levels of development”,¹²⁴ and, “[u]nder favourable conditions, these technologies can be a powerful instrument, increasing productivity, generating economic growth, job creation and employability and improving the quality of life of all”.¹²⁵ The digital divide that separates rich countries from poor and urban areas from rural was also addressed: “the benefits of the information technology revolution are today unevenly distributed between the developed and developing countries and within societies. We are fully committed to turning this digital divide into a digital opportunity for all, particularly for those who risk being left behind and being further marginalized.”¹²⁶

There are several justice concepts, outlined in the first half of this chapter, present in the words of the WSIS Declaration of Principles. First, a strong vein of egalitarian language runs through the Declaration, as it is put forth that, first, access to communications tools is a *fundamental right* for all people in the world.¹²⁷ The Declaration states, “Everyone, everywhere should have the opportunity to participate and no one should be excluded”.¹²⁸ This statement, and Article 10 of the Declaration, speak to an egalitarian notion of the right to access ICTs, regardless of age, gender or geographic location, and acknowledge also that not everyone is operating from an equal starting point.¹²⁹ The WSIS’s Plan of Action¹³⁰ to implement the general calls to action found in the Geneva Declaration, strongly reflects a *capabilities approach* to ensuring equal access to ICTs. Just like Amartya Sen’s holistic approach to economic development, the WSIS’ approach to ICT growth in underserved communities is a multi-faceted one, tackling cultural and linguistic diversity, respect for cultural identity, traditions and religions, support for local content development and digital archiving of indigenous knowledge.¹³¹ The Plan of Action also includes several provisions aimed at protecting the positive and negative liberties of ICT users across the globe.¹³² Therefore individuals’ abilities to interact freely using ICTs are curbed only insofar as their actions infringe on the rights of others to use the Internet and other ICTs

124 *Id.*, Article 8.

125 *Id.*, Article 9.

126 *Id.*, Article 10.

127 *Id.*

128 *Id.*

129 See World Summit on the Information Society Geneva Declaration of Principles 2003, Article 10. Document WSIS-03/GENEVA/DOC/4-E: “the benefits of the information technology revolution are today unevenly distributed between the developed and developing countries and within societies.”

130 See WSIS Geneva Plan of Action, 2003, available at <www.itu.int/wsis/docs/geneva/official/poa.html>.

131 *Id.*, Article C8, Paragraph 23(e).

132 *Id.*, Article C10, Paragraph 25 (c): All actors in the Information Society should promote the common good, protect privacy and personal data and take appropriate actions and preventive measures, as determined by law, against abusive uses of ICTs such as illegal and other acts motivated by racism, racial discrimination, xenophobia, and related intolerance, hatred, violence, all forms of child abuse, including pedophilia and child pornography, and trafficking in, and exploitation of, human beings.

freely. There is much aspirational language that calls for use of these tools in a positive way.¹³³ This language hints at a view by those setting policies at the highest levels on ICT use and engagement that the digital spaces into which we are entering require a new social contract.

Despite the generally positive aspirations and overwhelmingly egalitarian and development-focused rhetoric of those setting policies on ICT proliferation, the reality of ICT use is understandably more complicated. Along with the immense potential for good, in the form of increased productivity, increased positive interactions between people (through online social networking, for example) and increased commercial potential through e-commerce and e-banking, the Internet holds an immense potential for unjust behavior.¹³⁴ Just as any new and powerful tool may be used for the benefit of humanity, this tool may also be used by those who choose to operate outside of the codes of conduct established by the community, to benefit themselves to the detriment of others in the community.

The euphoria over the Internet's potential is beginning to wear off and giving way to a more balanced evaluation of both its benefits and drawbacks. Evidence of the public's awakening to the Internet's opportunity for abuse was in full view on the cover of *Wired Magazine*, one of the most popular technology publications, with its February 2011 issue, "The Underworld Exposed: A Guided Tour of the Dark Side".¹³⁵ In the issue, the magazine explored everything from a tiny village in Romania called "Hackerville" for its incredible number of cybercriminals,¹³⁶ to the top applications ("apps") for cybercriminals and their prices (ranging from USD 7,000 for an app that helps hackers intercept banking transactions to the free app that takes websites offline with distributed denial-of-service attacks that the group Anonymous used to take Visa, PayPal and other anti-WikiLeaks companies offline in December 2010).¹³⁷ Another example of the awakening of media and academics to the dangers of the Internet is the widely-heralded new book from Belarusian-born journalist and social commentator, Evgeny Morozov, entitled *The Net Delusion: The Dark*

