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NEW PLAYERS ON THE INTERNATIONAL STAGE

*Peter J. Spiro**

I. INTRODUCTION.

International law and relations have been until recent years more or less the exclusive preserve of nation-states. Since the Peace of Westphalia in 1648, states have served as the sole repository of international rights and duties; with few narrow exceptions, they have been the only entities to enjoy international legal personality. This fundament of international law in turn has reflected the dominance of states in international relations during the Westphalian period. That is, global power has been overwhelmingly concentrated in states and the governments that control them.

That concentration of real-world power appears now to be diffusing. As borders become more porous, communications more seamless, and security requirements less preemptive, nation-states are facing new rivals on the international stage. Corporations, non-governmental organizations (NGOs), and international and regional organizations have all emerged as significant independent forces in a post-Cold War world. At the same time as these non-state or supra-state entities have taken on an enhanced international profile, nation-states have themselves been weakened by internal fragmentation. This fragmentation is evidenced by the increased international activities of subnational governments, and of national legislative and judicial bodies. It is also highlighted by the emergence and recognition of numerous smaller and so-called micro-states. The change in the relative powers of state and non-state actors is thus compounded.¹

And yet international law has taken little account of this develop-

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1. See generally Jessica T. Mathews, *Powershift*, FOREIGN AFF., Jan./Feb. 1997, at 50.

ment in the distribution of international influence. The state, for the most part, has retained its monopoly on international legal status. Only states have full standing in international policymaking and judicial forums.

The dilution of the real-world primacy of nation-states should prompt a reexamination of the doctrinal core of international law. That is what makes the subject of this symposium issue such a timely one. I hope here briefly to introduce the variety of new actors and the context in which they appear to thrive at the expense of the traditional state. Section II sets forth circumstantial factors which have breached national borders and challenged state authority, in turn facilitating the growth of non-state power. Section III describes those actors beyond the state that now command some independent legal standing in international affairs. Section IV explores the possible advantages of enhanced legal status for non-state actors, which would advance the legitimacy of international lawmaking processes at the same time as it holds non-state actors more accountable in the exercise of their substantial powers.

II. THE NEW GLOBAL STAGE.

What makes this era different from all others? The assumption may be skeptically received, as well it should be. Such claims have perhaps an all too familiar ring. The pages of even recent history are littered with loudly trumpeted, but ultimately false, new dawns on global politics. In the wake of each of this century's world wars, most notably, well-meaning elites pressed elaborate visions of international cooperation and perpetual peace, exemplified, respectively, by the 1928 Kellogg-Briand Pact outlawing war and the post-World War II world federalist movement. Both, of course, were soon crushed by apparently irrepressible conflict, and indeed they are remembered today mostly as historical trifles.

The demonstrated durability of state powers should thus make one pause in predicting the nation-state's decline. But there is perhaps some cause to believe that things really have changed, at the same time as one must be careful not to slip into utopian fantasies. The grip of the state is, I think, being undermined by at least three more fundamental systemic developments in the nature of the international dynamic: the global communications revolution, regulatory competition among states, and the diminished priority of territorial security.

1. *Embedded political interdependence and the revolution in global communications.*

Transboundary communications now appear beyond the capacity of any one state to control. Global networks are now simply too dense to marshal from any center. In the old world, contact across state lines was channeled, in all important respects, through national executives. Diplomats spoke as the sole representatives not just of governments but also of peoples. In the new world, virtually any individual can, by use of the private mails, telephone lines, or the internet, establish direct international connections independent of governments (hence the relatively new moniker "citizen diplomat"). The phenomenon is one only of the last few years and so may mark a significant temporal divide between today's speculations of change and their stillborn counterparts from earlier eras.

How does the global communications revolution tend to undermine state power? At the domestic level, it has facilitated the organization of interests opposed to the state, so that authoritarian designs are harder to maintain. (For example, during the Cold War era, xerox machines were among the most tightly controlled commodities in East Bloc countries.) These interests also may be organized across state boundaries. Domestic human rights groups will be bolstered at the international level by groups such as Amnesty International, again to the detriment of unaccountable state control. At a less confrontational level, other types of non-national identities — social, cultural, and economic — are more easily solidified in the wake of enhanced cross-boundary contact. Because the state is no longer able to manage these contacts, the resulting transnational coalitions may not serve state interests. As Jean-Marie Guéhenno observes, "in the age of networks, the relationship of citizens to the body politic is in competition with the infinity of connections they establish outside it."² This "embedded interdependence" constrains state action and control.

