THE ROLE OF CITIZENS AND THE FUTURE OF INTERNATIONAL LAW: A PARADIGM FOR A CHANGING WORLD

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> The most powerful agent of growth and transformation is something much more basic than any technique: a change of heart. — **John Welwood**[1]

> Only in growth, reform, and change, paradoxically enough, is true security to be found. — **Anne Morrow Lindbergh**[2]

> You must be the change you wish to see in the world. — **Mahatma Gandhi**[3]

I. Introduction

Time is on our side and security is to be found, only if we would have a change of heart about the role that citizens can play in the future of international law. True, citizens do play a role in the development and enforcement of domestic laws, especially in

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1 John *Welwood, Ph.D. is the author of numerous books, including* Journey of the Heart: The Path to Conscious Love (Perennial 1996) and Toward A PSYCHOLOGY OF AWAKENING: BUDDHISM, PSYCHOTHERAPY, AND THE PATH OF PERSONAL AND SPIRITUAL TRANSFORMATION (2000).

2 Anne Morrow Lindbergh (1906 – 2001) was a noted author and aviation pioneer. She is the author of over 12 published books, including NORTH TO THE ORIENT (Harcourt, Brace and Company, New York 1935) and LISTEN! THE WIND (1938).

3 Mahatma Gandhi (1869 – 1948) was an Indian spiritual and political leader as well as a humanitarian. He is best known for having helped India gain independence in 1947 by using a method of direct social action based upon the principles of courage, nonviolence and truth called *satyagraha,* a method he developed.

more democratic and Western societies. Citizens have also had significant influence in the development of international law.[4] However, citizens (i.e. non-state actors) have not had a direct hand in the enforcement of international law through private action as accorded to state-actors (i.e. governments).[5] This means that citizens, in most cases, have had to go through their governments or petition their governments for redress. Furthermore, there are countless non-democratic societies and third-world countries whose citizens do not have a voice in domestic government, much less a voice in the development and enforcement of international law.

The world is changing. A post-Cold War world is unlike the old world with known enemies, defined boundaries, and static, statist legal frameworks. A changing world needs a new paradigm. I propose that this new model consists of citizens playing a greater role in the development and enforcement of international law through an integration of legal principles and alternative dispute resolution mechanisms, such as negotiation, mediation and arbitration.

Section II of this Article discusses the changing world with an eye towards a worldview in which the citizen plays a greater role, directly or indirectly, in the affairs of the world. Section III addresses the current role of the individual in the framework of international law enforcement and how changes in the world have affected the role of the individual as well as other non-governmental entities. Section IV presents a proposal for the role of the citizen as well as other non-governmental entities in light of a changing world, a role which advocates for citizens acting as the first line of offense in the enforcement of critical international laws.

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[4] Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 447-450 (2002) (discussing, from a historical perspective, the role that individuals have played in the enforcement of international law). It is important to note from Stephens' article that enforcement was by individuals demanding that their sovereign state file the action, not by individual action by the non-state actor.

[5] In this article, the following definitions are used with respect to state actors, non-state actors, and citizens: 1) *state actors* are official members of the government (i.e. officials), components or employees of a government (i.e. sheriffs), or anyone acting under 'color of law' (claim of legal right); 2) *non-state actors* are non-governmental persons such as the private sector, economic and social partners such as community-based organizations, and civil society in all its diversity; and 3) *citizens* can be state actors or non-state actors. For the purposes of this article, citizens are 'non-state' actors who are members of a civil society (ordinary citizens) who make up social and civic organizations as part of a functioning society. They are subject to the laws of the state. They do not act under 'color of law' or hold legally recognized positions within the government.

Section V examines the benefits of citizen enforcement of international law. Finally, Section VI concludes with a call to action in a time of opportunity for recognizing officially what citizens have been doing unofficially since time began – ensuring peace and prosperity simply through a change of heart.

II. Through the Looking Glass: A Changing World

From the early stages of World War I to the current post-Cold War climate, the world has gone through enormous changes including shifts in the political landscape, the possible emergence of a civilizational paradigm,[6] the merging of "hard" and "soft" law, and the consolidation and clash of critical world resources required for sustainable development of the planet. These major areas of a changing world mandate a new worldview for resolving the global issues of the 21st Century.[7]

A. Shifts in the Political Landscape

World War II produced a Cold War that was truly global,[8] characterized by "a period of East-West competition, tension, and conflict short of full-scale war, which was characterized by mutual perceptions of hostile intention between military-political alliances or blocs."[9] It was not until the late 1980s and early 1990s that the

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[6] Samuel P. Huntington, *The New Era in World Politics*, *in* Cross Cultural Negotiations and Dispute Resolution: Readings and Cases 12 (Grant R. Ackerman ed., 2003) (defining a civilizational paradigm as one in which societies which share cultural or religious identities form alliances with like countries and influence world events from the basis of that shared identity); *see also* Section IIB for a more detailed discussion on the impact of the civilization-based paradigm.

[7] David M. Trubek, *Recent Books on International Law*, 96 Am. J. Int'l L. 748, 751 (2002) (reviewing Governance in a Globalizing World (Joseph S. Nye, Jr. & John D. Donohue eds., 2000)) (highlighting Nye and Donohue's view that governance in a globalizing world requires "a radical rethinking of the relationship among nations, international institutions, and non-state actors of all types, as well as the development of new ideas about the nature of democratic legitimacy").

[8] Huntington, *supra* note 6, at 15 (quoting Former US President Franklin D. Roosevelt as having stated that World War II would "end the system of unilateral action, the exclusive alliances, the balance of power, and all the other expedients that have been tried for centuries – and have always failed.").

[9] *Cold War: Post War Estrangement*, http://www.ibiblio.org/expo/soviet.exhibit/coldwar.html (discussing the nature of the Cold War) (last visited August 23, 2006).

world saw changes in East-West relationships.[10] These new relationships marked the end of the Cold War and the beginning of a supposedly new, more peaceful post-Cold War climate.[11]

However, behind the "illusion of harmony"[12] that accompanied the early post-Cold War climate, new patterns of conflict arose among states because of new alliances being formed between states.[13] Scholars, notably Samuel P. Huntington, characterize this new, post-Cold War political landscape as having four primary characteristics.[14] First, global politics is both multipolar and multicivilizational, where being modernized is not the same as being Westernized.[15] Second, there is a shift in the balance of power where Western civilizations have decreasing influence while Asian civilizations are expanding their economic, military, and political influence.[16] A third aspect of this new world order is a civilization-based system, where societies that share cultural identities form cooperative alliances and countries assemble themselves around a core group of states.[17] Finally, there is a clash between the West's universalist views and the cultural relativist paradigm adopted by many non-Western countries, such as Iran, Iraq, and China.[18] The world today is one in which "conflict has few boundaries and a complex new order has supplanted the realist world order domi-

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[10] *Id*; *see also* Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U.L.J. 293, 303 (2002).

[11] Koh, *supra* note 10, at 303 n.21 (quoting Yale Cold War historian John Lewis Gaddis in *And Now This: Lessons from the Old Era for the New One*, *in* THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPT 11 (Strobe Talbott and Nayan Chanda eds., 2001), regarding the Cold War: "[w]e've never had a good name for it, and now it's over. The post-cold war era—let us call it that for want of any better term—began with the collapse of one structure, the Berlin Wall on November 9, 1989, and ended with the collapse of another, the World Trade Center's Twin Towers on September 11, 2001."). Gaddis saw the collapse of the World Trade Center as the formal end of the post-Cold War era.

[12] Huntington, *supra* note 6, at 15.

[13] *Id*; *see also* Koh, *supra* note 10, at 303 (describing the end of the Cold War in 1989 as bringing about a change in the focal point of human rights violations from those involving ideology to identity, resulting in "a horrific renewal of ethnic conflict and refugee outflows. The paradigmatic violation became not genocide or imprisonment of dissidents, but group and ethnic conflict.").

[14] Huntington, *supra* note 6, at 12.

[15] *Id*.

[16] *Id*. Certainly, reports about the rise of China and India as economic and political powers are one of many recognized examples of this phenomenon.

[17] *Id*. It could also be argued that those who share a religious identity will form cooperative alliances. In this article, the term "cultural" encompasses the religion of a given culture or the religion as a culture.

[18] *Id*.

nated by sovereign states."[19] This new order consists, in part, of individuals and organizations that owe loyalties to multiple entities including governments that rule their geographic areas, sub-national ethnic groups, global religious, ethnic, and cultural groups, and issue-based movements.[20] Such divisive networks foster proliferation and escalation of disputes.

B. Emergence of a Civilizational Paradigm

The civilizational paradigm relates to civilization*s* (in the plural), defined for the purpose of this article as ". . .the biggest 'we' within which we feel culturally at home as distinguished from all the other 'thems' out there."[21] For example, one might be born in Sri Lanka and educated in the United Kingdom and United States, yet consider herself Muslim before she considers herself as part of any other major identity group. The conflict arises because of the perceived difference in values inherent between Muslims (where religion and politics are interwoven) and the majority view of the United States and United Kingdom (where religion and politics are not so integrated).[22]

The civilizational paradigm is based on four foundational principles.[23] First, the same forces that call for integration and cohesion in the world generate counter forces that argue for more cultural focus and civilizational consciousness.[24] An example may be that, as much as the West attempts to assert democratic values as the model of good governance, those who are against these val-

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[19] Koh, *supra* note 10, at 303.

[20] Koh, *supra* note 10, at 303-304 (arguing that because of such varied loyalties, there is a greater chance of human rights abuses since groups are regularly pitted against other groups, who then intentionally target civilians or group of civilians as a means of accomplishing the group's goals).

[21] SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 43 (1996) (hereinafter "HUNTINGTON, CLASH (1996)") (discussing the difference between civilization in the singular and civilizations in the plural, where civilization was the opposite of a primitive society). The difference now is that there may be many civilizations, not just one, and it is the conflict between them which is more pronounced post Cold-War.

[22] *See*, *e.g.*, Sarah Lyall & Ian Fisher, *Many Muslims in Britain Tell of Feeling Torn Between Competing Identities*, N.Y. TIMES, Aug. 13, 2006, § 1, at 6 (discussing how Muslims living in Britain struggle with competing identities – Muslim and British, each considered part of two very distinct civilizations).

[23] HUNTINGTON, CLASH (1996), *supra* note 21, at 36.

[24] Huntington, *supra* note 6, at 19.

ues will push in the other direction, thus creating a polarizing effect among non-Western cultures.

Second, the perceived differences create a distinction between the West, as a dominant civilization, and all other civilizations, thus fostering a Western - non-Western divide.[25] In the context of those who are considered part of the "non-Western many,"[26] the perception is that there are only two worlds, thus setting the stage for conflict. Third, while nation states will continue to be at the forefront of world affairs in terms of state actors, the conflicts themselves are increasingly shaped by cultural and civilizational factors.[27] For example, the central conflict between Hezbollah forces in southern Lebanon and Israel in 2006 involved legitimate nation-states (Lebanon and Israel); however, the conflict was shaped by differences in the tenets of the 'culture' of Hezbollah (non-state actors) and Israel (state actor) due to long-standing cultural, religious and identity-based disagreements.[28]

Finally, the conflicts that pose the greatest threats to world security and stability are those between states or between groups of different civilizations.[29] Some examples in 1993 included continued, intensified fighting between Croats, Muslims, and Serbs in the former Yugoslavia and the still undecided status of Kosovo; "the confrontation at the Vienna Human Rights Conference between the West, led by U.S. Secretary of State Warren Christopher, denouncing 'cultural relativism,' and a coalition of Islamic and Confucian states rejecting 'Western universalism';" and the bombing of Bagdad as unanimously supported by Western governments and condemned by nearly all Muslim governments as an example of the "double standard" of the West.[30] Such conflicts pose the greatest threat because the cultural and civilizational differences, which touch an emotional core within human beings, do not seem to

25 *Id.*; *see also* Lee J. Davis, *Preparing for the Twenty-First Century by Paul Kennedy*, 5 INT'L LEGAL PERSP. 121 (1993) (book review) (discussing the argument by Paul Kennedy that technology, as an example, has created a wider gap between the world's "haves" and "have-nots").

26 HUNTINGTON, CLASH, *supra* note 21, at 36.

27 Huntington, *supra* note 6, at 19.

28 *Israel Hits Lebanon Ahead of Cease-Fire*, CNN.COM, Aug. 13, 2006, http://www.cnn.com/2006/WORLD /meast/08/13/mideast.main/index.html (discussing the UN-brokered cease-fire between Israel and Hezbollah, who are occupying territory in southern Lebanon. The key here is that the war was triggered by cultural and civilizational factors (namely that Hezbollah as an Islamic-extremist organization does not recognize Israel) and that nation states (Israel, Lebanon, United States, and United Nations) had to come together to resolve it).

29 *Id.*

30 *See e.g.*, HUNTINGTON, CLASH, *supra* note 21, at 38 (listing some relevant examples that occurred in 1993).

make room for similarities and the tolerances needed to resolve conflicts in a reasonable manner without violence and instability.[31]

This civilizational paradigm, or a "clash of civilizations,"[32] is allegedly at the heart of many post-Cold War events, including the breakup of the Soviet Union and Yugoslavia, internal struggles in Russia, intensity of trade conflicts between Japan and the United States, the developing arms race in East Asia such as between Pakistan and India, and China's continuing role as an emerging superpower.[33]

Because of conflicts between nation-states, citizens often feel powerless, even if there is a quasi-democratic political process in place. As such, citizens look elsewhere for a social and economic safety net and for security, such as along cultural, civilizational, and religious lines.[34]

Whether globalization is at fault or whether the world is moving towards a natural evolution, the fact remains that the clash between cultural and civilizational factors means that the new world order is increasingly being shaped by costly and violent cultural conflicts along civilizational fault lines.[35] The importance of this

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31 The Israel-Palestinian conflicts as well as the recent Israel-Lebanon/Hezbollah conflict are extreme examples of what can happen in such circumstances.