133 E.g. in the Tunisian meeting of the WSIS in 2005, the participants reaffirmed their "desire and commitment to build a people-centred, inclusive and development-oriented Information Society, premised on the purposes and principles of the Charter of the United Nations, international law and multilateralism, and respecting fully and upholding the Universal Declaration of Human Rights, so that people everywhere can create, access, utilize and share information and knowledge, to achieve their full potential and to attain the internationally agreed development goals and objectives, including the Millennium Development Goals." See Second Phase of the WSIS (16-18 November 2005, Tunis): Tunis Commitment. WSIS-05/TUNIS/DOC/7.

134 For more background on the potentials for harm in the Internet age, see Levmore & Nussbaum (2010); Morozov (2011); Goldsmith & Wu (2006).

135 *Wired Magazine*, February 2011.

136 N. Schachtman, "Criminal Code", *Wired Magazine*, February 2011, p. 24

137 Y. Bhattacharjee, "Why Does a Remote Town in Romania Have So Many Cybercriminals?", *Wired Magazine*, February 2011, p. 82

Side of Internet Freedom.¹³⁸ In this book, Morozov details instance after instance of governments, both authoritarian and professedly democratic, using the Internet to stifle public discussion, access to information and dissent against their governments.¹³⁹

While policy frameworks and regulation on the front end are crucial to the curbing and prevention of such negative and harmful applications of ICT tools, a robust mechanism is needed on the back-end of online interactions, to ensure *fair redress of harms*. This mechanism is most likely to grow out of existing applications of ODR within e-commerce and, in a more limited manner, e-government. It is therefore important to evaluate the existing applications of ODR and its potential to grow to accommodate the multiplicity of harms and disputes that are likely to evolve online, as more and more individuals take up ICTs in their everyday interactions with one-another.

3.10 *Transformative Justice – Do ODR Programs Have the Potential to Transform Conflict Between Individuals and Their States?*

We conclude with a look at the potential for the use of ODR as a tool that can effect the transformation of justice online. In traditional justice theory, transformative justice implies a focus on reforming the perpetrator and bringing the victim and perpetrator, both, to a better place. It implies transforming conflict resolution from a win/lose game into a win/win game. ODR has the potential to take transformative justice online, by changing the way citizens work with each other and with their governments, and by ultimately reaching those who have the least access to justice in ways which change their expectations of how the legal world works.

The use of ODR in diplomacy is a useful example of the potentials of ODR for transforming justice. Diplomacy is, in simple definitional terms, the “art and practice of conducting negotiations between nations”.¹⁴⁰ Multi-track Diplomacy is an expansion of this term in recent years to include a more holistic approach to state interaction, including official interactions between governments; unofficial interactions and interventions of non-state actors between nations; peace-building through non-governmental organizations’ conflict-resolution work; peacemaking through cross-border business between countries; cultural exchange programs, research, training and education on global or cross-cultural issues; grassroots activism across national boundaries; use of religion in peacemaking; peacemaking through funding of community-based organizations from abroad and finally peace-

¹³⁸ Morozov (2011).

¹³⁹ *Id.*

¹⁴⁰ Merriam Webster Dictionary, available at <www.merriam-webster.com/dictionary/diplomacy>.

building through communications and information dissemination.¹⁴¹ This holistic approach to diplomacy reflects Amartya Sen's *Capabilities Approach* to distributive justice in its tackling of the *causes* behind conflict through multi-faceted approaches, and also reflects a strong *transformative justice* strain as multi-track diplomacy is about transforming conflict by resolving issues that led to it, instead of addressing only end-of-the-line manifestations of underlying discontent between nations and communities.

While ODR's potential role in conflict transformation has not received much attention in the decade since ODR's real take-off, some peace and conflict scholars and mediators have called for the exploration of its potential in this field for some years now.¹⁴² This new set of technological tools to aid in age-old dispute resolution mechanisms, tried and tested in the diplomatic sphere, holds great potential to constitute another important "track" in multi-track diplomacy.