2. *The integration of the global marketplace.*

In part as a consequence of improved communications and of changes in the focus of economic activity, the global economy also poses a substantial threat to the continued primacy of the state. Greater mobility

2. JEAN-MARIE GUÉHENNO, *THE END OF THE NATION-STATE* 19 (1995).

in elements of production is giving rise to more intense regulatory competition among states.³ For example, if a software manufacturer can locate his engineers or draw from the local labor pool in any of a number of countries, he can shop for the most favorable national regulatory environment. States will have a corresponding incentive to accede to the producer preferences, among which will be a preference for lower levels of regulation as well as lower tax rates. To the extent that states are no longer able to extract taxes in a monopoly setting (as they did with respect to immobile capital and to segmented markets), their treasuries will be strained and their capacities for intervention correspondingly limited.

Similarly, global communications now allow a variety of financial transactions to be undertaken from any location. This, too, undermines states in their traditional role as market regulators. The increasing ungovernability of world financial systems may have increasingly significant implications as markets grow more important (and vulnerable) within a globally integrated economy.

Even assuming states could coordinate regulation with sufficiently comprehensive global coverage in response to increased mobility, such international action likely would require the cession of certain responsibilities to supranational institutions. This transfer of power upwards has also occurred with respect to the most significant problem of the global commons, namely that of environmental protection.

3. *The diminished need for state protection.*

In a world of hostile competition among territorial groupings, the state's ultimate promise of military security overshadows all other needs. State power is at its most concentrated during wartime. A defining characteristic of the nation-state is its monopoly over the instruments of force. Survival is a basic instinct and where it is threatened all else will be sacrificed; thus state activity is tolerated in the external realm which would be unacceptable in the domestic. The grossest abuses of authority, in democratic and non-democratic regimes alike, are almost predictably

3. For a law-and-economics explanation of this trend, see John O. McGinnis, *The Decline of the Western Nation-State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903 (1996); see also GUÉHENNO, *supra* note 2, at 8-10 (noting the decreased importance of territory to industrial activity, so that the economy has become "immaterial" in nature).

undertaken to repel foreign enemies, real or invented.⁴

Today, the threat of armed conflict appears more remote, at least in the developed world, than at any other time in modern history. As long ago explained by Immanuel Kant, democratic states tend not to fight one another; as the realm of democracy expands, the zone of peace grows larger. That tendency can also be viewed as both the cause and the result of the integrative developments described above. To the extent that states are less security-minded, they will have less incentive to maintain control of cross-border contacts. (Indeed they may have less incentive to control the borders themselves.) To the extent that such contacts are allowed to occur, transnational interests tend to consolidate and to further diminish the likelihood of armed state-to-state conflict.⁵ If domestic interests (political, economic, or social) perceive a substantial net loss from interstate conflict, it will not likely occur. Those interests appear to be crystallizing, both among economic actors (corporations that have evolved into truly transnational entities heavily dependent on trade) as well as along political and social lines of affinity (environmentalists, women, ethnic groups, etc.). Assuming that the demand for armed protection continues to diminish, state power will also decline.

These three developments in the spheres of communications, economics, and defense, all set into motion since the end of the Cold War, would seem to mark important turning points. At the same time, there do remain grounds for hesitation in pronouncing a watershed of Westphalian magnitude. After all, capital flows at the eve of World War I were estimated at rates surpassing today;⁶ and the major states of Europe were linked not only at the level of the ordinary conscript (through the emerging international labor movement) but also at the level of crowns, whose holders were mostly not-so-distant relatives. Over the centuries, world peace has been repeatedly declared, and the state has long been savaged as a declining institution.

Yet I suspect that this round of next-wave thinking may be vindicated. It may be that earlier predictions of the nation-state's decline were simply premature. Recent analyses are more sober and less

4. From our own experience, the infamous *Korematsu* decision stands out as one which surely would not have been tolerated during peacetime. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding wartime order excluding U.S. citizens of Japanese descent from Pacific Coast areas).

5. See, e.g., Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 512-13 (1995).

6. See Louis W. Pauly, *Capital Mobility, State Autonomy and Political Legitimacy*, 48 J. INT'L AFF. 369, 371 (1995).

visionary than their intellectual precursors; they come not in the wake of vast destruction (as did world-order movements following the world wars) but rather of apparent triumph (with the fall of iron curtain). The new paradigms, in short, are more grounded in realities than wishful thinking, and are thus more credible.

