

BEYOND STATE SOVEREIGNTY: THE INTERNATIONAL LEGAL SYSTEM AND NON-STATE PARTICIPANTS

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ABSTRACT

This article demonstrates how the core assumption of the dominant international legal doctrine that there is sole legal power in the sovereign state offers a very partial and biased view. It is conceptually flawed as it is based on a very limited, Eurocentric idea of the state. In addition, such a concept does not reflect the reality of international activity, where non-state actors, such as non-governmental organisations, transnational corporations and individuals, are key participants. It is evident

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that the international community is not limited to states. The article will show how both sovereignty and international community are not static concepts fixed to one entity or another but are relational concepts, which change over time depending on the others in the relationship. By exploring the participation of non-state actors it is evident that they have affected the enforcement of, and compliance with, international law and are part of the social embedding of international law.

Key words: international legal doctrine, sovereignty, state, non-state actors, transnational corporations, international community, non-governmental organizations.

MÁS ALLÁ DE LA SOBERANÍA ESTATAL: EL SISTEMA JURÍDICO INTERNACIONAL Y LOS PARTICIPANTES NO-ESTATALES

RESUMEN

Este artículo muestra cómo la afirmación básica de la visión dominante de la doctrina jurídica del derecho internacional, en el sentido de afirmar que en los estados soberanos es en el único ente en el que radica el poder jurídico ofrece una visión muy parcial y sesgada. Esta visión está conceptualmente viciada en la medida en que se basa en una muy limitada idea eurocéntrica de lo que es el Estado. Adicionalmente, dicho concepto no refleja la realidad de la actividad internacional, en donde los actores no-estatales, tal como las organizaciones no-gubernamentales, corporaciones transnacionales e individuos, son los participantes relevantes. Es evidente que la comunidad internacional no está limitada solamente a los estados. El artículo muestra cómo la soberanía y la comunidad internacional no son conceptos estáticos pegados a una u otra

entidad, sino que se trata de conceptos relacionales que cambian con el tiempo, dependiendo el uno del otro. Explorando la participación de actores no-estatales es evidente que ellos han afectado la obligatoriedad y el cumplimiento del derecho internacional y, además, son parte de la base social del derecho internacional.

Palabras clave: *doctrina jurídica del derecho internacional, soberanía, estados soberanos, actores no-estatales, corporaciones transnacionales, comunidad internacional, organizaciones no-gubernamentales.*

“[I]t is understandable that the rational talents on this [non-Latin American] side of the world, exalted in the contemplation of their own cultures, should have found themselves without valid means to interpret us. It is only natural that they insist on measuring us with the yardstick that they use for themselves, forgetting that the ravages of life are not the same for all, and that the quest of our own identity is just as arduous and bloody for us as it was for them. The interpretation of our reality through patterns not our own, serves only to make us ever more unknown, ever less free, ever more solitary. Venerable Europe would perhaps be more perceptive if it tried to see us in its own past.”¹

These words of GABRIEL GARCÍA MÁRQUEZ indicate the difficulty of applying one set of identities, rules or rigid systems established in one time and location to another time and location. This article aims to show that his words are equally applicable in relation to the prevailing doctrine of state sovereignty in international law. This doctrine was developed within ‘venerable Europe’ and needs to be interpreted to an international legal system that now comprises both state and non-state participants.

1 GABRIEL GARCÍA MÁRQUEZ, speech on being awarded the Nobel Prize for Literature, 8 December 1982 (see http://www.themodernword.com/gabo/gabo_nobel.html).

The legal doctrine that has dominated the understanding of the international legal system for centuries has maintained that the international legal system is a system solely for, and by, states. This approach finds support in the fact that membership of the United Nations (UN) is exclusive to states,² the Statute of the International Court of Justice declares that ‘only states may be parties in cases before the Court’³ and the primary sources of international law are usually expressed as arising only from the actions of states.⁴ This approach is encapsulated in the statement:

‘[s]ince the Law of Nations is a law between states only and exclusively, states only and exclusively are subjects of the Law of Nations’.⁵

The aim of this article is to show how the dominant legal doctrine (usually seen as being that of positivist theorists, ranging from liberal to socialist), which adopts this belief in the sole legal power of the sovereign state, offers a very partial and biased view, which does not reflect the reality of international activity and which hides the reality of international legal participation.⁶ The particular roles that