32 *But see* Tony Blair, *Why We Fight,* N.Y. POST, Mar. 22, 2006, (PostOpinion), at 29, *available at* http://www.number10.gov.uk/output/Page9222.asp (excerpt of UK Prime Minister Tony Blair's speech to the Foreign Policy Centre in London, arguing that "[t]his is not a clash between civilizations. It is a clash *about* civilization", meaning a "battle about modernity. . .[and] progress".). This is an interesting reframing of Huntington's view of the civilizational paradigm and its impact. Even this subtle difference in perception and perspective further supports the argument for the strategic integration of alternative dispute resolution mechanisms to effectively address such issues (last visited February 16, 2007).

33 Huntington, *supra* note 6, at 20.

34 Trubek, *supra* note 7, at 750 (discussing the ways in which the authors of the book, *Governance in a Globalizing World*, intend to revive "embedded liberalism" for the 21st Century with a new vision called "networked minimalism," which is centered around five core ideas: 1) subsidiarity; 2) multi-level governance; 3) multiactor politics; 4) networks; and 5) prudential limits to globalization. Some of these ideas are insightful in the context of this article). This model clearly recognizes that there are informal networks out there that are powerfully influential today in the world of politics, economics, and business and we need to find a way to include them into the larger international framework if there is to be sound global governance. *De minimus*, these groups must have a voice in the international legal framework because of their impact in making policy and in influencing national values.

35 Huntington, *supra* note 6, at 12; *see also* Douglas Johnston & Brian Cox, *Faith-Based Diplomacy and Preventive Engagement, in* FAITH-BASED DIPLOMACY: TRUMPING REALPOLITIK 23 (Douglas Johnston ed., 2003) (citing The Secretary-General, *Report of the Secretary General on the Work of the Organization*, Introduction, *delivered to the Security Council and the General Assembly*, U.N. Doc. A/55/985-S/2001/574 (June 7, 2001) (reporting on statistics from a Carnegie Commission study where it was found that during the 1990s, the international community spent

paradigmatic shift will be discussed in Sections III and IV. Suffice it to note for now that this one single issue demands a change in the way international law is enforced because, today, culture does not appear to have a voice in most domestic and international legal frameworks in terms of addressing international disputes. Without such a voice, the perceived cultural and civilizational battles are being waged outside the rule of law or without some other effective procedural mechanism to address these interests. Without an available forum, these and other conflicts will be resolved by any means deemed appropriate by the disputants, including self-help, resulting in countless violations of existing public international laws and customary international norms.

C. Merging of Hard and Soft Law

Within the positivist law framework, international law operates via "hard law" and "soft law." Hard law consists of three general sources of international law: "[1] treaties; [2] 'general principles of law'; and [3] customary international law."[36] Each of these categories is considered "hard law," the breach of which subjects the violator to sanctions or other enforcement mechanisms. Treaties and conventions are generally binding agreements between nation-states and govern the legal relationship between the states.[37] Only a state can initiate an action for non-compliance against another state if there is a violation of hard law.[38]

In addition to hard law, an emerging trend in international law is the prevalence of soft law. Soft law is not treaty, general principles, or custom. Among international legal scholars, soft law is "ei-

over $200 billion in intervention efforts across seven major conflicts in contrast to the cost of effective, preventative action, which would have cost only $70 billion.)).

36 OWEN J. LYNCH & GREG MAGGIO, HUMAN RIGHTS, ENVIRONMENT, AND ECONOMIC DEVELOPMENT: EXISTING AND EMERGING STANDARDS IN INTERNATIONAL LAW AND GLOBAL SOCIETY, Center for International Environmental Law Publications, Nov. 15, 1997, at § II, *available at* http://www.ciel.org/Publications/olp3ii.html (noting Article 38(1) of the International Court of Justice, which recognizes the three main categories as sources of international law and also includes " . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

37 Lynch & Maggio, *supra* note 36, at § II (discussing the nature of treaties and conventions and their binding effect on nation states that ratify them.).

38 *Id.*

ther not yet or not only law."[39] Soft law can take the form of "declarations, codes of conduct, guidelines and other promulgations [by branches] of the United Nations, operational directives of the multilateral development institutions, and resolutions and other statements by non-governmental organizations."[40] The key to these soft law standards is that while they do not carry the weight of enforcement as hard law instruments, they do provide significant influence in terms of normative weight.[41]

In this sense, the line between hard law and soft law becomes blurred, with soft law creating significant influence in the development of hard law.

What is significant about soft law is that it is defined and influenced by individuals, non-governmental organizations ("NGOs"), and non-state actors such that while soft law is not technically "law," it is evidence "of the increased presence of non-state participants in the international arena and to the success of non-state actors in promoting new legal standards which represent their views and values."[42] As such, these new non-state actors and the citizens who make up these organizations, particularly multi-national enterprises ("MNEs") and NGOs, will continue to influence international law, be a positive force for enforcement of such laws, and must be "integrated into policy processes."[43] Many forms of alternative dispute resolution ("ADR"), especially at the international level, would benefit from the use of soft law in the form of societal norms and customs to not only create mutually beneficial agreements but incentives to increase the enforcement and binding nature of such agreements. Such options will be discussed further in Section IV.

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39 *Id.* For example, this can include commitments developed by United Nations committees and conferences, such as the United Nations Conference on Environment and Development or the World Conference on Human Rights.

40 *Id*.

41 *Id*. The normative weight of soft law greatly influences the behaviours and norms of those creating the codes of conduct and those who will ultimately have to abide by them.

42 *Id*.; *see generally* Trubek, *supra* note 7, at 750 (discussing the nature of multilevel governance, multiactor politics, and networks as the basis of governance in the age of globalization. These three ideas are central to understanding the extent to which non-state actors, particularly NGOs and corporations, have become key players in the global world).

43 Trubek, *supra* note 7, at 750, with reference to the authors of GOVERNANCE IN A GLOBALIZING WORLD, refers to integrating MNEs and NGOs into the policy process, but I would argue that policy underlies the international legal framework so that these actors must also be allowed a voice and venue into the international legal framework via enforcement of international laws.

D. Battle for Critical World Resources in the Fight for Sustainable Development

A final, noteworthy evolution in the 21st century is the merging of human rights, environmental protection, and economic development objectives as complementary and related disciplines with the broader goal of global sustainable development.[44] The last decade marked an increase in conflict surrounding human rights, economic development, and the environment with some claiming that the last century was "perhaps the bloodiest in history."[45]

Increased conflict in the area of sustainable development is, in large part, due to "current global human demographic, consumption, and pollution patterns that place unprecedented demands on the regenerative capacity of remaining ecosystems and jeopardize the welfare of vulnerable groups."[46] Scholars, scientists, and policy-makers are realizing that human rights, environmental protection, and economic development are linked and inter-dependent such that issues in any of these areas must be addressed holistically.[47] For example, conflicts between environmental protection

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[44] William C. Clark, *A Transition Toward Sustainability*, 27 ECOLOGY L.Q. 1021, 1022-1023 (2001) (referring to "sustainable development" as "attaining healthy interactions between multiple dimensions of human endeavor and multiple dimensions of the environment").

[45] Amnesty International, *Establishing a System of International Justice to End Impunity* (Nov. 15, 1997), *available at* http://web.amnesty.org/pages/jus-index-eng (discussing a proposal for changes in international law to prevent crimes against human rights; articulating reasons for impunity from responsibility for such crimes)(last visited March 9, 2007). This sentiment of the twentieth century being the bloodiest in human history is a shared sentiment among most scholars, historians, and respected professions; s*ee also* Irvin Baxter Jr., *Behold - A Pale Horse, available at* http://www.endtime.com/past_article.asp?ID=76 (January/February 2000) (last visited August 23, 2006) (citing certain statistics of violent human deaths and suffering during the course of the twentieth century to be over 1.30 billion in comparison with a population of 1.6 billion at the beginning of the 20th Century, with such deaths occurring during times of war and relative peace).

[46] Owen J. Lynch & Greg Maggio, Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society, Center for International Environmental Law Publications, November 15, 1997, at § I, *available at* http://www.ciel.org/Publications/olp3i.html (discussing the impact of resource constraints on the world population, especially the impact on indigenous populations); *see also* Clark, *supra* note 44, at 1027-1029 (tracing the historical relationship between the environment and development over the last few generations and the decline in the balance between environmental resource protection and human development and population explosion).

[47] *Id.,* at 1022 (discussing the findings of the Brundtland Commission and the U.N. Conference on Environment and Development and stating that "individual problems are better viewed as multiple dimensions of an increasingly interdependent relationship between society and environment . . . [and that] the transcendent challenge before us is to craft a vision of the future that

and development initiatives often involve value conflicts between two or more development interests, one for environmental conservation, and the other for development to improve the quality of human environments.[48]

In addition, development without deliberation of the impact on human rights or the environment jeopardizes the long-term viability of any development effort because it will come at the price of human-rights violations.[49] For example, during the 1990-1991 Gulf War, Iraqis ignited hundreds of oil wells, resulting in the destruction of marine and coastal life as well as damage to air and soil.[50] Some six to eight million barrels of oil spilled into the Persian Gulf and Arabian Sea killing between 15,000 – 30,000 sea birds and contaminating shoreline reefs and wetlands, affecting the livelihood of coastal villages.[51] This one single incident not only destroyed the livelihood of coastal villagers but, no doubt, has also affected the marketability of future development efforts which would have brought foreign investment into the area to redevelop coastal villages and improve sustainability for area residents.

Between 1990 and 2000, there were approximately 118 armed conflicts that claimed more than six-million lives and destroyed the ecosystems of affected areas.[52] In addition, such conflicts resulted in thousands of people being forced to flee from their homes or becoming "internally displaced persons."[53] In 2001 alone, refugees accounted for approximately twenty- million of the world's population, with approximately twelve-million being refugees and five-

encompasses these interactions and to develop a strategy for action that addresses them."). Clearly, such interactions are not necessarily within the purview of a legal system and require dialogue and discussion more suitable to mediation and arbitration.

48 *Id.,* at 1022; *see also* Lynch & Maggio, *supra* note 46 at § I. For example, it was as late as 1972, with the development of the Stockholm Declaration of 1972, that a formal international law instrument recognized the link between human rights and environmental protection objectives. More recently, the 1993 Vienna Declaration, while not recognizing an explicit human right to environmental protection, at least links the right to a healthy environment with that of development. However, to date, there is no global human rights instrument that includes a "right to environment" per se.

49 Clark, *supra* note 44, at 1022.

50 Wendy Vanasselt, *The Collateral Damages of War*, 2 World Resources Institute – WRI Features, No. 10, Nov.–Dec. 2004, *available at* http://newsroom.wri.org/wrifeatures_text.cfm?ContentID=3144 &NewsletterID=79 (discussing the extended nature of destruction of lives, livelihoods, and natural resources as collateral victims of war).

51 *Id*.

52 *Id*.

53 *Id.* (defining "internally displaced persons" as "people forced to flee their homes, but still living in their original country.").

million being internally displaced persons.[54] As a result, in rebuilding conflict-torn nations, governments focus more heavily on basic necessities at the expense of the environment or protection of sustainable resource management.[55] Internally displaced persons, citizens of these war-torn nations, often become collateral damage and have little or no recourse via the international legal framework.

Finally, increased foreign investments through the use of bilateral investment treaties have a tremendous impact on the environment, human rights, and economic development capacity of the world. Many times, to rebuild economies ravaged by war, natural disasters, or destabilized governments, nations encourage foreign investment. While this *can* have a positive effect, it can also perpetuate an ongoing cycle of violence and resource exploitation because land and natural resources may be used "as bargaining chips to gain allies during strife, in negotiations to end conflict, or as postwar paybacks to those who helped win the conflict."[56]

Sustainable development, in the future, will consist of multidimensional conflicts that encompass human rights, economic development, and environmental protection because the "future will . . . see more people trying to produce and consume more goods on the same crowded planet. . .[creating] an increase[ed] risk of mutually costly collisions between environment and development."[57] No longer can we afford to litigate each aspect separately because the costs are too great and attempting to segregate and deal with them individually has proven to be inefficient and ineffective.[58] In fact, it has been through the failures in dealing with environmental, economic and human rights issues on an individual basis that many scholars and international bodies now realize the inter-connectedness of these issues.[59] These value conflicts eventually affect the delicate balance between human rights, environmental protection,

54 *Id,*; *see also* CIA – The World Factbook, Field Listing - Refugees and internally displaced persons, https://www.cia.gov/cia/publications/factbook/fields/2194.html (last visited August 23, 2006) (listing, by country, statistics on refugees and internally displaced persons).

55 Vanasselt, *supra* note 50.

56 *Id*.

57 Clark, *supra* note 44, at 1029.

58 Lynch & Maggio, *supra* note 36, at § I (stating that the growing realization of the link between human rights, economic development, and the environment came after failures from attempting to deal with the issues as separate conflicts).

59 *Id.* For example, it was as late as the development of the Stockholm Declaration of 1972 that a formal international law instrument recognized the link between human rights and environmental protection objectives. More recently, the 1993 Vienna Declaration, while not recognizing an explicit human right to environmental protection, at least links the right to a healthy

and development interests. Therefore, a different, more inclusive and holistic model is needed to handle these multi-dimensional conflicts in the changing world.

III. Current Role of Citizens in International Law

As much as the world has changed since the end of the Cold War and continues to do so, the role of the individual and other non-state actors has also evolved albeit more slowly. These actors have evolved from being *objects* of international law to being *subjects* and active participants within the international legal framework, whether they are duly recognized by the international system or not. In 1959, Kenneth N. Waltz, a political theorist and one of the most renowned scholars of international relations, argued that international relations behavior, such as causes of war, was based on a "three-images" model: 1) human nature; 2) the nation-state; and 3) the international system.[60] I propose that we are now at a point in history and in the nature of international relations where there is a fourth image, that of the "non-nation-state"[61] (i.e., the citizen or the non-state actor). This fourth view has its roots in the nation-state and the international system; however, the non-state actor has emerged as a force of its own and one whose influence demands attention, recognition, and respect.[62]

environment with that of development. However, to date, there is no global human rights instrument that includes a "right to environment" per se.