III. THE NEW ACTORS.

Predictions of state decline at least are credible enough to contemplate seriously the implications for the international legal order. A variety of non-state, supra-state, and sub-state actors (both as a cause and a result of diminished state power) have become more prominent at the international level as forces independent of state control, at least to some degree. This non-state power plays out not only in international decisionmaking processes (for instance, with respect to norm formulation) but also on the ground. And non-state power takes the form of action as well as influence.

By way of caveat, I do not mean to suggest that states have lost their place as the leading player in international relations. States still plainly overshadow other actors as the primary progenitors, agents, and enforcers of international law, and their real-world powers remain vast. State behavior will appropriately continue to command the commentators' principal attention.⁷ Institutions with three-hundred-year pedigrees do not disappear in mere decades;⁸ the state will need be grappled with for many years to come. I do argue, however, that the state no longer warrants our exclusive concern. The presence of other entities pose new challenges for international law in its making, study, and application. Existing conceptions of international law are grounded in the notion that everything begins and ends with the state. That is no longer true as a matter of fact. It should thus no longer gird the framework of the law.⁹

7. For an argument that predictions of the demise of the nation-state are "vastly overstated", see Mark L. Movsesian, *The Persistent Nation State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1081 (1996).

8. As demonstrated by the last seismic shift in international relations: The Holy Roman Empire was not formally disbanded until 1806, at least a century after it ceased to command significant geopolitical powers.

9. I do not here deal with the phenomenon of regional or international organizations. Although these entities are no doubt also playing an increasingly significant role in international affairs, their participation poses less of a challenge to longstanding approaches to the question of international legal personality. The conventional analysis would run that because they are composed of, and formally accountable to, state members, supra-state entities derive international legal personality from their members, and only to the extent so delegated by those members. Insofar as the functional requirements of maintaining an organization give rise to questions of personality

What follows is a brief introduction to the most important non-state actors (NGOs, corporations, and subnational governments) and a concise description of the nature of their international presence and the legal status that is now accorded them.

1. Non-governmental organizations (NGOs).

NGOs are hardly new to the international scene. The Catholic Church is perhaps the original NGO, and the labor movement provides the other significant example of transnational non-governmental organizing from earlier eras.¹⁰ While both remain quintessential models today, they are now joined by a throng. An almost infinite variety of groupings has spawned institutional vehicles in the form of NGOs (defined as organizations of non-national definition and not-for-profit orientation). Among the more prominent NGO grouping are environmentalists, human rights advocates, women, children, gays, the elderly, consumers, and indigenous peoples, each of which has mobilized at the international level.

Many NGOs at least purport to represent memberships, and many act as advocates in and out of international institutional settings. Greenpeace and Amnesty International are perhaps the most prominent examples of the modern advocacy NGO. These advocacy NGOs are noteworthy in at least two important respects. First, they now act directly to influence international decisionmaking institutions and not only through the channel of "home states". Thus, a Greenpeace or Amnesty International will not stop at having members or national sections lobby their own governments (although they will do that, too). Rather, they will move into the international stream as transnational entities seeking leverage wherever available. For example, a Greenpeace (with a largely North Atlantic membership) has had its positions voiced and advanced

independent of the member states, that personality has been found to exist by necessary implied powers. *See* Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11). As regional and international organizations (including such specialized agencies as the World Health Organization, the International Monetary Fund, and the World Trade Organization) assume a greater degree of functional independence from their state constituents, however, the role of these institutions may also pose difficult questions of legal status. *See* Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447, 450 (1993).

10. On the history of NGOs up until World War II, see generally LYMAN C. WHITE, INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS: THEIR PURPOSES, METHODS AND ACCOMPLISHMENTS (1951).

by delegations from small island states and lesser developed countries.¹¹ In that fashion, advocacy NGOs become players outside the control of the states from which they nominally hale.¹²

These NGOs have also been afforded a limited formal status in some international decisionmaking contexts. Pursuant to article 71 of the U.N. Charter, the Economic and Social Council (ECOSOC) has extended "consultative status" to international NGOs satisfying certain basic criteria. Recognition entitles an NGO access to ECOSOC proceedings and, for the more prominent organizations, rights to lodge oral and written interventions as well as to propose agenda items.¹³ NGOs have also been afforded limited rights of participation at UN-sponsored world conferences in recent years, including at Rio (on the environment), Cairo (population), and Beijing (women).¹⁴ Conferences on multilateral pacts on climate change and endangered species have afforded NGOs a place as observers to treaty monitoring proceedings. But in no institution save the International Labour Organisation have NGOs been formally extended a status even approaching parity with that of states. Nor have NGOs been afforded standing in international judicial forums,¹⁵ with prominent exceptions at the level of regional organizations.¹⁶

In practice, NGO influence has far exceeded that indicated by their tentative formal standing in international institutions.¹⁷ NGOs have

11. For a description of Greenpeace's coordination of such delegations in negotiations regarding the disposal of hazardous wastes, see Jennifer Clapp, *The Toxic Waste Trade With Less-Industrialised Countries: Economic Linkages and Political Alliances*, 15 *THIRD WORLD Q.* 505, 509-12 (1994).