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- 2 Though non-states have been members of the UN e.g. Byelorussian SSR and Ukrainian SSR.
 - 3 Statute of the International Court of Justice, Article 34(1).
 - 4 For example, it is the actions of states, by their practice and intentions, that is generally seen as constituting customary international law – see, for example, M. AKEHURST, ‘Custom as a Source of International Law’ 47 *British Year Book of International Law* (1974-5) 53.
 - 5 L. OPPENHEIM, *International Law* Vol 1 (Longmans 1905) p.341.
 - 6 Clarifying philosophical ideas within the context of the reality of international affairs is part of the approach of many third world, critical race theory, feminist and newstream international legal theorists. See, for example, J. GATHI, ‘The Contribution of Research and Scholarship on Developing Countries to International Legal Theory’ 41 *Harvard International Law Journal* 263 (2000), Panel on ‘International Dimensions of Critical Race Theory’ 91 *American Society of International Law Proceedings* 408 (1997), H. CHARLESWORTH and C. CHINKIN, *The Boundaries of International Law: A Feminist Analysis* (Manchester Univ Press, 2000) and M. KOSKENNIEMI, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers Publishing Cooperative, 1989). Note also H. LAUTERPACHT, ‘The Subjects of the Law of Nations’ (1947) 63 *Law Quarterly Review* 438 and (1948) 64 *Law Quarterly Review* 97.

non-state actors play, in terms of their degree of participation, will be considered in the context of the concepts of sovereignty and of the international community, which are key elements of the dominant legal doctrine's focus. Whilst the concept of the sovereignty of the state is an explicit foundational part of the dominant legal doctrine, as will be shown, the concept of an international community (of states alone) is generally an implicit part of that story. This is because:

Every concept of international law is based on an understanding of the social structure to which international law applies. Accordingly every theory of international law involves, explicitly or implicitly, a concept of international community or society.⁷

An acceptance of a social structure of international law and international relations,⁸ is essential in my view, as international law is part of social relations that change over time.⁹ One such change can be seen from the end of the twentieth century in the impacts of globalization, particularly the activities of transnational corporations, as well as actions by non-governmental organisations, have effects on the international legal system.¹⁰ Therefore, it is necessary to ensure that the conceptual bases for the international legal system reflect the reality of changed international social relations because:

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- 7 A. PAULUS, 'The Influence of the United States on the Concept of the "International Community"' in M. BYERS and G. NOLTE, *United States Hegemony and the Foundations of International Law* (CUP, 2003) p. 60.
 - 8 The constructivist conceptual approach of international relations offers an acknowledgement of social structures and activity – see C. REUS-SMIT (ed.) *The Politics of International Law* (CUP, 2004).
 - 9 See P. ALLOTT, *Eunomia* (OUP, rev 2001) and P. ALLOTT, 'The Concept of International Law' in M. BYERS (ed.) *The Role of International Law in International Politics* (OUP, 2000) 69. C. REUS-SMIT describes it as 'the socially rooted nature of international law': C. REUS-SMIT, 'Society, Power, and Ethics' in C. REUS-SMIT (ed) *The Politics of International Law* (CUP, 2004) p. 277.
 - 10 See, for example, the discussion by P. SANDS, 'Turtles and Torturers: The Transformation of International Law' 33 *NYUJILP* 527 (2001).

[T]he relationship between state and international law continually evolves. Each era [should see] the material and ideological reconstitution of the relationship between state sovereignty and international law. The changes are primarily driven by dominant social forces and states of the time.¹¹

It will be shown how both sovereignty and international community are not static concepts fixed to one entity or another but are relational concepts, which change over time depending on the others in the relationship. Some of the key participants in these relationships will be considered in order to demonstrate that the international community is comprised of more than states. The potential consequences of this in terms of the inadequacies of the dominant legal doctrine's approach to understanding the changes in the creation, development and enforcement of international law will then be raised.¹²

FICTIONS AND SOVEREIGNTY

The concept of state sovereignty is central to the dominant legal doctrine's view of international law. The clearest expression of this is:

Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. The development of the national organisation of states during the last few

11 B. CHIMNI, 'Third World Approaches to International Law: A Manifesto' in A. ANGHIE, B. CHIMNI, K. MICKELSON and O. OKAFOR (eds.), *The Third World and International Order* (M. NIJHOFF, 2003), 47 at p. 51-52.