60 *See generally* Kenneth N. Waltz, Man, the State, and War: A Theoretical Analysis (1959). Professor Kenneth N. Waltz is Emeritus Professor of Political Science at UC Berkeley and an Adjunct Senior Research Scholar at Columbia University.

61 The term "non-nation-state", as used here, is synonymous with the term "non-state actor" as well as "citizen" to the extent that a citizen takes the role of a non-state actor. The "non-nation-state" is any individual, group of individuals, or associations and organizations who are not formally recognized within the international law framework but yet can, and do, exert tremendous power in many areas, including natural resources, economic, political, and military. Examples may include Al Qaeda, Hezbollah, NGOs, and multi-national companies with vast resources to influence nation-states.

62 *See, e.g.*, Kenneth N. Waltz, Theory of International Politics (1979) (discussing the core aspects of a neorealist (or structural realism) approach to international relations, a theory which seems to argue that anarchy is the natural non-variable state of international relations and that the variable aspect is that those actors who have the major capabilities will ultimately set the stage in which other, lesser capable actors must act). Here, I am talking precisely about the possible shift in who those major actors are *now* (i.e., non-state actors) as opposed to under a classic statist framework. Because there is a shift in the major actors, we must re-look at the strategy of how to deal with the conflicts created by such new players. The "fourth image" will be the subject of a more detailed analysis in a future article.

A. The Classic Statist View of International Law

Under the classical, statist approach, promoted by positivists,[63] nation-states are the only recognized, legitimate subjects[64] of international law. Under this approach, individuals and other non-state actors are merely "objects" of international law and must look to a host state for remedy under international law.[65] Without proper redress, in a most extreme example, such injured parties could resort to a violent and unlawful self-help remedy.

B. The New, Emerging Role of Non-State Actors in International Law

A global society is "not the exclusive domain of nation states."[66] Since World War II, several developments suggest an increasingly important role for citizens and non-state organizations as active subjects, participants, and legal personalities on the international front. First, international organizations, such as the Organization of the American States ("OAS"), military/security bodies such as the North Atlantic Treaty Organization ("NATO"), and the European Union ("EU"), increasingly play a larger role in developing and enforcing international law.[67]

Second, multilateral financial development organizations such as the World Bank, transnational commercial enterprises, religious movements, and NGOs also play a major role in shaping international law.[68] International NGOs, in particular, have been recog-

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[63] Lynch & Maggio, *supra* note 36, at § II (discussing the difference between natural law and positivism and comparing that with an emerging, alternative perspective of the nature of law, policy science).

[64] *Id.* (defining positivism in international law as consisting of "subjects" (nation-states) and "objects" (everything else)). Under this view, individuals and other non-governmental entities are considered objects.

[65] *Id*.

[66] *Id*.

[67] *Id*. It is recognized that the degree of influence by each of these organizations with respect to developing and enforcing international law is subject to debate and, perhaps, the focus of another article. The point here is that pure nation-states no longer hold the bulk of influence in developing and enforcing international law.

[68] *Id.* (specifically highlighting Agenda 21, which stresses and recognizes the importance of non-state personalities as having an increasingly important role to play in "facilitating international legal and political objectives," and thus "having a major impact on global stability and security.").

nized as "actual international actors" given their international focus and membership.[69]

Third, many political organs of the United Nations, such as FAO, UNESCO, UNDP, UNEP, ILO, UNICEF, and multilateral development institutions are recognized as having an international legal personality.[70] They are deemed subjects and the laws which govern them are part of the body of general principles of international law.[71] As such, they have significant influence in how international law is interpreted and enforced. This influence is part of the network of non-state actors who, today, do not have direct access to legal institutions to enforce those policies and procedures that they have indirectly or directly created to protect the rights of the world's citizens.

Fourth, scholars have argued that the existing differentiation between "subject" and "object" in international law is no longer valid since it no longer reflects the reality of the global world we live in today.[72] They argue that it is better to view international law as:

> a particular decision-making process. . .(which is a dynamic and not a static one). . .[in which] there are a variety of participants, making claims across state lines, with the object of maximizing various values. . .[I]n this model, there are no "subjects" and "objects" but only participants. Individuals are participants, along with states, international organizations. . .multinational corporations, and indeed non-governmental groups.[73]

While scholars and the global community recognize and accept the role of citizens as participants in international law, non-state actors still suffer from a "procedural disability" in terms of protecting their rights and interests in the international legal order.[74] The result of this procedural disability and "non-recognition" can be seen in many recent world events, including individual and group

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69 *Id*.

70 *Id*. FAO is the Food and Agricultural Organization. UNESCO is the United Nations Educational, Scientific, and Cultural Organization. UNDP is the United Nations Development Program. UNEP is the United Nations Environment Programme. ILO is the International Labour Organization. UNICEF is the United Nations Children's Fund. An organizational chart depicting a complete view of the United Nations system is available at http://www.un.org/aboutun/chart.html (last visited Aug. 23, 2006).

71 Lynch & Maggio, *supra* note 36, at § II.

72 *Id*.

73 *Id. (*quoting R. Higgins, author of several books and articles. including R. Higgins, *Conceptual Thinking about the Individual in International Law*, 4 J. INT'L STUD. 1 (1978)).

74 Id.

terrorist activities, suicide bombings, and the rise of student movements in China and Korea. In fact, as the world's population continues to grow and the gap between the wealthy and the poor widens and becomes more visible,[75] some argue that there will be "increasing numbers of young men with pent-up energy and nothing to spend it on. . .[who will] often resort to violence to make their mark."[76] Therefore, because of this procedural disability, the emerging world of non-state, politicized individuals and groups often resort to violence as a means to communicate their frustration with the international legal order. Continuing this trend of shutting non-state actor networks off from the international legal framework is to our global detriment. What is needed is a reality-based, progressive international legal system that alleviates the problem of the procedural handicap that has, to date, prevented non-state actors from being part of the solution. ADR mechanisms, in the form of mediation, arbitration, and advanced international negotiation,[77] can significantly contribute to such a progressive model.

IV. Citizen Enforcement of International Law – a Proposal

Victor Hugo, the world-renowned French poet and novelist, once said, "[a]ll the forces in the world are not so powerful as an idea whose time has come." Such is the nature of citizen enforcement of international law. It is an idea whose time is now!

We are at a unique and critical point in history with an opportunity to shape the stability and security of the world and its inhabitants. All the forces of previous generations have made it such

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[75] Davis, *supra* note 25, at 121 (citing statistics by Paul Kennedy, Preparing for the Twenty-First Century 46 (1993) that includes the following: 1) one quarter of the earth's five billion people live in China; 2) another one quarter live in India; 3) a growing percentage of population in Africa are struggling with limited resources, social unrest, and economic marginalization; and 4) an estimate that between now [1993] and 2025, 95% of the population growth will be in undeveloped or developing countries).

[76] *Id. (*citing, as examples, the turmoil in Somalia, Haiti, and the Middle-East as well as the massive student movements in China and Korea.); *see also* Dean G. Pruitt & Sung Hee Kim, Social Conflict: Escalation, Stalemate, and Settlement 110 (2004) (discussing how economic disparity between groups can lead to resentment, hostility and often to vengeful tactics against other individual groups, resulting in school shootings, feuds, terrorist attacks, sabotage, workplace violence, and genocide).

[77] These are just a few of the possible alternative dispute resolution mechanisms that can be employed. These and other options are discussed further in Section IV.

that we are now, unequivocally, a global society. We are not only dependent on our neighbors and relatives, but our safety and prosperity is interdependent with strangers in foreign lands. As a global society, each one of us is the keeper of others' safety and happiness. As such, we are monitors, developers, and enforcers of the very laws we create, either directly or indirectly.[78] By developing a procedural framework that allows citizens a recognized and active voice in the enforcement of substantive international law and customary international norms, we can ensure that the international legal framework has a "seat at the table" for non-state actors as partners in a peaceful and stable world order.

I propose that this framework contain the procedural elements of the "citizen suit"[79] integrated with ADR, such as advanced negotiation, mediation and arbitration. This framework will allow for best practices in terms of creating a third-party beneficiary interest[80] in the subject matter of the dispute, as well as the efficiency, privacy, and procedural flexibility of dispute resolution mechanisms that are currently internationally recognized as the most effective and efficient means of resolving international disputes.

A. Create a Third-Party Beneficiary Interest in International Law

Though not entirely a new concept, the creation of a third-party beneficiary interest within the international legal framework is necessary in today's most pressing international treaties and conventions, including those that involve human rights,[81] environmen-

[78] *See, e.g.*, Barton H. Thompson, Jr., *Innovations in Environmental Policy: The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL L. REV. 185 (2000) (discussing how the role of citizen enforcement, particularly in the area of environmental laws, has extended into citizens acting as monitors and informants in addition to their current role as prosecutors in the form of attorneys general).

[79] The citizen suit is a creature of United States domestic environmental laws. It is further discussed in Section IV, Part A.

[80] BLACK'S LAW DICTIONARY 1480 (6th ed. 1990) (defining third-party beneficiary interest as having its basis in contract law. A third-party beneficiary contract is "[a] contract between two or more parties, the performance of which is intended to benefit directly a third party, thus giving the third party a right to file suit for breach of contract by either of the original contract parties." The key requisite to being a "third party beneficiary" under the contract is that the "parties to the contract must have intended to benefit the third party, who must be something more than a mere incidental beneficiary.").

[81] Wikipedia.org, *Human Rights*, http://en.wikipedia.org/wiki/Human_rights (last visited August 23, 2006) (defining human rights as those rights which some hold as being "inalienable" and belonging to all humans based on natural law). International human rights are generally codi-

tal preservation,[82] humanitarian laws,[83] children's rights,[84] and cultural and religious rights, which have a truly global impact. Such international laws are essential to creating a peaceful, secure, and stable world.

A leading procedural model for creating a third-party interest is the citizen suit, established within United States domestic environmental laws as part of a tri-partite enforcement mechanism.[85] The citizen suit can serve as a model for a similar framework at the international level.

1. The Role of the Citizen Suit

The citizen suit is a "quintessentially American legal process innovation"[86] for the enforcement of United States domestic environmental laws, though the citizen suit model has potential for wide application. The citizen suit is one element of a tri-partite system, complementing the activities of the federal government and the courts in enforcing the nation's environmental laws.[87] In

fied in declarations (non-legally binding) and conventions (legally binding under international law)).

82 Environmental laws are those aimed at protecting the environment for the benefit of human and non-human resources. The Kyoto Protocol is an example of an international environmental instrument. In the United States, for example, the Clean Air Act, 42 U.S.C. § 7604 (2004), and the Clean Water Act, 33 U.S.C. § 1365 (2004), are the principal domestic environmental laws.

83 AMERICAN RED CROSS, INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW (IHL), http://www.redcross.org/services/intl/0,1082,0_448_,00.html (last visited Aug. 23, 2006) (international humanitarian law "encompasses both humanitarian principles and international law treaties that seek to save lives and alleviate suffering of combatants and noncombatants during armed conflict.").

84 Principal international laws governing children's rights include: 1) United Nation's Convention on the Rights of the Child (CRC); 2) The International Labor Organization's Programme on the Elimination of Child Labor; and 3) UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children. *See also* PANUDDA BOONPALA & JUNE KANE, INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR OFFICE, CHILD TRAFFICKING AND ACTION TO ELIMINATE IT 15-18 (2002), *available at* http://www.ilo.org/public/english/standards/ipec/publ/childtraf /unbearable.pdf (discussing the emergence of child trafficking as a major international problem for children and ways to combat this problem at the international and domestic levels, including a look at international instruments aimed at preventing violation of children's rights).

85 Once again, it is recognized that there are other models which afford citizens a direct right of action to redress violations of international laws. I discuss and propose the citizen suit in particular because of its success in the history of United States environmental protection and because, in comparison with other similar models, it offers the most direct access to legal redress.

86 Thompson, Jr., *supra* note 78, at 192 (citing Zygmunt J.B. Plater, *The Three Economies: An Essay in Honor of Joseph Sax*, 25 ECOLOGY L.Q. 411, 425 (1998).

87 James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. SYMP. J. 1, 6-7 (2003) (discussing the benefits of the environmental citizen suit,

authorizing citizen suits,[88] the United States Congress envisioned a system where private action supplemented public enforcement of the nation's environmental laws for the well-being of all citizens and for the preservation of natural resources.[89] Congress considered several factors including the global nature of environmental harms and benefits that transcend geographic and market boundaries,[90] the positive role of citizens as direct monitors and enforcers of domestic laws,[91] the advantages of having citizens enforce laws as a public service that benefits greater society, [92] and the importance of allowing citizen involvement as a means to foster good, democratic global governance ideals.[93] A successful citizen suit may result in the imposition of monetary penalties payable to the United States, cessation of violations (injunctions), supplemental environmental projects at the expense of the violator, or payment of monies to the plaintiff or other organizations.[94] All told, the environmental citizen suit, now more than 30 years old, is the most effective force in helping to maintain the nation's environmental standards.[95] Citizen suits foster highly important values in governance, including rule of law, agency accountability, representational democracy, and environmental stewardship.[96]

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including the importance of the citizen suit in "uphold[ing] bicameral lawmaking and tripartite governance and help effectuate inscrutable congressional objectives . . . ."). In essence, the citizen suit is a check on the government to make sure that they keep their promise to citizens to provide environmental protection. This is the same promise that nation-states make to their citizens and constituents when states sign and ratify important international treaties and conventions.

88 Thompson, Jr., *supra* note 78, at 192 (Congress first authorized citizens suits in the 1970 Clean Air Act).

89 *Id.* at 193 (addressing the concern of overlapping prosecutions between public and private prosecutors, a problem which was inherent in antitrust and securities arenas where there was an inefficient overlap between public prosecutions and private actions).

90 *Id.* at 197.

91 *Id.* at 198.

92 *Id*. ("Citizen suits are a public service benefit because citizens can apply pressure to both the Environmental Protection Agency ("EPA") and the States to enforce and maintain environmental standards for the common good.").