12. See ABRAM CHAYES & ANTONIA H. CHAYES, *THE NEW SOVEREIGNTY* 251 (1995) ("[t]his burgeoning array of NGOs is the one element of the system that is not even in theory subject to governmental control.").

13. On the consultative status system, and recent efforts to reform it, see Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 *HUM. RTS. Q.* 107 (1996). See also E.S.C. Res. 1996/31 (updating consultative status arrangements).

14. For excerpts from representative rules governing NGO participation in these and other world conferences, see Global Environment Facility, *Participation By Non-Governmental Organizations In The Global Environment Facility*, U.N. Doc. GEF/PA.93/2/Annex 2 (1993).

15. See Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 *AM. J. INT'L L.* 611 (1994).

16. See, e.g., *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (Nov. 9, 1995), 34 *I.L.M.* 1453 (1995). In an exceptional recent development, France submitted to arbitral proceeding against Greenpeace to set damages for the sinking of the Rainbow Warrior. See *Panel Orders France to Pay \$18.1 Million to Greenpeace*, *N.Y. TIMES*, Oct. 3, 1987, at A2.

17. See, e.g., THOMAS PRINCEN & MATTHIAS FINGER, *ENVIRONMENTAL NGOS IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL* (1994); Felice Gaer, *Reality Check: Human*

prompted states to undertake significant international legal initiatives, especially with respect to human rights and environmental protection. They have also been able to pursue global political agendas outside of institutions, either by shaming states (or other relevant actors, most notably corporations) through exposure and/or by mobilizing sympathetic consumer constituencies within the integrated global economy. The former is by now a well-honed tactic of the human rights movement through which objectives are secured by public relations mechanisms. The recent controversy surrounding Royal Dutch Shell's proposed scuttling of an oil rig in the North Sea presents one recent example of the latter. Shell had received all appropriate domestic and international approvals to leave the Brent Spar rig on the ocean floor. Greenpeace objected and launched a campaign to boycott Shell gasoline. Within weeks, Shell's sales in Germany were down 30%, at which point the oil giant relented.¹⁸ Shell has since sought out Greenpeace for consultations in planning the decommission of other rigs.¹⁹ Similar tactics were deployed against France to protest its recent nuclear testing program in the South Pacific. Although the tests were completed as planned, the success of Greenpeace's consumer action campaign may have contributed to France's decision not to undertake more tests in the future.²⁰

Brent Spar-type tactics are effective in proportion to a corporation's or state's dependence on consumer trade. The potential for such activity will be enhanced by further integration of the global marketplace, which increases the exposure of target states and corporations.²¹ Granted, the mechanism may remain exceptional. Groups such as Greenpeace obviously cannot effectively attack every objective through outright confrontation. But the threat of membership mobilization will make repetitive deployment unnecessary in some cases. Potential targets may accede to NGO demands, or at least come to an informal negotiating

Rights NGOs Confront Governments at the UN, in *NGOs, THE UN & GLOBAL GOVERNANCE* 51 (Thomas G. Weiss & Leon Gordenker eds., 1996).

18. See Tony Paterson, *North Sea Shell Game: Greenpeace's Campaign Against Oil Multinational Royal Dutch Shell*, *THE EUROPEAN*, June 30 - July 6, 1995.

19. See *Shell Discusses Future of Brent Spar With Greenpeace*, *EUR. ENV'T*, Jan. 23, 1996, available in LEXIS, World library, Allwld file.

20. See, e.g., Craig R. Whitney, *France Ending Nuclear Tests That Causes Broad Protests*, *N.Y. TIMES*, Jan. 30, 1996, at A1; *Greenpeace to Go to Court to Get Back Seized Boats and Helicopter*, *AGENCE FRANCE PRESSE*, Nov. 14, 1995, available in LEXIS, News library, AFP file (reporting substantial drop in international orders for Beaujolais Nouveau wine in wake of nuclear test protests).