12 F. TESÓN has persuasively argued that the concept of the international legal system as a solely state-based process 'is incapable of serving as the normative framework for present or future political realities... [N]ew times call for a fresh conceptual and ethical language': F. TESÓN 'The Kantian Theory of International Law,' *Columbia Law Review* 92 (1992), pp. 53-54. Many of the major critiques of the dominant legal theories are summarised in A. PAULUS, 'International Law after Post-Modernism: Towards Renewal or Decline of International Law?' 14 *Leiden JIL* (2001) 727.

centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the state in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.¹³

Within this doctrine sovereignty has been seen as the ability and power of each state to decide for itself any matter on, or affecting, its territory. This view is defended on the basis that it (and the consequent idea of sovereign equality)¹⁴

is a constituent fiction that requires acceptance if the whole edifice of the international legal system is not to be called into question.¹⁵

Yet even the core element of state sovereignty - being the state itself - is a legal fiction. The state is an entirely artificial entity that cannot act by itself. 'State' actions and statements are actually made by an elite of people who control decision-making inside a territorial boundary.¹⁶ As HILARY CHARLESWORTH and CHRISTINE CHINKIN have made clear, the state is not a good structure for engagement with many vital international issues as it reinforces a particular hierarchy, it creates a false division between the public and the private areas of life and its approaches to conflict resolution are often based on violence and control.¹⁷ Yet it is this legal fiction of the state upon which the concept of state sovereignty has been invented.

13 *Island of Palmas (The Netherlands v. United States)* 2 RIAA (1928) 829.

14 'The [United Nations] is based on the principle of sovereign equality of all its members': United Nations (UN) Charter Article 2(1).

15 R. DUPUY, 'Comments' in M. BYERS and G. NOLTE, *United States Hegemony and the Foundations of International Law* (CUP, 2003) p. 179.

16 Though the individual, in her/his private capacity, remains distinct from the actions she/he takes on behalf of the state: see R. GEUSS, *History and Illusion in Politics* (CUP, 2001).

17 H. CHARLESWORTH and C. CHINKIN, *The Boundaries of International Law: A Feminist Analysis* (Manchester Univ Press, 2000). They also note the value of hierarchy-less societal structures.

It is an invention because the concept of sovereignty that is part of the dominant legal doctrine arose from a particular type of sovereign power found within Europe in the seventeenth and eighteenth centuries:

The excesses and excrescences of ‘sovereignty’ are due in part [to] the provenance of the term and its entry into the international political and legal vocabulary... The law of inter-prince relations, with its roots in religious law, natural law, Roman Law and morality was later subsumed and assimilated into the modern law of nations, but did not shed its origins and its princely paraphernalia.¹⁸

Indeed, CARL SCHMITT confirmed this when he considered that ‘the last great heroic deed of the European peoples’ was the creation of a world legal order,¹⁹ and this ‘deed’ was intended to be in its supposed self-image.

This particular concept of sovereignty largely ignored, or deliberately set aside, alternative concepts of sovereignty from other regions and from other cultures.²⁰ So the concept of state sovereignty in international law as expounded in the dominant legal doctrine largely remains caught in the conceptual baggage that originated from the age of princedoms. This is despite the reality that:

18 L. HENKIN, *International Law: Politics and Values* (1991) at p. 9.

19 C. SCHMITT, *Staat, Grossraum, Nomos, Arbeiten aus den Jahren* (Duncker and Humblot, 1995), p. 585.

20 For further discussion of alternative concepts of sovereignty see R. MCCORQUODALE and R. PANGALANGAN, ‘Pushing Back the Limitations of Territorial Boundaries’ *12 European Journal of International Law* (2001) 867, especially at pp. 877-879. For a perspective from Colombia, see L.F. ÁLVAREZ LONDOÑO, *Un nuevo orden internacional* (Pontificia Universidad Javeriana, 1999), L.F. ÁLVAREZ LONDOÑO, *Derecho internacional público* (Pontificia Universidad Javeriana, 2nd ed., 2002), and, on a specific topic, A.I. IBÁÑEZ GUZMÁN, *El sistema penal en el Estatuto de Roma* (Universidad Externado de Colombia, 2003).