93 *Id.*; *see also* May, *supra* note 87, at 2 n.2; May, *supra* note 87, at 33-55 (discussing the elements of constitutional standing required to file a valid citizen suit). A major aspect of citizen suits is that citizens have constitutional standing by statute to maintain a cause of action directly against a potential violator or against a state or governmental agency (i.e., EPA) for acts or omissions to enforce appropriate standards.

94 *See* May, *supra* note 87, at 8-9 (discussing the importance of the impact of citizen suits via statistics that there are approximately 850 citizens suit "legal events" per year and that nearly 75% of all actions to enforce the nation's environmental laws are in the form of citizen suits.)

95 *Id.* (providing statistical support for the success of the citizen suit and the manner in which citizen suits have "conserved innumerable agency resources and saved taxpayers billions.").

96 *Id.* at 5.

These are the same values that are now necessary in international law on a broader scale in a variety of issues as previously discussed in Section II.

2. Existing Examples of a Third-Party Beneficiary Interest in International Law Instruments

The success of the citizen suit in the United States has inspired many scholars, commentators, and policy-makers to look at how it (or another form of third-party beneficiary interest) can be used to improve compliance with environmental laws of foreign nations, international agreements, and other regulatory systems.[97]

Some progress has been made in applying the concept of third-party beneficiary in international legal instruments, however procedural limitations affect their credibility and efficacy. First, a quasi-citizen enforcement provision exists in the North American Agreement on Environmental Cooperation ("NAAEC")[98] to the North American Free Trade Agreement ("NAFTA").[99] Under the dispute resolution mechanism of the NAAEC, both parties to NAFTA and non-parties (e.g., individuals and NGOs) can access the dispute resolution procedure.[100] Parties to NAFTA[101] have direct access while non-parties have discretionary access.[102] Allowing non-parties to file a claim for environmental non-compliance against a named party to NAFTA "represents a premier attempt to. . .provide a modality in international trade law for

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97 Thompson, Jr., *supra* note 78, at 186.

98 Diana Lopez-Feliciano, *The North American Free Trade Agreement (NAFTA) Demands a Citizen Enforcement Provision to Protect the National and Global Environment*, 29 REV. JUR. U.I.P.R. 629, 639 (1995) (explaining that the purpose of the Environmental Side Agreement is three-fold: "1) cooperation to promote human health and environmental protection; 2) enhancing compliance and enforcement of environmental laws; and 3) promoting transparency and public participation.").

99 *Id.*, at 631-632 NAFTA is a trade agreement between Canada, Mexico, and the United States. It was signed by President Bush in December 1992 and ratified under President Clinton's Administration in November 1993. The Environmental Side Agreement was incorporated as part of NAFTA amidst intense pressure and challenge from environmental groups.

100 Martha Siefert, Note, The NAFTA's Environmental Side Agreement*: Is the Mandatory Arbitration Procedure Fact or Fiction? A Proposal to Allow for Citizen Suits in the Greening of Mexico*, 3 SW. J.L. & TRADE AM. 467, 475 (1996).

101 *Id*. Parties are the actual contracting parties to NAFTA, meaning that only state actors have direct access to the dispute resolution procedure. This is consistent with the classic international law paradigm.

102 *Id.* at 474-75 (describing the structure of the Commission for Environmental Cooperation ("CEC") within the NAAEC).

reconciling trade values with social and environmental values"[103] in which non-state actors play a key advocacy role.[104]

While NAFTA has incorporated public participation for enforcement of the NAAEC, the dispute resolution mechanism pertaining to non-state actors falls short of the autonomy afforded by a true citizen suit.[105] First, citizens cannot prosecute the violator directly but must go through the CEC Secretariat.[106] Second, the prosecution of a violator of the NAAEC is limited to the attorney general of the agreement.[107] Third, the ability to prosecute depends entirely on the discretion of the Secretariat and the CEC.[108] Finally, citizens do not have the same autonomy in filing a claim nor the same control over the claim as those who file under a true citizen suit provision.[109] These aspects limit the extent to which NAFTA provides for true public participation in the enforcement of one of the most important and landmark trade agreements existing today.[110]

A second example of international law incorporating a third-party beneficiary interest is the model established by the World Intellectual Property Organization ("WIPO"). WIPO's purpose is "to ensure that the rights of creators and owners of intellectual property are protected worldwide and that inventors and authors are, thus, recognized and rewarded for their ingenuity."[111] In 1994, WIPO established the WIPO Arbitration and Mediation Center to provide alternative dispute resolution options "to resolve international commercial disputes between private parties," particularly in the areas involving intellectual property.[112] A unique feature of the Center is the use of arbitration to resolve Internet domain registration disputes via WIPO's Uniform Domain Name Dispute Resolution Policy ("UDRP").[113] The UDRP provides the legal

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103 *Id.* at 475 (quoting Jack I. Garvey, *Current Developments*, 89 AM. J. INT'L L. 439 (1995)).

104 Lopez-Feliciano, *supra* note 98, at 643; Siefert, *supra* note 100, at 478.

105 *Id.*, at 644.

106 *Id*.

107 *Id*.

108 *Id*.

109 *Id*.

110 *Id.*, at 647.

111 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), AN ORGANIZATION FOR THE FUTURE, http://www.wipo.int/about-wipo/en/gib.htm#P9_1980 (last visited Aug. 23, 2006).

112 WIPO Arbitration and Mediation Center, http://arbiter.wipo.int/center/index.html (last visited August 23, 2006).

113 WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), WIPO GUIDE TO THE UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (UDRP), http://arbiter.wipo.int/domains/guide/index.html (last visited Aug. 23, 2006) [hereinafter "UDRP"] (discussing the UDRP policy

framework under which domain name registration disputes can be resolved using the Rules for Uniform Domain Name Dispute Resolution Policy ("UDRP Rules").[114]

A typical Internet domain name registration agreement is an agreement between a domain name registration company (registrar) and the domain name holder (registrant).[115] For example, a registrar such as an Internet service provider may verify and create a domain name for ABC Company, the registrant, a sports clothing manufacturer, called abccompany.com. ABC Company could then claim ownership of the intellectual property rights to that domain. However, a third party complainant, such as ABC Incorporated, an athletic equipment manufacturer, may argue that the domain name abccompany.com violates their rights because they own the domain names "abccompany.net," "abccompany.info," and "abccompany.org," such that the new registration negatively affects their business or creates confusion in the marketplace.

Under WIPO's UDRP Rules, ABC Incorporated, a third party who was *not* a party to the original registration agreement, can file a complaint against ABC Company and ask for arbitration of the dispute under WIPO's UDRP. This is a unique feature of WIPO's dispute resolution policy that: 1) recognizes the global nature of the Internet; 2) there may be other parties who may have a legitimate interest, whose concerns have not been considered with respect to domain name registration; and 3) third parties have a valid right to be heard in an appropriate dispute resolution forum.[116]

A final example of international law instruments recognizing a third-party beneficiary interest is bilateral investment treaties ("BITs") or multilateral investment treaties ("MITs"), such as NAFTA. BITs and MITs are agreements between developed and developing nations that allow for foreign investment in the developing nations. Such foreign investment, especially from private rather than governmental sources, is vital to the economic development of poorer nations and gives developing countries an extra boost in terms of additional capital, modern technology, a trained workforce, and skilled managers who can provide a structure for

in detail); *see also* ICANN: Rules for Uniform Domain Name Resolution Policy, http://www.icann.org/udrp/udrp-rules-24oct99.htm (last visited April 19, 2005) [hereinafter "ICANN"].

114 UDRP *supra* note 113. The UDRP applies to the .com, .net, .org, .biz, .info and .name gTLDs (generic top level domain), and certain ccTLDs (country-specific top level domains) adopted by the countries on a voluntary basis.

115 *Id*.

116 *Id*.

conducting international business.[117] Therefore, while BITs and MITs constitute an agreement between nation-states and state actors, the treaties benefit non-state actors, namely private investors, as well.[118] In recognizing the importance of private investors to developing nations and the lack of an adequate legal mechanism for private foreign investors to resolve foreign investment disputes, the World Bank[119] initiated the creation of the World Bank Convention,[120] which provided private investors with the jurisdictional capacity to file a cause of action against a host state (and direct party to a BIT or MIT) in the event of an investment dispute.[121] As a direct result of the World Bank Convention, a private investor can file a foreign investment dispute claim against a host state (and party to the agreement) and compel arbitration of the dispute through the International Center for the Settlement of Investment Disputes ("ICSID").[122] ICSID, therefore, is another example of a dispute resolution framework in international law that closely mirrors the concept of a citizen suit integrated with an alternative dispute resolution mechanism.

As evidenced by the aforementioned examples, the international community, especially in the areas of trade, commercial disputes, and investments, is increasingly realizing that private parties are an instrumental part of an effective international legal framework. Therefore, the same courtesy that has been extended to the legitimate interests of private citizens and non-state actors in the areas of environmental preservation, commercial disputes, and foreign investments should now be fully and immediately extended to those private citizens and non-state actors with legitimate interests in protecting human rights, international environmental standards, children's rights, and humanitarian interests, to name a few.

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117 P.F. Sutherland, *The World Bank Convention on the Settlement of Investment Disputes*, 28 INT'L & COMP. L.Q. 367 (1979); *see also* Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381 (2003).

118 Coe, *supra* note 117. Private investors include individuals, foundations, corporate entities, and other non-state actors who have a vested interest in their investment in the host state.

119 Sutherland, *supra* note 117, at 372 (discussing the lack of standing of a private investor who had a dispute regarding his/her investment prior to the World Bank Convention that established better investor standing for resolution of conflicts). The World Bank is instrumental in directing the flow of capital from developed to developing nations.

120 *Id.* at 378. The World Bank Convention entered into force on October 14, 1966.

121 *Id*.

122 *Id*. ICSID is seated in Washington D.C. at the principal offices of the World Bank. It has full legal personality and may enter into contractual relations, institute legal proceedings, and acquire or dispose of property.

B. Integrate the Use of Alternative Dispute Resolution (ADR) Processes

Whether as an independent mechanism or in partnership with the creation of a third-party beneficiary interest for non-state actors, the international legal framework, via incorporation within treaties and conventions, should contain provisions for the use of ADR processes to resolve international disputes, especially those disputes for which timely resolution is of utmost importance and could mean the difference between life and death.

1. The Role of ADR Processes

ADR is generally recognized as a means to resolve a dispute outside of traditional court litigation.[123] Of the numerous ADR processes, mediation and arbitration are considered the most prominent.[124] Mediation, arbitration and other hybrid ADR processes offer several advantages over court litigation, including easy access to the process, virtually unlimited standing,[125] less rigid rules of procedure and evidence, creativity in resolving the dispute, party autonomy in defining the terms of a resolution, and party ownership of the enforcement of the terms of resolution along with favorable international acceptance of the process. Of course, one of the most beneficial aspects of ADR is its time and cost efficiency compared with full-court litigation or the more complex arbitration settings that use formal rules of procedure and evidence.

These benefits are particularly relevant to addressing the needs of the international community in solving a variety of disputes such as sustainable development, human rights, environmental protection, and humanitarian aid disputes where the issues are not so "cut and dry."

2. Effective ADR Options for International Law

There are many ADR processes which could be used effectively and efficiently within the international legal framework, including negotiation, mediation, arbitration, hybrid processes such

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123 JOHN W. COOLEY & STEVEN LUBET, ARBITRATION ADVOCACY 1 (2d ed. 2003). Negotiation is also considered an ADR process and is the foundation for mediation, arbitration and other hybrid processes. As such, it is considered an integral part of all ADR processes.

124 *Id*.

125 By "unlimited standing," I am referring to the fact that, unlike litigation where a party may need to meet certain criteria to get their case heard, ADR is seen as more open to parties and less demanding that a particular criteria be met before a party can initiate such a service.

as med-arb, cultural ADR processes, and various Track II diplomacy strategies.

Mediation[126] is generally regarded as facilitated negotiation. It is a dispute resolution process in which "a neutral assists the disputing parties in reaching a voluntary settlement of their differences through an agreement that defines their future behavior."[127] In mediation, the parties control the outcome and final agreement.[128] The mediator is generally an active participant who tries to get the parties to reconcile and come to an agreement, regardless of who is right or wrong.[129]

In this regard, mediation offers several advantages, including voluntary participation, confidentiality, privacy, flexibility, the ability to address underlying interests, the ability for the parties to control the outcome, creative solutions, a cost lower than that of litigation or arbitration, and, generally, a high rate of compliance by the parties to the agreement.[130] In addition, international mediations can be conducted within a minimal number of days and be relatively inexpensive compared with litigation.[131]

A primary disadvantage of mediation is that, unless specified by agreement, mediation is not binding.[132] In addition, mediators have no power to impose a settlement or to enforce a settlement agreed upon by the parties.[133] The issue of enforcing mediated settlement agreements is being addressed by the Mediation Committee of the International Bar Association as well as by individual states, such as California. For example, Article 7 of the California International Arbitration and Conciliation Act provides that a mediated settlement agreement that is signed by the mediator and the parties or their representatives "shall be treated as an arbitral

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126 Conciliation is sometimes used interchangeably with mediation and there is still debate as to whether they are different. Some international instruments specifically refer to "conciliation" and seem to envision that this process is more "interventionist" (than mediation) in that the conciliator can actually draft agreements, present them to the parties, rewrite them, and take a more active role in having the parties resolve the conflict. *See, e.g.*, United Nations Commission on International Trade Law, Conciliation Rules, arts. 7 & 13 (1980; Model Law on International Commercial Conciliation, art. 6 (2002).

127 COOLEY & LUBET, *supra* note 123, at 2.

128 *Id*.

129 *Id.* at 3.

130 *Id.* at 7.

131 Eric van Ginkel, *Transatlantic Dispute Resolution*, MEDIATE.COM, October 2004, http://mediate.com/articles/vanginkele1.cfm (discussing the benefits of international mediation as a primary international dispute resolution mechanism) (last visited March 11, 2007).