21. For an elaboration on the phenomenon of extrainstitutional activism, see Paul Wapner, *Politics Beyond the State: Environmental Activism and World Politics*, 47 *WORLD POL.* 311 (1995).

table, out of an awareness that consumer campaigns have worked in the past. There will also be episodes in which the possible costs of boycott efforts will not outweigh the benefits of the activity that the NGO seeks to halt. This may help to explain Shell's continued presence in Nigeria notwithstanding objections to the human rights practices of the current regime there.²² While NGO power is not absolute, it is significant and growing.

2. Corporations.

As with the case of NGOs, corporations have long enjoyed a presence at the international level. The Hudson's Bay and British East India Companies were effectively sovereign over their far-flung trading realms, engaging in such characteristically governmental activity as coining currency, concluding treaties, and making war.²³ During the 1960s and 1970s, the activities of multinational corporations were subjected to international scrutiny in the face of lesser developed country claims of capitalist exploitation.²⁴

In the interwar era of the 1920s and 1930s, the International Chamber of Commerce participated in a variety of League of Nations proceedings and even signed some League instruments as a party.²⁵ Corporate alliances such as the ICC now participate in international contexts as NGOs, subject to the same requirements and enjoying the same rights as others under the consultative status system. Corporate interests have also organized themselves for the issues of the day, for example, by forming a highly effective Business Council on Sustainable Development to participate in multilateral forums relating to the international environment.²⁶

Corporations so grouped thus enjoy some formal status in international institutions. But, as with NGOs, the status is decidedly second

22. For another example of such corporate cost-benefit balancing, see Seth Mydans, *Pepsi Courts Myanmar, Preferring Sales to Politics*, N.Y. TIMES, Feb. 22, 1996, at D6.

23. See PHILIP JESSUP, A MODERN LAW OF NATIONS 22 (1968).

24. An institutional relic of that uproar is still found in the UN Commission on Transnational Corporations.

25. See WHITE, *supra* note 10, at 22 (noting that ICC delegate signed League instruments relating to import/export restrictions and customs formalities).

26. See Hugh Faulkner, *Some Comments on the INC Process*, in NEGOTIATING CLIMATE CHANGE: THE INSIDE STORY OF THE RIO CONVENTION 229-37 (Irving M. Mintzer & J.A. Leonard eds., 1994) (analysis by the Executive Director of the Business Council for Sustainable Development on the role of corporations in the climate change process).

class even as real world corporate power grows.²⁷ Except at the ILO, the corporate community does not enjoy a seat at the table, at least not in its own name. Corporations generally have no standing in public international judicial and dispute resolution bodies, even where they effectively may be the only real parties in interest. This may have been the case with the first decision handed down by the new World Trade Organization dispute resolution panel, which, though styled as a dispute between Brazil and the United States, was in fact more a dispute between two oil companies.²⁸

Excluding corporate actors from formal decisionmaking processes, as well as absolving them from ultimate accountability under international law, may have made sense in a world in which corporations had a clear national identity and could be adequately represented by and through particular states. Until recent years, this has held more or less true. Even during their vilification during the sixties and seventies, the so-called "multinationals" qualified as such by virtue of a mere presence in more than one country. The moniker "multinational" has not, at least until recently, implied true multinationality in the sense of being under the ultimate control of more than one nation, and thus in a sense being in the control of none. The United American Fruit Company, for example, was multinational insofar as it had operations in several Latin American countries, but it was exclusively a U.S. enterprise at its core, clearly governed by the dictates of U.S. law.

Today such national identity and control is no longer so apparent. Some large corporations are becoming truly multinational in the sense that it is now almost meaningless to describe them as, say, American or British or Dutch.²⁹ Even a corporation so intertwined with U.S. foreign relations as Coca-Cola is now moving to shed its national roots.³⁰ The increasingly cosmopolitan nature of international corporate giants is reflected in corporate structures that make them difficult to regulate from

27. See Jonathon I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 749-54 (summarizing limited status of corporations under current international law).

28. See G. Richard Shell, *Participation of Nongovernmental Parties in the World Trade Organization: The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 368 & n.53 (1996).

29. Cf. Robert B. Reich, *THE WORK OF NATIONS* 113 (1991) (describing multinational origin of "American" automobiles).

30. See Glenn Collins, *Coke Drops 'Domestic' and Goes One World*, N.Y. TIMES, Jan. 13, 1996, §1, at 35 (reporting elimination of distinctions between domestic and international operations for purposes of internal corporate structure).

any single state.