Today the state encounters multiple demands and faces the forces of globalisation but also fragmentation. The reification of sovereignty as it is mirrored in international rules obscures the essence of these changes.²¹

Even the development of international inter-state institutions that have some aspects of sovereignty,²² merely underlines the problematic nature of this definition of state sovereignty as ‘to replace absolute sovereigns with absolute supra-sovereigns in the form of institutions is hardly the solution’.²³

However sovereignty does not have to be conceived in terms of a strict focus on the state itself. As MARTIN LOUGHLIN has shown:

[Because] public power is an expression of a political relationship, it would be a mistake to assume that sovereignty resides in a specific locus, whether that be the king, the people, or an institution such as parliament. Sovereignty ultimately inheres in the form which the political relationship takes.²⁴

In other words, sovereignty is not in an entity (e.g. in the state). Rather, sovereignty is in the relationship between entities (e.g. between a state and individuals). Sovereignty is, therefore, relational

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- 21 N. TSAGOURIAS, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester Univ Press, 2000) p. 61. See also S. MAKINDA, ‘The Global Covenant as an Evolving Institution’ 6 *International Journal of Human Rights* (2002) 113.
- 22 See, for example the sovereignty of international institutions in Bosnia-Herzegovina, Kosovo and Kosovo, as discussed in a series of articles on international administration in 10(1) *Global Governance* (2004) and in R. WILDE, ‘Representing International Territorial Administration: A Critique of Some Approaches’ 15 *European Journal of International Law* (2004) 71.
- 23 B. RAJAGOPAL, *International Law from Below* (CUP, 2003), p.294. DAVID KENNEDY has noted that many international lawyers remain ‘obsessed with the struggle somehow to reinvent at an international level the sovereign authority [international law] was determined to transcend’: D. KENNEDY, ‘The International Style in Postwar Law and Policy’, *Utah Law Review* (1994) 7 at p. 14. See also the critique by A. ORFORD, ‘The Gift of Formalism’, 15 *European Journal of International Law* (2004) 179.
- 24 M. LOUGHLIN, ‘Ten Tenets of Sovereignty’ in N. WALKER (ed.) *Sovereignty in Transition* (Hart, 2003) 55 at p. 68.

and not static. Being relational, sovereignty changes over time with changes in the relationship.

In fact sovereignty has always changed with changed relationships. At the beginning of the development in the international legal system of the concept of sovereignty taken from Europe, the relevant relationship was one of princes or feudal lords. For example, the duty of personal loyalty of a vassal to a lord, which lay at the heart of feudalism, became the duty of allegiance to states, and the feudal bond to the land became the scope of a state's jurisdictional power.²⁵ As this view was applied to the international legal system, the relevant relationship to which it was applied was one between states, and only between states, because it was states which were seen by the dominant legal doctrine to be within an international sovereignty relationship. Yet there was no requirement within the concept of sovereignty itself that meant that it could only be applied between states.

Indeed the Permanent Court of International Justice noted the importance of sovereignty relationships:

The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations.²⁶

The Court here is clarifying that, as international relations develop then so does the relativity of the extent of a state's sovereign power in comparison with others. In other words, the sovereignty relationship of the state with others participating in international relations will change depending on the others in the relationship.

25 J. BRIERLY, *The Law of Nations: an Introduction to the International Law of Peace* (6th ed., 1963), pp. 1-2.

26 *Tunis-Morocco Nationality Decrees Opinion* [1923] PCIJ Reports, Series B, No. 4, p. 24. There are a number of aspects of international law that show the relational aspect of sovereignty, such as the principles of reciprocity, *pacta sunt servanda* and non-intervention, although each of these have been applied by the dominant theorists as relating solely to states.

This makes sovereignty ‘conditional’ because it is acted upon, asserted, developed and limited within the context of a relationship with others.²⁷ These others need not only be states. The others can include internal social forces within a state, due to the rapid reduction of matters within the domestic jurisdiction of a state and the reality that territorial boundaries are of limited relevance for many parts of the international legal system today.²⁸ It is only the dominant international legal doctrine that has asserted that the sole relationship is between states. That limitation is not inherent in the concept of sovereignty.