132 COOLEY & LUBET, *supra* note 123, at 8.

133 *Id*.

award rendered by an arbitral tribunal. . .and shall have the same force and effect as a final award in arbitration."[134] While the binding force of the mediated settlement agreement is only applicable in the State of California, this Act makes California an ideal forum for international mediations[135] and provides an effective mediation framework for other states and nations to follow.

Today, mediation is used by WIPO to resolve intellectual property disputes[136] and by other international organizations for settling international disputes. However, due to the unenforceability of mediated awards, arbitration has generally been regarded as the preferred method for settling international disputes.[137]

Arbitration is a dispute resolution process in which "one or more neutrals render a decision after hearing arguments and reviewing evidence."[138] In contrast to a mediator, the arbitrator is *generally* "a passive participant whose role is to determine right or wrong" and to make a final decision on the dispute based on the merits of each side's case.[139] The advantages of arbitration include voluntary participation,[140] privacy and confidentiality, written procedures for conducting the arbitration, expertise, lower costs as compared with litigation, ability to tailor the remedy to the dispute, and enforceability.[141] Once an arbitrator renders an award, the

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[134] van Ginkel, *supra* note 131 (quoting Article 7 of the California International Arbitration and Conciliation Act); *see also* California International Arbitration and Conciliation Act, Cal. Code Civ. Proc. § 1297.11-.412 (1988).

[135] van Ginkel, *supra* note 131 (discussing the merits of the California International Arbitration and Conciliation Act in the context of providing effective transatlantic mediation services in the face of an expanding relationship between the US and the European Union).

[136] World Intellectual Property Organization (WIPO), Why Refer Intellectual Property Disputes to Mediation?, http://www.wipo.int/amc/en/mediation/why-mediation.html (last visited August 23, 2006) (discussing the merits of mediating intellectual property disputes, including preservation of relationships, less cost, and confidentiality along with preserving one's reputation).

[137] Cooley & Lubet, *supra* note 123, at 21 (discussing the extent to which arbitration has become the de facto standard for international dispute settlement).

[138] *Id.* at 2-3.

[139] *Id.* Note that in some countries, such as Europe and Singapore, the arbitrator is more proactively involved in the arbitration process and conducts examination of witnesses and consults with experts outside of the court-appointed experts.

[140] This is true insofar as the agreement is entered into voluntarily (as opposed to adhesion contracts). Arbitration can also be binding or non-binding. In the case of a binding arbitration, there is commonly no appeal. van Ginkel, *supra* note 131 (distinguishing arbitration and litigation).

[141] Cooley & Lubet, *supra* note 123, at 7; *see also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T. 53 [hereinafter "New York Convention"] (controlling the enforcement of arbitration awards, regardless of where the award was issued)

award is usually final and not subject to appeal, unless agreed to beforehand by the parties.[142] In addition, arbitration does not conform strictly to rules of evidence, is not necessarily based on precedent,[143] and does not offer uniformity in the decision-making process.[144] However, despite minor disadvantages such as the general inability to appeal an arbitral award[145] or strict rules of evidence,[146] arbitration has emerged as "a fixture in international trade and investment because it compares favorably to the alternatives."[147]

In the area of international trade and investment dispute resolution, arbitration offers "a neutral mechanism characterized by private proceedings, flexible procedures, expert decision-makers, relative finality, and enforceability of the result."[148] In the case of investment disputes, a host state is likely to prefer a private proceeding to a more public litigation in the investor's home state.[149] As discussed *supra*, arbitration is now widely accepted as the preferred dispute resolution mechanism to resolve international disputes. Today, arbitration is used to resolve international

142 Cooley & Lubet, *supra* note 123, at 8. *But see* Arbitration Act, 1996, c.23, §69 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts1996/96023—g.htm#69 (providing for application for leave of appeal from an arbitral award to the High Court unless parties agree otherwise).
Note that an appeal of an arbitral award to a court is disfavored in many US judicial circuits. The appeal of an arbitral award discussed here refers to one that is appealed to another arbitral panel, which is always ok if agreed to by the parties. *See generally*, Erik van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur*, 3 Pepp. Disp. Resol. L.J. 157 (2003).

143 Although there is less emphasis on the required use of precedent in arbitration than in litigation, the prevailing trend is for arbitrators to adjudicate on the basis of prevailing law so as to provide credible, reasoned awards, especially if they will be published.

144 Cooley & Lubet, *supra* note 123, at 8.

145 Note: One could appeal to another arbitral panel; however, this is disfavored even if the law allows for this option.

146 These disadvantages are recognized on a broad level with due recognition that arbitration is undergoing changes every day (e.g., the adoption of the IBA Rules of Evidence) and that such disadvantages are no longer a significant barrier to the success of arbitration as an ADR process. However, it should also be noted that because many arbitrators are former judges or lawyers, arbitration is becoming more and more like litigation with its inherent traps.

147 Clyde Pearce & Jack Coe, Jr., *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 Hastings Int'l & Comp. L. Rev. 311, 319 (2000).

148 *Id.* at 319-20; *see also* Elizabeth M. Senger-Weiss, *Enforcing Foreign Arbitration Awards*, 53-WTR Disp. Resol. J. 70, 71 (1998) (discussing the merits of arbitration and enforceability under the New York Convention). It is primarily the global enforceability of the arbitral award via the New York Convention that has made arbitration the *de facto* dispute resolution process for international business disputes.

149 Pearce & Coe, *supra* note 147, at 320.

commercial disputes,[150] foreign investment disputes,[151] international sports disputes,[152] environmental disputes, intellectual property disputes, and a growing number of consumer disputes in both the United States and Europe.[153]

Arbitration is used in each of these areas because litigation is too costly and time-consuming. In addition, because these disputes cross the borders of national sovereignty, using traditional court adjudication is not a viable option, primarily because of the difficulty of enforcing foreign judgments. Such is the case when dealing with disputes regarding cultural and ethnic identity, human rights, children's rights, global environmental concerns, and other similar international disputes.

Med-Arb (short for mediation-arbitration) is a hybrid ADR process with some advantages for dealing with international disputes that are multi-dimensional in nature, such as those dealing with human rights and sustainable development, trade and environmental concerns, labor and children's rights, as well as conflicts that have their foundation in identity and value differences. Such disputes deal with socio-political factors, which cannot be strictly addressed by mediation or arbitration alone. These disputes cannot be addressed by mediation alone because of the traditionally acknowledged lack of enhanced enforceability of mediated agreements.[154] Similarly, such disputes are inherently cumbersome in an arbitration-only setting if strict rules of evidence are observed or the parties cannot agree to a seat of arbitration, among other factors.

In med-arb, a third-party neutral begins to mediate the dispute. If, after some point, the mediation is not effective in resolving the dispute, the same or different neutral can agree to arbitrate

150 *See, e.g.,* Jack J. Coe, Jr., International Commercial Arbitration: American Principles and Practice in a Global Context 347 (1997).

151 Coe, *supra* note 117, at 1381.

152 Jan Paulsson, *Arbitration of International Sports Disputes*, 11-WTR ENT. & SPORTS LAW. 12, 14 (1994); *see also* The Court of Arbitration for Sport/Tribunal Arbitral du Sport (CAS/TAS), http://www.tas-cas.org/ (last visited Aug. 23, 2006)

153 Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT'L L. & COM. REG. 357, 360-363 (2002).

154 Note: In the case of a mediated agreement, there is no enforcement mechanism because of the inherent voluntary nature of mediation. There is nothing the parties can fall back on if they do not come to a settlement agreement during the mediation process. Therefore, there is a need for a hybrid process, such as med-arb to make a settlement agreement more enforceable.

the dispute on the merits of either party's claims.[155] Med-arb can be particularly relevant in an international setting when it is part of a multi-step or multi-tiered dispute resolution clause.[156] The multi-tiered dispute resolution clause can provide for an effective dispute resolution process as well as a mechanism by which the dispute can be resolved if the mediation does not result in a settlement.[157] Under this clause, parties will first attempt mediation. If the mediation is unsuccessful, the parties will resolve the dispute via arbitration. In addition, an arbitrator can be appointed before or at the same time that a mediator is selected.[158] This may alleviate any issues related to conflict of interest and other concerns regarding the enforceability under the New York Convention of a settlement agreement embodied in an "Award on Agreed Terms."[159] The result of a med-arb process is "an award – a decision on the merits of the parties' claims and defenses, based on evidence – which can be filed and enforced in a court of law"[160] like any other arbitral award.

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[155] COOLEY & LUBET, *supra* note 123, at 263. It is generally advised that a different party address each step so as to avoid bias or conflict of interest that may arise from the same party conducting the mediation and arbitration.

[156] van Ginkel, *supra* note 131.

[157] van Ginkel, *supra* note 131; *see also* Skokomish Indian Tribe v. Tacoma Public Utilities, 410 F.3d 506 (9th Cir. 2005) (holding that the Skokomish Tribe had no basis for a right of action for damages under a claim that the Tacoma Public Utilities (TCU) and the City of Tacoma, WA (CT) violated the fishing rights of the Tribe as reserved to the Tribe under the Treaty of Point No Point between the United States and the Tribe because the Tribe had not demonstrated itself to be a 'person' in this action and TCU and CT were not parties to the Treaty). This case is a perfect example of where there are valid, concrete, discernible issues related to sustainable development for mediation/negotiation and where the legal process failed to help the parties under a valid Indian Treaty. A med-arb process initiated by a citizen suit mechanism would have been very helpful here.

[158] van Ginkel, *supra* note 131.

[159] *Id.*; *see also* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf (Articles 30 and 31(2) of the Model Law on International Commercial Arbitration explicitly permits a settlement reached during the arbitration proceedings to be rendered as an arbitral award on agreed terms); van Ginkel, *supra* note 131, at n.17 (discussing the recommendation for having a separate mediator and arbitrator (as apposed to the mediator subsequently being the arbitrator) in order to address the concern by the UNCITRAL Working Group of the Model Law about the possible unenforceability of an arbitral award under the New York Convention where the arbitrator was not selected at the time the dispute originated and thus not recognized under the New York Convention).

[160] COOLEY & LUBET, *supra* note 123, at 263; *see also* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 701-701 (2003) (discussing the two requirements for an enforceable award under the New York Convention: 1) the tribunal must have its origins in an arbitration agreement; and 2) international tribunal must render an "arbitral award.").

Negotiation, or specifically, international negotiation,[161] as an independent ADR process outside of mediation or arbitration, is yet another legitimate dispute resolution mechanism. Although negotiation is generally seen as part of mediation, arbitration, and litigation, many today argue that negotiation is a distinct and independently defined ADR process that has many advantages outside of its use within other ADR processes such as mediation, arbitration, and litigation.[162]

Cultural ADR involves the use of negotiation or mediation with particular sensitivity to disputes that involve significantly different cultures where the parties do not necessarily share "the same way of thinking, feeling, and behaving."[163] "What makes cross-cultural disputes particularly unique is that such cultural differences can result in misperceptions, miscommunication, misinterpretation, and possible escalation of the conflict . . . and this even before attempts at negotiation or mediation."[164] This is because culture can literally influence "confrontation, motivation, influence, and information strategies,"[165] especially where non-state actors have significant influence in the conflict.

However, managed properly, processes such as negotiation and mediation (and to some extent arbitration), unlike courts, provide an excellent forum for engaging in a dialogue to address such cultural differences, thereby diffusing many of the underlying interests and causes perpetuating the conflict.

Cross-cultural dispute resolution is further enhanced by existing cross-cultural research that can more easily be employed in

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161 This might also incorporate or be referred to as Track I diplomacy, which is considered to be negotiations conducted by state actors, such as those within the State Department, with other state actors.

162 *See generally* Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1 (2005) (discussing how negotiation is an independent dispute resolution process, as opposed to being part of litigation, that possibly merits its own ethical standards).

163 NANCY J. ADLER, INTERNATIONAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 181-182 (2d ed. 1991). *See also* John Barkai, Japanese & Chinese Negotiating Styles: Implications for Mediation, Cardozo Journal of Conflict Resolution Symposium: INTERNATIONAL MEDIATION IN TIMES OF CONFLICT: LESSONS FROM PUBLIC AND PRIVATE DISPUTE RESOLUTION (FALL 2005) (DESCRIBING THE NATURE OF CROSS-CULTURAL DISPUTE RESOLUTION OFTEN BEING DESCRIBED AS ONE OF "SAME BED, DIFFERENT DREAMS.").

164 For a good discussion on cross-cultural negotiations in particular, see ROY J. LEWICKI ET AL., NEGOTIATION 405-436 (5th ed. 2005).

165 JEANNE M. BRETT, NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES 78 (2001); *see also* John Barkai, *What's a Cross-Cultural Mediator To Do? – A Low Context Solution to a High Context Problem* (article on file with the author and soon to be published).

the context of cultural ADR than by the rigid, entrenched, and historical context of the traditional international legal framework. Three such areas of research are particularly noteworthy for the purposes of cultural ADR.

First, Edward T. Hall's research on time orientation and context communication is particularly relevant when dealing with conflicts between the East and the West. The time orientation element, also called monochromic/polychromic orientation, provides insight into how cultures view the use of time as an organizing factor for such things as meetings and schedules.[166] The context communication element, also called high/low context communication, focuses on the amount of information contained within the setting of a situation in order to communicate a given message and how different cultures operate in this context.[167]

Second, the research of Charles M. Hampden-Turner and Fons Trompenaars, based on a survey of over 46,000 managers in as many as 40 countries, looks at six cultural dimensions,[168] which are further dissected by nationality. The six cultural dimensions are univeralism/particularism, individualism/communitarianism, specificity/diffusion, achieved status/ascribed status, inner direction/outer direction, and sequential time/synchronous time.[169] Hampden-Turner and Trompenaars' research is particularly relevant when attempting to determine an individual's world view in relation to their culture, their self-perception within their culture and community, and the manner in which they might deal with motivation and the nature of the passage of time. Such information can aid in assessing the potential underlying interests of the parties but is also useful in crafting a solution that can be the most culturally and individually acceptable agreement, thereby ensuring its durability.