Indeed, it is becoming increasingly difficult for states to regulate even those corporations that maintain a strong national identification. As global capital becomes more mobile and the global economy more competitive, state efforts to constrain corporations may be doomed to fail in some contexts. The United States, for example, would find it very difficult, at best, to impose its domestic minimum wage laws on a U.S. corporation's operations in Malaysia, for to do so would place the U.S. corporation at a disadvantage against competitors from other nations not subject to the same regulation. In turn, a developing state like Malaysia could not itself impose a minimum wage so long as other countries did not do the same, for to do so would likely force the U.S. corporation to relocate outside Malaysia. To the extent this description now reflects real-world conditions, the corporate community itself could become an ultimate repository of power.

No wonder that NGOs have moved on some issues to influence corporate behavior directly, rather than indirectly by winning state regulation to the same effect. Such has been the case with the Brent Spar incident and other boycott efforts. It has also characterized the shareholder responsibility movement, in which progressive interests enjoying large shareholding interests (most notably, U.S. state and local pension funds as well as churches) pressure corporations through shareholder resolutions to adhere to environmental and human rights practices beyond those required by domestic or international law.

3. *Subnational governments.*

Subnational governments are assuming an unprecedented role in global affairs.³¹ Subnational governments active at the international level include provinces, localities, and perhaps most notably the constitutive units of federative nation-states. The international profile of subnational governments has been most enhanced in recent years in the economic and cultural spheres. Sister-city arrangements blossomed in the 1980s, and it is now routine for subnational officials to undertake international promotional campaigns (through trade delegations or permanent trade offices) to attract foreign investment into their jurisdic-

31. See, e.g., BRIAN HOCKING, *LOCALIZING FOREIGN POLICY: NON-CENTRAL GOVERNMENTS AND MULTI-LAYERED DIPLOMACY* (1993); Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821 (1989).

tions.³² These activities have been facilitated by advances in global travel and communications, as well as by the global economic integration that makes transnational investment possible (and indeed necessary) to economic growth.

Subnational action has also had political implications at the global level. Conduct on the part of U.S. states in the areas of tax policy³³ and the treatment of aliens (on both an individual and collective basis)³⁴ has raised the ire of foreign governments. Even where subnational practice involves areas of core traditional authority (criminal or family law, for example) international norms may now elevate those practices to international significance. These cameo appearances by subnational authorities indicate that they may have interests at the international level distinct from the nation-states of which they are a part.

The fact of distinctive subnational interests is increasingly reflected in domestic policymaking structures. Federal units in such nations as Germany, Switzerland, and Canada have been afforded constitutional powers at the international level, in particular to enter into certain types of international agreements.³⁵ In Belgium, the interests of ethnic communities (the Flemish, Walloons and a small ethnic German population) are formally and informally balanced at the international level so that the communities have fairly advanced international capacities (again, especially with respect to agreements) at the same time that they exercise effective veto power over national foreign policy positions. In the U.S., states officials have won a formal consultative role in the trade agreement negotiating process.³⁶

32. On the latter, see generally STATES & PROVINCES IN THE INTERNATIONAL ECONOMY (Douglas M. Brown & Earl H. Fry eds., 1993).

33. See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (considering California state tax scheme condemned by foreign governments and corporations); HOCKING, *supra* note 31, at 130-51 (setting forth context for same).

34. With respect to the treatment of individuals, international protest has often been provoked by the treatment of foreign individuals in state criminal justice systems. See, e.g., Sharon Waxman, *France Wants Prisoner in Texas Transferred*, WASH. POST, Dec. 8, 1994, at A38; Ronald Smothers, *British-American Is Executed in Georgia*, N.Y. TIMES, Apr. 8, 1995, at 7. See generally Ronan Doherty, Note, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281 (1996). California's Proposition 187, under which undocumented aliens are barred from state social service and educational benefits, presents perhaps the most harsh treatment of aliens. See Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 158, 165-66 (noting Mexican government opposition to the state ballot measure).

35. See Schreuer, *supra* note 9, at 450.

36. See 19 U.S.C. §§ 2114c(2)(a) & 2155(b)(1) (West Supp. 1996) (establishing advisory capacity for state governments on trade issues).

There are, however, few direct links between subnational governments and international decisionmaking structures. A union of local elected officials enjoys consultative status at the UN, and municipal authorities were an important force in the UN-sponsored Habitat II world summit on housing and other problems common to urban governance that was convened in Istanbul in the summer of 1996. Such subnational geographic regions as Wales, the Basque land, and Catalonia have direct official links to the central organs of the European Union.³⁷ The province of Quebec has a seat in the association of francophone states. But that appears to be the extent of formal subnational participation in international institutions.