Therefore, when the dominant legal doctrine’s view of sovereignty is examined, it can be seen to be a myth based on a fiction. Instead of sovereignty being defined in the state alone, it is found to be a relational concept dependent on relationships with others. Within the international legal system, that sovereignty relationship occurs through interactions with others in the system, which need not be limited to other states and can change over time. It is in this context that the interaction between sovereignty and the international community can be considered.

INTERNATIONAL COMMUNITY

‘International community’ is an idea that has been used for many purposes over centuries, from rhetorical to institutional.²⁹ It has been called both imagined and unimagined.³⁰ It is often used both to

27 H. SHUE, ‘Limiting Sovereignty’ in J.M. WALSH (ed.) *Humanitarian Intervention and International Relations* (OUP, 2003), especially pp. 14-16.

28 See R. MCCORQUODALE and R. PANGALANGAN, ‘Pushing Back the Limitations of Territorial Boundaries’ *12 European Journal of International Law* (2001) 867.

29 See D. KRITSIOTIS, ‘Imagining the International Community’ *13 European Journal of International Law* (2002) 961 and see also R. AGO, ‘Pluralism and the Origins of the International Community’ *3 Italian Yearbook of International Law* (1977) 30.

30 See B. ANDERSON, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991). P. ALLOTT, *The Health of Nations: Society and Law*

‘support the values the users of the expression are expounding’³¹ and to distinguish these values from those of others.³²

The ‘international community’, at least in relation to sovereignty, has had a persistent definition by the dominant legal doctrine: it means a collective of states. For example, HANS KELSEN considered that a state is sovereign because it is independent from any other state and it is only bound by international law as an expression of legal order of the international community of states.³³ This linkage is shown most clearly in the Vienna Convention on the Law of Treaties 1969, where a peremptory norm of international law is defined as ‘a norm accepted and recognised by the international community of states’.³⁴ From this it has been argued that:

Beyond the state (CUP, 2002), p.230 notes: ‘Conceptual dissonance and conceptual drift have been characteristics of the life-story of the three societies (called European Communities) which are now contained in a society called the European Union. A member of a select but ominous class of international social systems which also includes the Holy Roman Empire and the League of Nations, the European Union is a paradoxical social form, namely, an *unimagined community*’ (his emphasis). See also L. HANSEN and M. WILLIAMS, ‘The Myths of Europe: Legitimacy, Community and the “Crisis” of the EU’ 37 *Journal of Common Market Studies* (1999) 233.

- 31 D. GREIG, “‘International Community”, “Interdependence”, and All That... Rhetorical Correctness?” in G. KREIJEN (ed.), *state, Sovereignty and International Governance* (OUP, 2002) p.598. For example, JAVIER SOLANA, NATO Secretary-General said on 23 March 1999: ‘This military action is intended to support the political aims of the international community... Our objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo’, as quoted in M. WELLER (ed.) *International Documents and Analysis 1* (CUP, 1999) p. 495.
- 32 KOFI ANNAN, the UN Secretary-General, has noted that ‘the international community is defined by not only what it is for but by what and whom it is against’: quoted by M. KOSKENNIEMI, ‘Comments’ in M. BYERS and G. NOLTE, *United States Hegemony and the Foundations of International Law* (CUP, 2003) p. 97. See also CARL SCHMITT in relation to friend-enemy oppositions – C. SCHMITT, *The Concept of the Political* (MIT Press, 1996/1934) pp. 45-54.
- 33 H. KELSEN, ‘Theories du droit international public’, 94 *Recueil des Cours* (1953) 1-2003, 79-85.
- 34 Vienna Convention on the Law of Treaties 1969, Article 53.

[The ‘international community’] is employed normatively as representing the law-making authority of the substantial majority of states to establish rules of customary international law or, more particularly, to bestow upon specific rules the status of peremptory norms.³⁵

Indeed, ‘sovereignty, closely linked to the concept of the state, constituted the central notion of the concept of “international community” by the dominant legal doctrine.’³⁶

A consequence of this restrictive definition is that there could be no acceptance of the actions of non-state actors (which term excludes international organisations of states) as being part of the international community.³⁷ Indeed, this exclusion of non-states within the idea of the international community (as well as the intermittent exclusion of states which are considered by some states as ‘outlaws’)³⁸ ‘is as much the part of a community concept as their inclusion’.³⁹ This approach by the dominant legal doctrine reinforces certain colonialist, imperial, gendered power structures of exclusion.⁴⁰ It also ignores alternative ideas of community, for example:

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- 35 D. GREIG, “International Community”, “Interdependence”, and All That... Rhetorical Correctness?” in G. KREIJEN (ed.), *State, Sovereignty and International Governance* (OUP, 2002) 521, p. 531.
- 36 C. MIK, ‘State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context’ in N. WALKER (ed.), *Sovereignty in Transition* (HART, 2003) 367, at 367.
- 37 O. KORHONEN, *International Law Situated: An Analysis of the Lawyer’s Stance towards Culture, History and Community* (KLUWER, 2000) maintains that international lawyers have been unable to offer an integrated understanding of international community as the positivist approach to the structure of international law militates against such an understanding.
- 38 See G. SIMPSON, *Great Powers and Outlaw States* (CUP, 2004).
- 39 A. PAULUS, ‘The Influence of the United States on the Concept of the “International Community”’ in M. BYERS and G. NOLTE, *United States Hegemony and the Foundations of International Law* (CUP, 2003) p. 75.
- 40 See, for example, B. CHIMNI, ‘Third World Approaches to International Law: A Manifesto’ in A. ANGHIE, B. CHIMNI, K. MICKELSON and O. OKAFOR (eds.), *The Third World and International Order* (M. NIJHOFF, 2003), 47, H. CHARLESWORTH and C. CHINKIN, *The Boundaries of International Law: A Feminist Analysis* (Manchester Univ Press, 2000) and L.A. KHAN, *The Extinction of Nation-States* (KLUWER, 1996), especially pp. 146-152.

[T]he idea of the unified Muslim community that transcends state borders and challenges conceptions of state sovereignty remains very much a point of discussion and debate for Muslim theorists and very much an aspiration for Muslim activists, for reasons intrinsic to Islamic ethics.⁴¹

Such an exclusive, restrictive definition by the dominant legal doctrine is also not consistent with the sociological idea of a 'community'. For many sociologists, the term 'community' is associated with the work of FERDINAND TÖNNIES, who drew a distinction between *Gesellschaft* (or society), which is artificially negotiated, and *Gemeinschaft* (or community), which is more natural, organic and instinctive.⁴² For social anthropologists, within debates about culture and communities, it has been considered that:

[H]uman beings are ineluctably social and that an individual's revision of his or her projects necessarily occurs within a communal field... [but there are] multiple axes of differentiation within 'the community'.⁴³

Thus, while humans wish to form communities, there are a great varieties of ideas and values within a community and so there does not have to be an exact sharing of values for a community to exist. In fact, a vast array of 'communities' exist, from epistemic to intentional, and includes religious communities and other self-identifying communities.⁴⁴

41 S. HASHMI, 'Pan-Islamism, State Sovereignty, and International Organisation' in S. HASHMI (ed.), *State Sovereignty: Change and Persistence in International Relations* (Penn state Univ Press, 1997) 49 at p. 51.

42 F. TÖNNIES, *Gemeinschaft and Gesellschaft: Grundbegriffe der reinen Soziologies* (1887, translated by Loomis, 1940).

43 J. COWAN, M-B DEMBOUR and R. WILSON, *Culture and Rights: Anthropological Perspectives* (CUP, 2001) p. 17-18. See also the work of W. KYMLICKA, *Liberalism, Community and Culture* (Clarendon, 1989).

44 See, for example, P. HAAS, 'Introduction: Epistemic Communities and International Policy Coordination', 46 *International Organisation* (1992) 1, A. ZITO, 'Epistemic Communities, Collective Entrepreneurship and European Integration' 8 *Journal of European Public Policy* (2001) 585, L. SARGISON, 'Green Utopias of Self and Other', *Special Edition of Critical Review of International Social and Political Philosophy*, 2/3 (2000) 140, M. BADERIN, 'The Evolution of Islamic Law of Nations and the

Further, what appears to be a key element of any community is relationships. For example, ANTHONY APPIAH, when considering black communities and cultures, argues that '[black culture and community] is something that emerges out of certain politically asymmetrical historical relationships between social groups,'⁴⁵ in which a community is formed through a series of relationships between members. These relationships need not be the same for every member of the community and not all members of the community must share the same values, goals or outcomes. Ultimately the concept of community is relational. Its extent and impact is determined by its participants.