Finally, perhaps the most cited and influential research is from cultural anthropologist Geert H. Hofstede, considered by many as

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[166] Illyung Lee, *In re Culture: The Cross-Cultural Negotiations Course in the Law School Curriculum*, 20 OHIO ST. J. ON DISP. RESOL. 375, 410-11 (2005) (citing EDWARD T. HALL, BEYOND CULTURE (1989) and discussing Hall's research findings on the nature of cross-cultural understanding).

[167] *Id*. at 408-411.

[168] *Id.* (citing CHARLES M. HAMPDEN-TURNER & FONS TROMPENAARS, BUILDING CROSS-CULTURAL COMPETENCE: HOW TO CREATE WEALTH FROM CONFLICTING VALUES (2000) and briefly discussing these six dimensions).

[169] *Id*. at 405-7

"the 'father' of cross-cultural databases."[170] Hofstede's transnational research involved survey data collected from over 116,000 questionnaires via employees of IBM, a multinational corporation, in over 53 countries. Hofstede's research introduced five cultural dimensions: power distance, individualism/ collectivism, masculinity, uncertainty avoidance, and long-term/short-term orientation.[171] Hofstede's research is particularly useful for understanding the nature of social inequality, gender-biased perceptions among cultures, ambiguity and how different cultures deal with it, and the role of the individual in relation to a group. In the context of cultural ADR, Hofstede's research can produce more informed resolution of disputes. For example, parties will better know how a resolution will be perceived within a given culture as well as what 'players' must be present in coming up with a durable resolution. Parties can also ensure that the agreement is drafted in a manner that does not unintentionally 'insult' the other party or foster mistrust (e.g., a 25-page detailed American contract versus a 5-page Chinese memorandum of understanding). In brief, cultural ADR is ripe for the current state of international relations.

Finally, Track 2 diplomacy, which espouses strategies such as faith-based diplomacy, is another ADR-type process that appears to work effectively when the core nature of the conflict involves identity-based issues stemming from significant cultural or religious differences. Track 2 diplomacy stands in contrast to what is known as Track 1 diplomacy.

Mainstream attempts for the resolution of international conflicts are generally centered on "Track 1" diplomacy, where the primary participants are state actors – official governments and government-sponsored organizations. Therefore, "Track 1" diplomacy is essentially a "process whereby communications from one government go directly to the decision-making apparatus of another."[172] Such diplomacy usually involves intense negotiations and

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170 CHARLES M. HAMPDEN-TURNER & FONS TROMPENAARS, BUILDING CROSS-CULTURAL COMPETENCE: HOW TO CREATE WEALTH FROM CONFLICTING VALUES (2000).

171 Illyung Lee, *supra* note 166, at 402 (citing GEERT H. HOFSTEDE, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND 13-14 (rev. ed. 1997), discussing in brief the meaning of each of the cultural dimensions, and noting that the long-term/short-term time orientation was added later); *see also* GEERT H. HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS 351-370 (2d ed. 2001) (discussing long-term/short-term orientation).

172 ABDUL AZIZ SAID, CHARLES O. LERCHE, JR. & CHARLES O. LERCHE III, CONCEPTS OF INTERNATIONAL POLITICS IN GLOBAL PERSPECTIVE 69 (3d ed. 1994).

sometime shuttle diplomacy with the use of a non-party-to-the-conflict mediator.[173]

In contrast, "Track 2" diplomacy, or citizen diplomacy as it is sometimes called, is the unofficial interaction between unofficial parties to the conflict resolution process. Track 2 diplomacy is defined as the "unofficial, informal interaction between members of adversarial groups or nations with the goals of developing strategies, influencing public opinions and organizing human and material resources in ways that might help resolve the conflict."[174] This process may involve a variety of non-governmental entities, such as conflict resolution specialists, private citizens, non-governmental organizations (NGOs), or businesses.

Faith-based diplomacy is a form of Track 2 diplomacy because it involves non-state actors working within an unofficial capacity to help groups or nations resolve the conflict. More specifically, faith-based diplomats believe that in some circumstances, such as identity-based conflicts, there is a tight integration between religion and politics. For example, practitioners of faith-based diplomacy argue that because the political order (i.e., how people and societies are to live together) is based, in part, on the religious texts of the various faiths, religion must be part of the solutions package in such identity-based conflicts.[175] Thus, this type of ADR involves an analysis of the religious texts, their ideologies, their practices, and their traditions.

Practitioners of faith-based diplomacy argue that by understanding such religious texts and ideologies, one can gain a deeper understanding of the source of the conflict as well as some possible solutions to the conflict that will address the underlying interests.

Faith-based diplomacy, as a Track 2 approach, can be a highly successful ADR process for those conflicts which potentially in-

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[173] For example, consider the role played by U.S. Secretary of State Condoleezza Rice in the recent 2006 conflict between Israel and Hezbollah guerillas located in Lebanon. Rice essentially engaged in shuttle mediation between the governments of Israel and Lebanon to help solve the conflict.

[174] J. Montville, *Track Two Diplomacy: The Arrow and the Olive Branch: A case for Track Two Diplomacy in* THE PSYCHODYNAMICS OF INTERNATIONAL RELATIONSHIPS, VOL.II: UNOFFICIAL DIPLOMACY AT WORK 161-175 (Vamik D. Volkan, Demetrios A. Julius & Joseph V. Montville eds., 1991).

[175] Douglas M. Johnston, *Faith-based Diplomacy: Trumping Realpolitik*, Presentation to the Norwegian Chaplains Corp 50th Anniversary Conference in Oslo on Conflict and Peace (Oct. 25, 2003), http://www.icrd.org/docs/norway.html. (last visited March 11, 2007).

volve a 'clash of civilizations' as discussed in Section II.[176] Because the core of a civilization is its culture and that culture forms an integral part of a person's identity, any potential threat to that identity in the form of violence, perceived destruction of the community, or extreme religious differences will create an environment ripe for conflict. Such issues are not easily dealt with in a court of law because these issues and their related worldviews are historical, complex, engrained, and involve psychological barriers to a viable solution.

In brief, the role of ADR is becoming increasingly important in the arena of international law because it offers a means of resolving conflict in a way that addresses underlying needs, interests, and values, maintains party privacy and autonomy, and offers a chance at real reconciliation and problem-solving without the costs and time expenditures historically associated with high-stakes litigation. The use of ADR is especially relevant to the global problems of the 21st century and should be effectively incorporated as part of the fabric of current and future international legal instruments.

C. Limitations of Today's International Legal Tribunals

A variety of international tribunals exist to resolve disputes that may arise within the international legal framework. However, many of these tribunals have limitations which bar non-state actors or create procedural roadblocks for non-state actors who seek redress for their conflicts.

For example, the International Court of Justice ("ICJ") or "World Court" presides over legal disputes arising between States.[177] The ICJ's jurisdiction extends *only* to States who have voluntarily consented to its jurisdiction.[178] Therefore, only nation-states have standing to bring a cause of action. Non-state actors,

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176 *See, e.g.*, Avnita Lakhani, *Finding a Peaceful Path for Kosovo: A Track 2 Approach*, WHITEHEAD J. DIPL. & INT'L AFF. (Summer/Fall 2006) (discussing how faith-based diplomacy as a Track 2 approach can be instrumental in resolving the conflicts in Kosovo).

177 International Court of Justice: Forward, http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm (last visited August 23, 2006). The ICJ is the successor to the Permanent Court of International Justice; *see also* Peggy Rogers Kalas, *International Environmental Disputes and the Need for Access by Non-State Entities*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191, 207-208 (2001).

178 *See* Statute of the International Court of Justice, Oct. 24, 1945, art. 34, para. 1, 59 Stat. 1031 [hereinafter "ICJ Statute"] ("Only states may be parties in cases before the Court.").

especially in such areas as environmental disputes or human rights disputes, do not have direct access to the ICJ to file a claim.[179]

A second permanent international court is the European Court of Justice ("ECJ"). The ECJ, established in 1980, is the judicial organ of the European Union.[180] The ECJ has jurisdiction *only* over regional disputes between member states of the European Union under Article 170 of the EC Treaty.[181] The treaty does not extend to regional disputes where one party is a non-state actor.[182] Furthermore, non-member countries, such as Switzerland or Norway, are outside the reach of the ECJ.

A third and possibly more advanced mechanism to address human rights violations is the European Court of Human Rights ("ECHR").[183] The ECHR was set up in 1959 as one of three institutions having the responsibility of enforcing the Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention").[184] The ECHR has jurisdiction over the current forty-six (46) contracting member States who have accepted the Court's jurisdiction via Article 46 of the Convention.[185] Under the ECHR model, any contracting state (state application) or individual claiming a violation of the Convention (individual application)

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179 Kalas, *supra* note 177, at 208.

180 *Id.*, at 209.

181 *Id*.

182 *Id.*, at 209 n.74 (noting that while the ECJ only has jurisdiction over member states, Article 173 of the EC Treaty allows that "actions may be brought by a legal or natural person to review the legality of certain acts of the EC Council and Commission if the act concerned is a decision addressed to that person or is of direct concern to it." (citing PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 170 (1995) [hereinafter "Principles"])). In addition, Article 234 of the EC Treaty allows private citizens of the EU access to the national courts, in some instances, for disputes arising under the treaty through the device of a preliminary ruling (*see* Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.pa., GUIDE TO PRELIMINARY RULING PROCEEDINGS BEFORE THE COURT OF JUSTICE EC, http://www.juradmin.eu/en/ jurisprudence/guide/ (last visited Aug. 23, 2006).

183 *See generally,* Cour Européenne des Droits de l'Homme/European Court of Human Rights: Historical Background, Organization and procedure, http://www.echr.coe.int/echr (last visited Aug. 23, 2006) [hereinafter "ECHR"]; *see also* Kalas, *supra* note 177, at 219-220 (discussing the ECHR in the context of addressing violations of the right to a healthy environment as connected to a protected human right).

184 ECHR, *supra* note 183; *see also* Registry of the European Court of Human Rights, *Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol 11*, (Feb. 2003), http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916 D7A/0/EnglishAnglais.pdf (last visited August 23, 2006).

185 *See generally*, *The Council of Europe's Member States*, *available at* http://www.coe.int/T/E/ Com/About_Coe/Member_states/default.asp (listing the 46 member states which includes 21 countries from Central and Eastern Europe. Five countries, including the Holy See, the United States, Canada, Japan and Mexico have observer status).

can lodge a direct application for breach of any of the rights under the Convention.[186] The ECHR does accept individual applications from persons, non-governmental organizations, or groups of individuals themselves or through a representative under Article 34 of the Convention.[187] In addition, the ECHR allows for "friendly settlement" of cases, which are considered confidential and supervises the execution of judgments via the Committee of Ministers of the Council of Europe.[188] The Committee is also responsible for ensuring that the violating State has taken adequate remedial measures to comply with the obligations determined by the ECHR judgment.[189] Therefore, the ECHR also serves as an enforcement mechanism. Since the inception of the ECHR and particularly after 1980, there has been a steady growth in the number of cases referred, from 7 cases in 1981 to 119 in 1997, and the number of applications registered, from 5,979 cases in 1998 to 13, 858 in 2001.[190]

While these statistics are encouraging from the standpoint of having a forum and an individual petition mechanism, the ECHR has its limitations. First, the ECHR can only hear cases involving the responsibility of a contracting State, and only for "widespread violations" of the European Convention.[191] Second, the ECHR is limited to hearing cases where the State has accepted the ECHR's jurisdiction under Article 46 of the Convention.[192] While individual applications or applications via NGOs, organizations, or representatives are allowed, such applications can only be from citizens

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186 ECHR, *supra* note 183; *see also Rules of Court*, http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf (last visited Aug. 23, 2006) [hereinafter "Rules"] (discussing the rules of the European Court of Human Rights. More specifically, Title II and its relevant rules address requirements of individual applications and the manner in which such individual applications are handled).

187 Rules, *supra* note 186 (referring to Rule 36: Representation of Applicants).

188 ECHR, *supra* note 183 ("friendly settlements" are essentially negotiations between the parties to settle the case. They are considered confidential); *see also* Rules, *supra* note 186.

189 Rules, *supra* note 186; *see e.g.*, Lopez Ostra v. Spain, App. No. 16798/90, 20 Eur. Hum. Rts. Rptr. 277, (Judgment, Dec. 4, 1994) (a case before the ECHR that is a good example of the integrated nature of harms under the paradigm of sustainable development).

190 ECHR, *supra* note 183 (reflecting the number of applications and not necessarily the number of cases accepted and decided after Protocol 11 came into force in November 1998). In some ways, these numbers are as disturbing as they are encouraging. In as much as the ECHR is a forum for addressing violations of fundamental human rights and freedoms, it could also be seen as a "dumping ground" because of a lack of other effective ways to resolve such issues in as much as a mirror into the future as discussed in the beginning of this article.

191 Kalas, *supra* note 177, at 220.

192 *Id.*, at 220 (citing the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 46, 312 U.N.T.S. 222, 246).

of contracting States and filed only against other contracting States.[193] Furthermore, individual applications are subject to preliminary examinations, admissibility assessments, and approval by a three-member Committee or a Chamber.[194] As such, the application must go through several pre-conditions before being accepted for a formal hearing. Furthermore, unlike a typical citizen suit provision, individuals cannot file an application with the ECHR claiming that a non-state actor, such as a multi-national corporation, is committing human rights violations against the Convention in a contracting State that directly affects the individual applicant. These substantive and procedural limitations need to be addressed to provide a more effective global forum for the problems facing the 21st Century.

A fourth and more recent addition to the suite of international tribunals is the International Criminal Court ("ICC"). The ICC is the first permanent international tribunal with the "powers to prosecute individuals, not States, who are accused of genocide, war crimes, [and] crimes against humanity. . .."[195] The ICC has jurisdiction to prosecute only the "most serious international crimes" as long recognized by the international community and as defined under the Rome Statute of the ICC.[196] Furthermore, because the ICC is complementary to national jurisdiction, *only* a State Party, the Prosecutor, or the United Nations Security Council may initiate a proceeding before the ICC.[197] Jurisdiction to prosecute individuals is "based on the principle of 'complementarity,' which allows national courts the first opportunity to investigate or prosecute" the offending individual.[198] As noted, the ICC also does not have subject matter jurisdiction over crimes against the environment, human rights crimes, crimes against children such as trafficking or slave labour, or crimes associated with violations of humanitarian laws.