Of course, this lack of status may be attributed to the fact that subnational authorities, by definition, remain under the control of national governments. Unlike corporations and NGOs, they are territorially fixed and cannot exploit mobility and transnational identities to defeat central government supervision. If the strength of central governments continues to flag, however, this control may emerge more formal than real, at least on some issues. In that case, the international significance of subnational governments is likely to be further enlarged, regardless of the legal status attributed to them under international law.

IV. NON-STATE ACTORS AND INTERNATIONAL LEGAL PERSONALITY.

Notwithstanding the rise of non-state entities as part of the global dynamic, states have effectively maintained their monopoly over the levers of international law. With few exceptions, they have barred all others from formal participation in the lawmaking process. States are the sole repositories of international rights. They are also the sole repositories of international duties.

That leaves the entities described above without rights or duties under international law save those attached indirectly through states. Take the example of an international environmental regime. Neither the NGO Greenpeace, the corporation Royal Dutch Shell, nor the subnational government of California has the right to participate in the negotiation of that regime, and none correlatively has the direct obligation to accept its competence.

The consequences of non-recognition under international law create

37. See Peter John, *UK Subnational Offices in Brussels: Diversification or Regionalization*, 28 REGIONAL STUD. 739 (1994); Naomi Roht-Arriaza, *The Committee on the Regions and the Role of Regional Governments in the European Union*, 20 HASTINGS INT'L & COMP. L. REV. 413 (1997).

an increasingly worrisome gulf between international law and international reality. On the one hand, certain transnational interests will not be represented, or at least not fully represented, in a system that acknowledges the voice of states alone. The very fact that non-state groupings are mobilizing at the international level is evidence of that shortcoming, for they would have no need to mobilize were their positions adequately advanced by state representatives. Any system based exclusively on territorial definition will tend to exclude those groups that do not enjoy territorial concentration.³⁸ And states will always have an interest qua states to limit the depth of international regulation. (The domestic analogy might be to the matter of whether Congress is held to the laws it imposes on everyone else. It will no doubt be more hesitant to legislate to the extent that it is.) Non-state interests, many of which may represent significant public constituencies, will thus go unrepresented or be imperfectly represented in state-centric forums.

This last observation itself is controversial and could be the subject of great debate. But assuming it to represent some truth, it tends to throw the very legitimacy of the existing international lawmaking system into doubt. That legitimacy will ultimately be determined by individuals and by entities that command the discrete loyalties of those individuals. A system which excludes certain organizational actors from deliberative participation will not be considered legitimate by those organizations nor in turn by its constituencies. Because a Greenpeace or an Amnesty International is not formally included in the making of relevant international regimes, the process leading to those regimes may not be considered legitimate by the organizations or their members and other sympathetic constituencies. Those organizations and constituencies may reject the regimes themselves as the product of a flawed and exclusionary process.

Such rejection of international regimes could have significant systemic consequences. Non-state actors are in a position to make good on their rejection, thus threatening the efficacy of institutional decision-making. As described above, NGOs have deployed the power of consumer action to some effect, even where the targeted actor is in full compliance with international law. Such was true of Royal Dutch Shell

38. Gays would present the paradigmatic case. Even though they comprise by the most conservative estimates at least a percent or two of human society, they will nowhere form a majority. Thus, even if representation were perfectly democratic the worlds over, in an international system based on territory this substantial population — larger than that of many states — would have no independent voice in international decisionmaking.

and disposal of the Brent Spar, and of France and its recent South Pacific nuclear tests. And yet in both situations Greenpeace wanted more, and in both cases it succeeded. To the extent that Greenpeace and other NGOs succeed in these tactics, they in effect set the law. It will make no difference whether state-negotiated treaties allow for oil-rig scuttling or nuclear testing; as Gu  henno observes, "It matters little whether a norm is imposed by a private enterprise or by a committee of bureaucrats."³⁹ So long as Greenpeace and others can mobilize significant consumer interests to punish those who engage in these activities, they will not be undertaken, or at least not without great cost.

The formal institutional process in that case becomes largely irrelevant. That must presumptively be considered undesirable, for it is in institutions that power is best held accountable. This brings into relief the other side of the failure to afford non-state entities an enhanced international legal personality, to wit, that such entities are not held responsible under international law at the same time as they are not permitted to participate in its making. Thus, were a state to impose economic sanctions on France in the wake of its nuclear testing activity, that state would likely be deemed to violate international law.⁴⁰ But no one would think similarly to accuse Greenpeace for what is in effect the same action. Greenpeace is free to deploy its power as irresponsibly as it so desires, as some would argue it did in the case of Brent Spar.⁴¹

In this respect, the status (or lack thereof) of corporations is similarly significant. The rationale for excluding corporations from decisionmaking processes, as well as from international legal accountability systems, has been that corporations are ultimately creatures of a particular state, and that the state will represent corporate interests at the international level as well as ensure corporate compliance with international law requirements. This rationale lies at the core of international law notions of state responsibility, under which states are held accountable for actors within their control.