Indeed, the relational aspect of the international community can be seen in some of the implied applications of the concept in certain areas of the international legal system. Some treaties have directly applied ideas of a broader international community than just of states alone. For example, the concept of inter-generational equity in international environmental law, which carries with it the idea of there being humanity across the ages, and the concept of 'the common heritage of mankind' in the law of the sea, are both contained in widely ratified treaties.⁴⁶ The concept of the international community in these areas is characterised by:

Modern International Order: Universal Peace through Mutuality and Cooperation' 17 *American Journal of Islamic Social Sciences* (2000) 57 and M. BARNETT, 'Sovereignty, Nationalism and Regional Order in the Arab States System' in BIERSTEKER and WEBER (eds.) *State Sovereignty as Social Construct* (CUP, 1996).

- 45 A. APPIAH, 'Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction', in A. GUTMANN (ed.) *Multiculturalism and the Politics of Recognition* (Princeton Univ Press, 1992) in J. COWAN, M-B DEMBOUR and R. WILSON, *Culture and Rights: Anthropological Perspectives* (CUP, 2001) p. 18.
- 46 Framework Convention on Climate Change 1992, Article 3 and UN Convention on the Law of the Sea 1982, Part IX. For the conceptual bases see E. BROWN WEISS, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1989). See also A. AGRAWAL and C. GIBSON, 'Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation' 27 *World Development* (1999) 629 and C. BRANNSTROM, 'Conservation-with-Development Models in Brazil's Agro-Pastoral Landscapes', 29 *World Development* (2001) 1345. International humanitarian law is also generally considered to be premised on the

[A] changing psychology and breadth of consciousness leading to a merging of *de lex lata* norms and *de lege ferenda* ideas as the human international community comes to recognise that the ‘voice of the inanimate object... should not be stilled’, reflecting the impossibility of separating the bits of mankind from the environment as a whole, or from the claims of future generations.⁴⁷

Similarly, the Vienna Declaration on Human Rights, agreed by consensus of all states at the World Conference on Human Rights in 1993, makes clear that ‘[t]he promotion and protection of all human rights is a legitimate concern of the international community.’⁴⁸ In this Declaration it is clear that the ‘international community’ referred to must extend beyond states, as how a state treats the people within its territorial boundaries is no longer a matter for that state alone to decide but is a matter for the broader international community, including individuals. In addition, in the International Law Commission’s (ILC’s) Articles on Responsibility of States for Internationally Wrongful Acts, which have been widely accepted as an appropriate account of the law on state responsibility, there is direct reference to obligations owed to ‘the international community as a whole’.⁴⁹ When challenged about this by the adherents to the dominant legal doctrine, the ILC’s Special Rapporteur explained that ‘the international community includes entities in addition to states; for example, the European Union, the International Committee of the Red Cross, the United Nations

notion of a common humanity, see, for example, R. COUPLAND, ‘Humanity: What is it and how does it influence International Law?’ 83 *International Review of the Red Cross* (2003) 969 and the Rome Statute of the International Criminal Court, Preamble.

- 47 P. BIRNIE and A. BOYLE, *International Environmental Law* (2nd ed, 2002) p.259 (footnotes omitted).
- 48 Vienna Declaration and Programme of Action on Human Rights 1993, 32 *ILM* 1661, para 4. Similar statements are found in the Concluding Document from the Moscow Conference on the Human Dimension of the Conference on Security and Co-Operation in Europe (CSCE) (now OSCE), 30 *ILM* (1991) 1670.
- 49 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 53rd session, UN Doc A/CN.4/L.602/Rev.1, 26 July 2001, Articles 42 and 48.

itself'⁵⁰ and that to limit 'international community' to states alone 'no longer reflects the reality of the world.'⁵¹

It is even possible to find in the opening words of the United Nations Charter an expression of an international community that was not limited to states. The opening words are:

We the Peoples of the United Nations determined
to save succeeding generations from the scourge of war, which twice in our
lifetime has brought untold sorrow to mankind, and
to reaffirm faith in fundamental human rights, in the dignity and worth of
the human person, in the equal rights of men and women and of nations
large and small, and
to establish conditions under which justice and respect for the obligations
arising from treaties and other sources of international law can be maintained,
and
to promote social progress and better standards of life in larger freedom...
have resolved to combine our efforts to accomplish these aims...⁵²

The intention of the Preamble was, like most Preambles,⁵³ to set out the values and objectives of the Charter.⁵⁴ The values, or 'aims',

50 J. CRAWFORD, Fourth Report on State Responsibility UN Doc. A/CN.4/517 (31 March 2001).

51 J. CRAWFORD, 'Responsibility to the International Community as a Whole', 8 *Indiana Journal of Global Legal Studies* 303 (2001), 314.