Finally, in the international arena, a slightly similar yet less direct mechanism is currently in place via the Optional Protocols of several international human rights instruments.[199] Optional Proto-

193 ECHR, *supra* note 183.

194 ECHR, *supra* note 183; Rules, *supra* note 186.

195 Kalas, *supra* note 177, at 210.

196 The International Criminal Court: Frequently Asked Questions, http://www.icc-cpi.int/about/ataglance/faq.html (last visited August 23, 2006).

197 *Id*.

198 *Id*.

199 *See, e.g.*, the UN Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1), the UN Optional Protocol to the International Covenant on Civil and

cols are meant to provide for some non-state actor participation in the enforcement of international legal instruments. For example, the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1), if signed and ratified by the state party who signed and ratified the original ICCPR, allows the Human Rights Committee ("HRC") "to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."[200] This allows the Committee to notify the State Party for an explanation and to undertake an independent investigation.[201] Once the HRC notifies the State Party, the State has six months to "submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State."[202]

While an Optional Protocol does provide for public participation, there are several troublesome and limiting aspects to the Optional Protocols in international law. First, the Optional Protocol is considered to be a separate treaty and must be signed and ratified by states that are party to the original treaty (e.g., ICCPR).[203] The Optional Protocol does not become binding automatically simply because the nation-state has signed and ratified the primary treaty. This additional requirement, whilst being considered 'normal', is simply another hurdle that *appears* to give rights to private citizens, but really underscores the lack of rights to private parties as well.[204] Second, any state party may denounce the Optional Protocol at any time with written notice to the Secretary-General of the

Political Rights, aimed at abolishing the death penalty (ICCPR-OP2), the UN Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-AC), and the UN Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (OP-CAT); *see also* The Office of the United Nations High Commissioner on Human Rights, *The Core International Human Rights Instruments and Their Monitoring Bodies*, http://www.ohchr.org/english/law/ (last visited Apr. 19, 2005); Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principle International Human Rights Treaties as of 09 June 2004*, http://www.unhchr.ch/pdf/report.pdf (last visited Aug. 23, 2006).

200 The Office of the United Nations High Commissioner on Human Rights, *Optional Protocol to the International Covenant on Civil and Political Rights*, http://www.ohchr.org/english/law/ccpr-one.htm (last visited Aug. 23, 2006) (referring to Article 1 of the Optional Protocol) [hereinafter "Cov. On Civ. & Pol. Rts"].

201 *Id.* (referring to Article 4 of the Optional Protocol).

202 *Id.* (referring to Article 4(2) of the Optional Protocol).

203 *Id.* (referring to Article 8 of the Optional Protocol).

204 I refer here to the concept of "throwing a bone to a dog" in order to appease, knowing full well that the bone does not have any meat to it and hoping that the dog does not realize this. . .at least for the time being. It is much like an avoidance tactic.

United Nations.[205] Third, individual complaints cannot be anonymous and must be made by named individuals.[206] This would seem to work against the purpose of many international treaties, especially human rights treaties, where reporting a violation would put the individual in even more danger than keeping silent. Allowing anonymous complaints would appear to be a better alternative so as to secure the safety of the complainant and to also allow the Committee to conduct its investigations without fear of reprisal or compromising the integrity of the investigation. Finally, the HRC gives states an extended period of time (six months) to provide an explanation and any remedies that may have been applied.[207] Requiring the exhaustion of all available domestic remedies[208] in addition to an additional six-month period may provide the state with an opportunity to correct any violations, but the protocol does not instill a sense of comfort for the victim. In addition, if the victim is seen as having no standing in the domestic forum, the chances of obtaining any relief are taken away. Such a protracted time frame, in the midst of a human rights crisis or egregious violation of human rights, can be enormously painful and frustrating, especially for victims. In six months, the individual who complained may have been killed or be otherwise unable to testify on his or her own behalf. In six months, thousands of children could have fallen victim to human trafficking, sold into bondage and slave labor, or killed.

In brief, while the Optional Protocols allow for public participation, they do not have sufficient teeth to be an adequate enforcement mechanism. A process that allows for more direct access to the individual complainant at the international level is necessary, especially in certain international instruments where time is of the essence.

Furthermore, even tribunals that do incorporate an ADR process, such as arbitration, provide little or no direct recourse for non-state actors to address the daily atrocities that, while committed in their towns, cultures, and environments, affect more than one nation-state or those atrocities committed by non-state actors. For example, the Permanent Court of Arbitration ("PCA") was established at The Hague to provide for conciliation, mediation, commissions of inquiry and arbitration services for the resolution of

205 Cov. On Civ. & Pol. Rts, *supra* note 200 (referring to Article 12 of the Optional Protocol).
206 *Id.* (referring to Article 1 and Article 3 of the Optional Protocol).
207 *Id.* (referring to Article 4(2) of the Optional Protocol).
208 *Id.* (referring to Article 2 of the Optional Protocol).

international disputes based on the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.[209] However, jurisdiction under the PCA requires at least one party to be a State or organization of States and both parties to the dispute must expressly consent to the jurisdiction of the PCA.[210] The PCA also cannot hear disputes between two private entities, such as between a multi-national corporation and victims of environmental hazards caused by the corporation.[211] Therefore, the PCA provides limited access to non-state actors seeking to resolve cross-border, multi-dimensional disputes, absent modifications to the treaty that established the PCA.[212]

While international legal tribunals offer little hope to non-state actors in resolving complex, multi-dimensional disputes,[213] the foundation laid by the existing use of ADR options such as mediation and arbitration offers tremendous hope for a procedural framework that espouses public participation and enforcement as foundational principles, integrated with the use of alternative dispute resolution processes such as mediation and arbitration.

Such a framework can make a difference in our ability to create an "early warning system" whereby catastrophic violations of international human rights, humanitarian laws, environmental standards, and children's rights can be prevented and controlled before the cost becomes too high for everyone.

In order to make such a framework a reality, we must be the change we seek in the world and transcend from old ways of thinking to a new paradigm consistent with a changing world. Change is not easy. For some, change is downright impossible. However, through collaborative innovation, the use of best practices, and an unbending realization that a global society demands a global vision for global peace and security, change can also be like a tall, cool glass of water on a hot summer day. . .anywhere in the world!

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209 Kalas, *supra* note 177, at 212; *see also* UNCITRAL Arbitration Rules, G.A. Res. 31/98, U.N. Commission on International Trade Law, 31st Sess., Supp. No. 17 at ch. V, sect. C, U.N. Doc. A/31/17 (1976) [hereinafter UNCITRAL].

210 *Id*.

211 *Id*.

212 Kalas, *supra* note177, at 212 n.87 (noting that, in fact, "[a]t a conference convened in Washington, D.C. in April 1999, leading international scholars proposed that the PCA be the interim forum for resolving international environmental disputes." (citing *The George Washington University Law School Conference on International Environmental Dispute Resolutions,* 32 GEO. WASH. J. INT'L L. & ECON. 325 (2000))).

213 ECHR and, in a limited way, WIPO, do address complex non-state actor disputes, but even these tribunals are limited in scope and substantive jurisdiction.

D. Potential Roadblocks to Implementation

Enforcement of international law by non-state actors through the use of citizen suit-type provisions combined with ADR is a viable proposal. However, it does present issues of standing, direct access to international enforcement mechanisms, and concerns over how awards might be enforced so as to make a real difference. Fortunately, each of these concerns has a possible solution rooted in the best of legal and non-legal traditions.

1. Standing for Non-State Actors

Standing generally refers to the requirements an individual must have in order to have his or her case heard in court.[214] Standing, as required to bring forth a valid citizen suit in the United States, consists of individual standing and associational standing.[215] Individual standing refers to requirements that an individual must demonstrate to assert his or her own rights.[216] Associational standing refers to the requirements that an association or NGO must meet to assert a claim on behalf of its members.[217]

In the case of citizen enforcement of international law in the areas of human rights, rights of the child, and humanitarian aid, such standing requirements could easily be met by either individuals or associations acting on behalf of its victims in their memberships. Unlike some instances of environmental harms, which are not immediately or readily proven, it is much easier to demonstrate a violation of a person's human rights, the involvement of children in forced labor or armed conflict, or the consequences of not allowing proper humanitarian aid to devastated, war-torn areas of the world.

Second, the standing requirements combined with the citizen suit's mandatory 60-day notice of violation provision ensure that there is no direct violation of the doctrine of state sovereignty or of the internal separation of powers issues.[218] Furthermore, the use of

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214 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (identifying three major elements of U.S. constitutional standing as injury, causation, and redressability); *see also* May, *supra* note 87, at 37-38 (discussing the separation of power issue with regards to the citizen suit and enforcement of environmental laws.).

215 May, *supra* note 87, at 34 (standing in this case refers to constitutional standing requirements necessary to bring a proper case before a federal district court).

216 May, *supra* note 87, at 34, n.221 and n.222.

217 May, *supra* note 87, at 34 n.219 and n.222.

218 *Id.*, at 37-38 (discussing the separation of power issue with regards to the citizen suit and enforcement of environmental laws).

ADR as an independent mechanism or as part of the international legal framework would virtually eliminate the standing issue, since that threshold requirement is a creation of the legal system. For example, a citizen could seek redress immediately through an ADR process by filing a request for investigation or a claim of violation. Once a request has been made, the relevant organization can conduct a simple investigation to determine the nature of the claim. In certain cases, such claims may have been referred to ADR by the court. As part of the initial investigation, the organization can determine if the citizen's request is something that can be addressed via an ADR process rather than through a court and proceed to address those issues that can be resolved via the appropriate ADR format.[219] The key difference is that the referral is not made by a court. The claim is initiated directly by a non-state actor. In addition, the claim may be related to more complex, multidimensional issues, such as potential human rights violations, environmental pollution, cases of identity or ethnic conflicts, and other similar dilemmas that courts would likely avoid.

2. Direct Access to the Enforcement Mechanism under International Law

Direct access to the international courts or an ADR mechanism is critical for victims of egregious violations of international law.[220] Non-state actors must be recognized as subjects of international law during treaty negotiations. In as much as states are parties to international law instruments, such instruments are crafted and operate for the fundamental purpose of benefiting citizens. In the global world we live in today, that protection must reach beyond the 'boundaries' of signatories to such instruments. Therefore, non-state actors are the direct and intended beneficiaries of international law instruments, whether as part of "hard law" or "soft law." As such, non-state actors must be acknowledged as

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[219] A similar process is used at community justice centers or dispute resolution centers. I am talking about a more formal, international process that will address more than just local disputes or minor grievances.

[220] The intent here is to provide access to such forums for the purposes of civil suits with the recognition that private citizens generally do not have access to file criminal charges within the criminal justice branch in country court systems. For example, in the United States, the Foreign Tort Claims Act allows non-citizens to file civil tort actions against foreigners in US courts. *See* Stephens, *supra* note 4, at 436-440 (discussing the importance of the 1980 decision in *Filartiga v. Pena-Irala,* which interpreted the United States Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (1994), as authorizing an alien to file a civil claim in US district courts for the tort of torture, considered a violation of a "universal, definable, and obligatory" human rights norm (quoting Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980))).

requisite parties to ensure that international laws are enforced in accordance with the promises made between states for the benefit of citizens.

This recognition can be formally acknowledged during treaty negotiations where the relevant treaty provision itself (*expressis verbis*) allows for non-state actors to have an active role in the enforcement of treaty purposes. Such a treaty provision allows non-state actors to access traditional forums, such as the ICJ or PCA, as well as non-traditional means of dispute resolution such as those discussed above.

3. Enforcement of Awards

Enforcement of awards, especially arbitral awards, is a third issue that may impede the implementation of a citizen enforcement proposal, especially where the violations concern violations of human rights obligations under international law. In the sphere of international commercial or investment dispute arbitration, for example, it is well-settled and acknowledged that the New York Convention on the Enforcement of Foreign Arbitral Awards ("New York Convention"), one of the most universally adopted conventions, controls the enforcement of both the arbitration agreement and the arbitral award.[221] Although the New York Convention was primarily intended to govern international commercial disputes, it now also enforces arbitral awards involving international investment disputes as well as international consumer disputes. Because of its wide international acceptance, it is reasonable to conclude that the New York Convention could apply to a broad class of disputes, such as those involving the enforcement of arbitral awards resulting from arbitrations of human rights violations.[222]

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[221] Ian H. Eliasoph, *Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms*, 10 New Eng. J. Int'l & Comp. L. 83, 98-99 (2004) ("The New York Convention can be considered as the most important Convention in the field of arbitration and as the cornerstone of current international commercial arbitration." (citing Albert Jan Van Den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 1 (1981))).

[222] *See generally* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 Va. J. Int'l L. 675, 701 (2003) (discussing the fact that two of the primary advantages of the New York Convention, as defined by the drafters of the Convention are: 1) it "gave a wider definition of the awards to which the Convention applied"; and 2) it "reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply." (quoting U.N. Doc. No. E/Conf. 26/SR.25, at 2 (1958))); *see also* Eliasoph, *supra* note 221, at 98-99 (advocating for human rights arbitral clauses in labor contracts to alleviate violations of human rights and addressing enforcement of such arbitral clauses under the New York Convention).

Under Article I(1) of the New York Convention, the Convention "shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal."[223] Article I (1) goes on to say that the Convention "shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."[224] Some scholars state that the fact that the Convention does not define "non-domestic" awards is further indication of the Convention being "deliberately designed to cover as wide an array of arbitration awards as possible, while permitting the enforcing authority to supply its own definition of "non-domestic."[225] Therefore, the New York Convention appears to allow enforcement of a wide range of arbitral agreements and awards.