Mediation and negotiation are traditional methods of conflict resolution between political enemies, where the mediator is a neutral a third party that both parties agree to. Talks between Israel and Palestine,¹⁴³ the IRA Britain in Northern Ireland,¹⁴⁴ and between the Government of Sri Lanka and the Tamil Tigers¹⁴⁵ are just three famous examples of talks mediated by neutrals from third-party countries (the United States has been a mediator in the first two and India in the third instance). This kind of diplomacy uses classical ADR methods. It is not seen by many people as "traditional law" in the sense that it does not rely on courts or the use of written law. This is because the warring parties usually do not share a set of laws that can be looked to in determining who is right or wrong, or in determining how to address a certain party's grievance. The system of international human rights and humanitarian laws is similarly different from traditional domestic legal systems because international laws are not imposed on denizens but instead are only enforceable 1) upon states (not individuals within those states) and 2) if states agree to be bound by those laws and continue to abide by them. International law is therefore *consensual*, much like the private agreements between individuals and businesses in business.

141 The Institute for Multi-track Diplomacy <www.imtd.org/at-a-glance/mission/working-methods/what-is-multi-track-diplomacy/>, last accessed 8 February 2011.

142 S. Hattotuwa, for example, has written on the potential of ODR for conflict transformation since the mid-2000s. See Sanjana Hattotuwa, *Mediation From the Palm of Your Hand: Forging the Next Generation ODR Systems*; see also, Hattotuwa (2006), p. 17.

143 See, e.g. Kenneth W. Stein, "American Mediation of the Palestinian-Israeli Conflict: A Positive Assessment of the April 2002 Powell Mission", *Rivista Italiana di Geopolitica* May 2002, pp. 173-182.

144 George Mitchell, a United States Senator, helped mediate the 1998 Good Friday Negotiations between the parties in Northern Ireland. See BBC, *The Search For Peace: Profile of George Mitchell*. Available at <http://news.bbc.co.uk/1/hi/english/static/northern_ireland/understanding/profiles/george_mitchell.stm>.

145 See *The Thimpu Talks: 1985 - Sinhala-Tamil Conflict and the India Factor*. Available at <www.sangam.org/BOOKS/thimpu.pdf>.

The use of new technologies to aid the mediation and negotiation between parties to conflict on a state level – *i.e.* between governments or a government and a group within its territory with which it is in conflict – therefore falls within a pattern of operation that has been necessitated in international relations for centuries: a pattern of innovative adaptation of domestic legal systems (where establishment of laws, obligation to follow them and enforcement of redress when laws are disobeyed is easier to achieve) to the international sphere, where none of the domestic tools of establishment, obligation and enforcement exist. The introduction of technology platforms on which to conduct talks that have traditionally taken place offline, often in a neutral third country, could drastically reduce costs and improve efficiency of talks. There are, of course, caveats to the use of ODR to replace aspects of diplomacy that require face-to-face time and relationship-building. In 1997, George Schultz, a seasoned diplomat with the United States, warned against perceiving e-diplomacy (or, as he describes it, digital diplomacy) as a panacea: “Information technology cannot replace solid diplomatic reporting. It is important to distinguish between excellent means of communication and excellent communication. Computers offer the former, and educated men and women can manage the latter.”¹⁴⁶ This is certainly true and the key element of relationship-building and in-person trust-creation must remain in any conflict-transformation efforts taken.

ODR tools can, however, supplement these aspects of diplomacy by, for example, enabling quicker transmission of information and negotiation following in-person meetings between mediators and disputants, when they return to their own countries, for example. ODR could, for example, help diplomats engaging in conflict mediation by making scheduling, drafting and archiving tools available to them on a web-based platform. With the ability to create hierarchies of permission for access to each piece of information, the technology behind ODR can do a great deal to help conflict-resolvers manage their caseloads and their communication with each other and their clients.

A crucial caveat to the use of web-based platforms to conduct what can be politically sensitive and high-risk communications, of course, is that such platforms must be secure and all data protected. The November 2010 WikiLeaks leak of diplomatic cables, through which a few hackers managed to access and then publicly release thousands of classified documents from 274 US embassies around the world, dated from 28 December 1966 to 28 February 2010, should give us pause and spur providers of ODR services to tighten security in provision of their services in general.¹⁴⁷ While the leak of any private interaction online is

¹⁴⁶ G. Schultz, *Diplomacy in the Information Age*, Talk given at US Institute for Peace, September 1997.

¹⁴⁷ See, generally, CNN WikiLeaks Timeline, available at <www.cnn.com/2010/US/11/30/wikileaks.timeline/index.html>.

damaging to trust in Internet communications, the leaking of sensitive diplomatic information has the potential to threaten lives and derail positive peace and development processes.¹⁴⁸ Research into the best applications of ODR technologies to political conflict resolution is therefore warranted, as the potentials for these technologies to improve diplomatic work exist, but any technology used must be carefully tailored to the risks and particularities of diplomacy.