As suggested, however, greater mobility of capital may put some corporations beyond the effective control of states because mobility

39. GU  HENNO, *supra* note 2, at 58.

40. In fact, state opposition to the French testing was pursued, unsuccessfully, in the International Court of Justice. See Request for an Examination of the Situation In Accordance With Paragraph 63 of the Court's Judgement in Nuclear Tests (New Zealand v. France), 1995 I.C.J. 288 (Sept. 22).

41. For an elaboration, see Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations in the 'Unregulated' Marketplace*, 18 CARDOZO L. REV. 957 (1996).

creates regulatory competition — a sort of international race to the bottom — by allowing corporations to exploit the existence of states who refuse to join supranational or parallel regulatory regimes. To the extent this holds true (once again, the observation could be debated at length), the premise for the law of state responsibility collapses. Little is gained by holding a state responsible for something over which it has no power, something akin to holding a parent responsible for a child who has reached the age of majority.

Under the existing system of international law, insofar as corporations are not accountable to states, they are accountable to no one. The gap is a troubling one because corporate behavior is often the ultimate object of international legal norms. This is most obviously the case with respect to worker rights, but also the environment and even human rights. And yet a corporation that exploits labor, or pollutes the air or water, or is complicit in the human rights abuses of a repressive government is no international law violator because it has no international legal personality.

Finally, the same sort of observations could be made of subnational governments, albeit to a lesser degree. They too may reject the legitimacy of a decisionmaking process which does not afford them a voice, at least where their distinctive interests are at stake. For example, U.S. state governments have expressed alarm at the prospect of international family law conventions preempting their own laws in a sphere in which they have traditionally held dominant as against the federal government. Such resistance would no doubt be softened had state officials themselves a seat at the international negotiating table. Similar difficulties are presented with respect to international human rights norms implicating criminal processes, the treatment of aliens, and trade.

Nor are subnational authorities as accountable to central governments as they once were. Although subnational units are not mobile in the way that corporations may be (territory doesn't move) they can exercise another type of exit, namely, secession. In fragile nations, the possibility of secession will afford a subnational entity substantial leverage in dealing with the national government. But even in well-knit nation-states, subnational authorities are not so easily cowed as perhaps they once were,⁴² even where the issue is the subnational's own compliance with an international norm. On issues of intense concern at the subnational level, national governments are sometimes unable for

42. See, e.g., James Podgers, *Greetings from 'Independent' Hawaii*, A.B.A.J., June 1997, at 74; Celestine Bohlen, *Italian's Call for Breakup Stirrs Storm*, N.Y. TIMES, May 12, 1996, §1, at 4.

political reasons to exercise internal discipline notwithstanding the possibility of international complications. Thus, when California passed Proposition 187, a ballot referendum aimed at discouraging the presence of illegal aliens, the prospect of the federal government moving to preempt the measure was nil, even in the face of strong Mexican opposition to the subnational action (as well as the possibility that California violated international human rights norms). As I have elsewhere explained, the episode suggests an advantage to holding subnational actors accountable for their actions under international law.⁴³

And yet subnationals, corporations, and NGOs will not be accountable so long as they have no formal status under international law. This will work to the ultimate detriment of states and the international lawmaking process. If states attempt to maintain their monopoly on international law status, states and their international institutions will be bypassed by these unrecognized but powerful non-state entities. The failure of the international system thus in some respects works to the advantage of non-state powers, who in effect get to have their cake and eat it, too. Although states would ostensibly cede power by admitting non-state actors into the club of international persons, they would also regain the legal capacity, this time at the international level, to rein in their new rivals.

V. CONCLUSION.

The stakes here are enormous. History has shown that international law, to the extent it does not account for the realities of the global dynamic, becomes an irrelevancy. This was the lesson of the Cold War, during which international law suffered wounds from which it is only now recovering. The question of legal personality may pose an important test for its capacity to adapt to new conditions on the ground. Entities other than states are coming to command significant independent power on the international stage. International law and institutions should move to harness this new power to advance the state of global governance. If instead it ignores what it cannot make go away, the law will itself become a victim of its blindness.

43. See Spiro, *supra* note 34, at 175-76.