A potential hurdle to enforcement under the New York Convention centers around two reservations stated under Article I(3). Article I(3) identifies a "reciprocity reservation" and a "commercial reservation."[226] If a party to the New York Convention opts to select one of these reservations, enforcement of the arbitral award is somewhat restricted based on the reservation selected. The "reciprocity reservation" allows the state that is party to the convention "to choose whether the Convention will universally govern all foreign arbitral awards or only foreign arbitration awards made in member states."[227] Fortunately, because so many nations have adopted the New York Convention, this reservation is essentially moot.[228]

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223 Eliasoph, *supra* note 221, at 99 (quoting the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, 48) [hereinafter "New York Convention"].

224 Eliasoph, *supra* note 221, at 99.

225 *Id.* (citing YUN HO CHO, THE NEW YORK ARBITRATION CONVENTION OF 1958 AND ITS APPLICATION BY THE UNITED STATES AND KOREAN COURTS—COMPARATIVE ASSESSMENT 7 (1985)).

226 New York Convention, *supra* note 225, at Article I(3).

227 Eliasoph, *supra* note 221, at 105-106.

228 *Id*; *see also* Senger-Weiss, *supra* note 148, at 75 (stating that the reciprocity reservation in court cases has been "narrowly construed" to allow for enforcement of an arbitral award under the New York Convention (citing Fertilizer Corp of India v. IDI Management, Inc. 517 F. Supp. 948 (S.D. Ohio 1981))), rehearing denied, 530 F. Supp. 542 (S.D. Ohio 1982) (in which the court held that simply being a signatory to the New York Convention was enough for enforcement of the arbitral award, thus allowing broad interpretation of the Convention to give effect to the purpose of the NY Convention)).

The "commercial reservation" means that only those arbitral awards which are "considered as commercial" in the country where the enforcement is sought will be recognized and enforced.[229] Article I(3) states that a member nation may choose to "apply the convention only to differences arising out of legal relationships, whether contractual or not, which are *considered as commercial* under the national law of the state making such declaration."[230] To date, only forty-four (44) nations have adopted the "commercial reservation."[231] The approximately ninety-two (92) nation-states that have not adopted the reservation must enforce all foreign arbitral awards unless they meet the exceptions found under Article V.[232] While the definition of what is "commercial" is to be construed by the domestic law, the trend is to construe the term broadly, giving deference to the purpose of the New York Convention, especially in the United States.[233] Because the majority of members to the New York Convention regard the commercial res-

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229 Eliasoph, *supra* note 221, at 108; *see also* Senger-Weiss, *supra* note 148, at 75 (discussing *Sumitomo Corp. v. Parakopi Compania Maritima, S.A*., where the court held that simply because both parties were foreign to the United States did not make the dispute a "commercial" transaction under U.S. law for purposes of invoking the commercial reservation and avoiding enforcement of the arbitral award. The court held that "to hold that subject matter jurisdiction is lacking where the parties involved are all foreign entities would certainly undermine the goal of encouraging the recognition and enforcement of arbitration agreements in international contracts." (citing *Sumitomo Corp. v. Parakopi Compania Maritima, S.A*., 477 F. Supp. 737 (S.D.N.Y. 1979), affirmed, 620 F. 2d 286 (2nd Cir. 1980))).

230 Eliasoph, *supra* note 221, at 106 (emphasis added); *see also* United Nations Commission on International Trade Law (UNCITRAL): Status of Conventions and Model Laws, http://www.uncitral.org/english/status/status-e.htm (last visited on Apr. 20, 2005) (citing the major international trade law conventions, status of conventions, parties to conventions, and reservations and declarations to conventions made by member states as of March 2005. In particular, there are 135 parties to the New York Convention).

231 Eliasoph, *supra* note 221, at 108-109 (this includes the United States which has adopted both the reciprocity reservation and the commercial reservation); Bergensen v. Joseph Muller Corp., 710 F. 2d 928 (2nd Cir. 1983) (stating that "[h]ad the United States acceded to the convention without these two reservations, the scope of the Convention doubtless would have had a wider impact. Nonetheless, the treaty language should be interpreted broadly to effectuate its recognition and enforcement purposes.").

232 Eliasoph, *supra* note 221, at 108-109.

233 Eliasoph, *supra* note 221, at 110-111 (citing First Circuit court decision in *Societe Generale de Surveillance, S.A. v. Raytheon European Management and Systems Co.*, 643 F.2d 863 (1st Cir. 1981) as stating that " . . . the courts have held the term 'commerce' in this provision of the Act refers to interstate or foreign commerce and is to be broadly construed."); *see also*, Kevin C. Kennedy, *Invalidity of Foreign Arbitration Agreement or Arbitral Award*, 31 AM. JUR. 3d PROOF OF FACTS § 11 (2002) ("In interpreting this provision of the New York Convention, U.S. courts have construed the term 'commercial' broadly . . . "); ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 1 (1981) (stating that "under the New York Convention, most courts have so far also given a broad interpretation to the meaning of commercial.").

ervation as an anomaly, the possibility of using the New York Convention to enforce human rights awards or human rights related arbitral clauses provides great promise.[234] Therefore, widespread recognition and acceptance of the New York Convention can alleviate concerns about enforcement of arbitral awards as they relate to citizen enforcement of various international law instruments. In addition, where parties attempt other ADR processes, such as mediation, med-arb, cultural ADR, or Track 2 diplomacy strategies, such efforts can result in a mediated agreement that can potentially have the same force and effect as an arbitral award. As discussed *supra*, provisions of the California International Arbitration and Conciliation Act already provide hope that even mediated agreements can have the same force and effect as arbitral awards. Taking this just one small step forward, a mediated agreement, having the same effect as an arbitral award, can then be enforced via the New York Convention within the international legal framework.

V. Benefits of Private Enforcement of International Law

There are numerous advantages to allowing non-state actors to partner with state actors in enforcing international law. First, private enforcement of international law is consistent with the role that individuals and non-state actors have always played, both on the domestic and international legal planes. Non-state actors are the eyes and ears of the government, able to spot opportunities for the home state as well as serve as monitors and watchers for the well-being of their fellow citizens. Allowing citizen participation in the enforcement of laws simply gives due recognition to the value of a vigilant and increasingly global society. In fact, many faith-based organizations insist "on a moral right of human beings everywhere to be concerned with the plight of other humans irrespective of national boundaries."[235] This kind of solidarity is at the heart of the evolving world. Only by giving non-state actors a voice and a mechanism to effectively resolve cross-boundary, multi-faceted dis-

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[234] Eliasoph, *supra* note 221, at 109 (arguing that the commercial reservation "provides no barrier to the enforcement of human rights related arbitral clauses" because most member states have not adopted the commercial reservation or have construed the term broadly).

[235] Ainslie Embree, *Kashmir: Has Religion a Role in Making Peace?*, *reprinted in* FAITH-BASED DIPLOMACY: TRUMPING REALPOLITIK 69 (Douglas Johnston ed., 2003).

putes will there be more cohesion and stability in the world. This stability is a foundation of peace.

Second, private enforcement of international law will give teeth to existing international legal instruments in a way that has eluded the international community. Treaties and conventions today, as binding as they are meant to be, have very little impact on changing the behavior of nation-states. Governments have a natural affinity for self-preservation and will not willingly admit to human rights atrocities simply because they have signed and ratified an important international treaty. There are numerous face-saving and face-giving messages being sent by signing and ratifying such treaties; however, sometimes, actions belie words. In addition, absent severely egregious violations, such as crimes against humanity or genocide, it is highly unlikely that one state will file a claim against another state with which there is a close economic relationship. Conflicts of interests prevent such ready disclosure and "public flogging." By allowing citizens to be partners in the enforcement of key international laws, governments can evolve into modern international establishments commensurate with the changing world while re-focusing governmental resources in areas that require national attention, such as national and international security. Now more than ever, governments of the world need to find ways to encourage public participation through lawful, innovative means because globalization has created a truly borderless world.

Third, public participation in the enforcement process will facilitate the dialogue and recognition of certain international norms and rights as inalienable, thus further reinforcing such ideals as human rights, rights of the child, the right to a clean, healthy environment, and the right to self-governance.[236] Today, treaties and conventions that deal with rights of citizens are generally negotiated from the perspective of universalist or cultural-relativist outlooks.[237] The universalist perspective views "individual rights as applicable to all persons regardless of citizenship, religion, morals

[236] Koh, *supra* note 11, at 316-317 (arguing for what he calls "inside-outside" engagement with governments and private sectors and to improve internalization of international human rights norms. This might include "'inside' diplomatic channels for government-to-government dialogue against a background of 'outside' sanctions."). The diplomatic channels can also include what is commonly referred to as "Track II diplomacy" consisting of non-state actors such as NGOs, faith-based organizations, or companies who form a partnership for dialogue and change.

[237] Patrick D. Curran, *Universalism, Relativism, and Private Enforcement of Customary International Law*, 5 CHI. J. INT'L L. 311, 315 (2004).

or culture. . .such that human rights norms transcend cultural boundaries."[238] Conversely, a cultural-relativist perspective argues that "individual rights [are] dependent upon the decisions of a territorial sovereign and require a sovereign to recognize 'international' rights only if those rights coincide with its morals or culture."[239] In the cultural-relativist paradigm, a sovereign state is "free to exercise its autonomy by *selectively* recognizing emerging or established norms of international law."[240] This difference in perspective is at the heart of many cultural, ethnic and value conflicts today.[241] By allowing non-state actors to have a voice in an appropriate dispute resolution framework, there is a greater chance to peacefully resolve such disputes along with greater understanding, acceptance, and tolerance of differences.

It could be argued that inviting the public into this realm might cause too many civil suits, overcrowd dispute resolution forums, or result in ineffective decisions. There is certainly a possibility of a greater influx of private actions being filed; however, the international community has generally, in an intelligent manner, devised procedural safeguards to prevent frivolous private actions. The same procedural safeguards that are built into the citizen suit provisions, such as penalties for initiating frivolous claims, strict notice and filing requirements, could be adopted here. In addition, because ADR mechanisms are integrated into the process, there is greater confidentiality for nation-states and less risk of exposure for such atrocities as human rights abuses. Exposure, to be sure, is not all bad. The international community is likely to respect a nation-state more for taking responsibility for violations of key treaty provisions and look to it for guidance and future economic partnership than to respect those who repeatedly and intentionally "skirt around the abuses." Surely, this is more advantageous than the "bloodletting" that is currently occurring in all parts of the world.

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[238] *Id*. at 316.

[239] *Id*. at 315.

[240] *Id* (emphasis added). This means that those nations who subscribe to a cultural-relativist paradigm may have a completely different perspective on human rights that may not be consistent with the Universal Declaration of Human Rights, even if they signed the UDHR. A vivid example is the case of bride-burning in India, the intentional abortion of female children in China, or the trafficking of women and children in many South Asian countries.

[241] *Id*. at 315 (noting that historically non-secular sovereigns have been strong proponents of the cultural-relativist paradigms whereas more secular nations see and advocate for universalist principles). The inherent conflict between Christianity in the US and Islam in the Middle East is an example of these views, though as Curran points out, the US has "occasionally adopted a cultural-relativist approach to treaty negotiations and implementation."

Finally, citizen enforcement of international law, at its best, can serve as an early warning system to prevent future, more egregious violations of international law. In fact, Harold Hongju Koh, former U.S. Assistant Secretary of State for Democracy, Human Rights and Labor from 1998-2001, has advocated for an early warning mechanism as a key aspect of the United States human rights policy for the 21st Century to serve as an effective strategy for preventing human rights abuses.[242]

As in the case of citizen suits in the United States environmental laws, citizens act as the first line of an offensive strategy to combat intentional, long-term, egregious violations of the law, whether domestic or international. As Prof. Koh explains, the issue today is "getting the right information into the right hands at the right moment, before large-scale abuses actually take place, in time to generate the political will necessary to head off the explosion of atrocities."[243] While Koh is referring specifically to human rights abuses, the citizen suit has done exactly this in terms of preventing large-scale, catastrophic environmental abuses in the United States. Citizens, as individual non-state actors or as non-state associations, are at the heart of environmental security in the United States today because they see and feel the direct impact of environmental abuse and have access to a process and a forum for preventing further harm.

A similar mechanism integrated with ADR processes can offer governments tremendous support by providing active vigilance over their national interests, early detection and investigation of violations which could have future catastrophic consequences, and the ability to create lasting, creative, and enforceable solutions against future violations.[244] More than ever, today's citizens are active, intelligent, and willful participants in a global society. Therefore, citizen enforcement of international law is simply the best, most efficient and effective strategy for good, long-term national and international governance. It is a strategy based on proactive management, preventative measures, and purposeful ac-

242 *See generally* Koh, *supra* note 11, at 322-324 (discussing early warning, preventive diplomacy, and promoting democracy as the core strategies of future US human rights policy for the 21st century). Harold Hongju Koh is the Gerald C. and Bernice Latrobe Smith Professor of International Law at Yale Law School.

243 *Id.*, at 323.

244 *Id.*, at 330-331 (relating his experience in modern policymaking as one in which "those with influence have too few ideas, while those with ideas have too little influence" and arguing for a better framework in the 21st century, which would have a "proper balance between practical and theoretical, between principle and praxis.").

tion rather than the reactive mindset so long used within the international legal framework.

VI. Conclusion: An Idea Whose Time is Now

The 21st century opened with a new world and a chance for a new beginning. It begs the question of how we, as a global society, will choose to shape our future. If we choose to follow the ways of our predecessors, then, more likely than not, history will repeat itself with a death toll to match. Insanity is doing the same thing and expecting different results.[245] However, with a slight shift in perspective, a small, incremental change in the international legal framework and the increased, strategic use of alternative dispute resolution processes, non-state actors can join state actors in a partnership towards the mutual goal of a more secure and stable world order through citizen enforcement of international law. Insanity is no longer a viable option.

[245] The original quote is attributed to Albert Einstein who said, "The definition of insanity is doing the same thing over and over again and expecting different results." Albert Einstein (1879-1955) was a German-born American physicist who developed the special and general theories of relativity. He earned the Nobel Prize for Physics in 1921.