In the work that the authors do for Internet Bar Organization, ODR is one of many technology tools that link technology with law to promote and shape the emerging online justice community. By using technology and the Rule of Law to promote human rights and alleviate poverty, we directly confront those who use technology and the absence of the rule of law to shape a lawless Internet. The opportunity for us to confront today's inequities through a global collaboration to increase access to justice cannot be wasted. Political and economic insecurities are inextricably tied. Most political and ethnic conflicts arise out of some form of economic exploitation, based on social, religious, ethnic or other pretexts. Empowering individuals economically on a grassroots level therefore helps resolve one of the basic contributors to political conflicts. ODR holds the potential for economic empowerment on a grassroots level through e-commerce ODR that is targeted at those at the bottom of the pyramid. Just as an example, the creation of mobile money platforms in Kenya, the Philippines, Bangladesh and Afghanistan, to name just a few countries employing this new means of economic transaction, has opened up access to banking, saving and money transfer to millions of the un-banked.¹⁴⁹ Currently such mobile banking platforms do not come with a built-in dispute resolution mechanism. Disputes over transactions are taken to conventional court systems. The creation of a mobile-based ODR platform that can be accessed via the very tools used by people to conduct their transactions has the potential to build trust in mobile money, and to improve security and accountability of these new systems.

148 See, e.g., C.R. Albon, *How WikiLeaks Just Set Back Democracy in Zimbabwe*, 28 December 2010, The Atlantic. Available at <www.theatlantic.com/international/archive/2010/12/how-wikileaks-just-set-back-democracy-in-zimbabwe/68598>. When WikiLeaks released a cable detailing the secret work Morgan Tsvangirai, the opposition leader of Zimbabwe and a democratic beacon for the country, was doing with Western countries to foster political reform through sanctions, "Zimbabwe's Mugabe-appointed attorney general announced he was investigating the Prime Minister on treason charges based exclusively on the contents of the leaked cable. While it's unlikely Tsvangirai could be convicted on the contents of the cable alone, the political damage has already been done. The cable provides Mugabe the opportunity to portray Tsvangirai as an agent of foreign governments working against the people of Zimbabwe. Furthermore, it could provide Mugabe with the pretense to abandon the coalition government that allowed Tsvangirai to become prime minister in 2009."

149 See Vodaphone Policy Paper, *The Transformational Potential of M-Transactions*, Policy Paper Series No. 6, July 2007, see, also GSMA, *Mobile Money for the Unbanked*, 2009 Report. Available at <www.mobilemoneyexchange.org/Files/d13c521a>.

4 CONCLUSION

This chapter looked at how ODR's development in its foundational years has helped define and shaped an emerging online justice system. By reviewing the historical definitions of justice and comparing those conceptions with existing aspirations of the ODR community, we revealed that the ODR community holds itself up to ages-old standards of justice, and fares decently in comparison to the court systems and ADR systems it has evolved to supplement. Noting that the most developed forms of ODR have occurred in the e-commerce field, we identified and evaluated this industry by its own aspirational standards: transparency, independence, impartiality, effectiveness, fairness and integrity, accessibility, flexibility and affordability. These same ODR standards can also be applied to the burgeoning ODR use by governments in their relationship with citizens, and nations in their diplomatic relations, as the online justice system continues to grow.

The vision of the Internet as a beacon of freedom, something the UN has endorsed through the World Summit on the Information Society, needs practical, yet inspirational projects to shape it. Access-enhancing initiatives using mobile technologies will redefine justice by creating new opportunities for all to share fairly, and the expansion of ODR to complement these initiatives will promote an honest and trustworthy online society.

While ODR is most often used as a tool on the micro- (that is, person-to-person) level of politics and economics, it has, as we have laid out in this chapter, the potential to *transform* conflicts at the macro- (that is, governmental and state-to-state) level. ODR, applied according to the justice principles laid out in this chapter, holds many possibilities for improving access to justice within sectors of commerce, government and society that have thus far been excluded from conventional court-based justice because of the impracticability of bringing small issues before the courts. Small disputes aggregate into big ones, however, and tackling these disputes using innovative and flexible technology-assisted dispute resolution mechanisms is a powerful idea. We believe it is our duty as lawyers, mediators and human beings in the ODR community to help this field meet its truest justice potential.