52 Preamble, United Nations Charter 1945.

53 Preambles to treaties (and national legislation) usually set out purposes, values and goals - see, for example, J. an AGGELEN, 'The Preamble of the United Nations Declaration of Human Rights', 28 *Denver Journal of International Law and Policy* (2000) 129, A. WINCKEL, 'The Contextual Role of a Preamble in Statutory Interpretation' 23 *Melbourne University Law Review* (1999) 184 and E. AXLER, 'The Power of the Preamble and the Ninth Amendment' 24 *Seton Hall Legislative Journal* (2000) 431. The Appellate Body of the World Trade Organisation has used the preambles (or chapeau) of specific Articles of treaties to interpret state's obligations e.g. in *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, pp. 16-17.

54 The UN Charter's Preamble was intended to be 'so simple and clear and moving that it might hang upon the wall of every home in our member nations, and be understood by common man [and woman] everywhere, and warm their hearts': *Documents of the United Nations Conference on International Organization* (1945) (UNICO

proclaimed were to end war, to protect human rights, to protect nations large and small, to establish justice and respect for international law and to promote social progress and better standards of life.⁵⁵ However, the role of ‘We the Peoples’ was not to establish the United Nations organisation (UN) itself, as the Preamble expressly provides that:

to accomplish these aims, accordingly our respective governments, through representatives assembled in the city of San Francisco... have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

The UN as an international organisation was established by and for states. Yet its aims were drafted to be the aims of ‘We the Peoples’. It was the governments of these peoples that were instructed by the Preamble to accomplish these aims. As the UN Secretary-General, KOFI ANNAN, wrote to the Millennium Summit of the UN in 2000:

Documents] vol VI 19 Doc 1006 I/6 15 June 1945, p. 8 (Virginia Gildersleeve (US representative)).

- 55 N. WHITE, *The United Nations System: Toward International Justice* (Lynne Rienner, 2002), states that these values are ‘the *raison d’être* of the entire [UN] system’ (p.47). One of the principal drafters of the Charter expressed the aims broadly: ‘Let us, in this new Charter of humanity, give expression to this faith in us, and thus proclaim to the world and posterity, that... behind the mortal struggle, was the moral struggle, was the vision of the ideal, the faith in justice and the resolve to vindicate the fundamental rights of man, and on that basis to found a better, freer world for the future’: J. SMUTS, address to Plenary Session at San Francisco, UNICO Documents vol 1 425, quoted in C. HEYNS, ‘The Preamble of the United Nations Charter: The Contribution of Jan SMUTS’ 7 *African Journal of International and Comparative Law* (1995) 329, 337. JAN SMUTS key role is confirmed by all the major writing on the drafting of the Preamble, for example: R. RUSSELL and J. MUTHER, *A History of the United Nations Charter* (Brownings Institute, 1958) p.911-918; B. SIMMA (ed.) *The Charter of the United Nations* (OUP, 1995) p. 12 and B. SIMPSON, *Human Rights and the End of Empire* (OUP, 2001) p. 263. It is one of history’s ironies that SMUTS, who was at that time Prime Minister of a racially discriminatory government in South Africa, failed to apply these values to his own state. Indeed, at the very first meeting of the UN General Assembly SMUTS was criticised by other states for his government’s policies. NELSON MANDELA later said, SMUTS ‘promot[ed] freedom around the world... [but] repressed freedom at home’ (N. MANDELA, *Long Walk to Freedom* (Little Brown, 1994) 42.

For even though the United Nations is an organization of states, the Charter is written in the name of ‘We the Peoples’.... Ultimately, then, the United Nations exists for, and must serve, the needs and hopes of peoples everywhere.⁵⁶

In other words, the United Nations system was meant to be a system in which states were responsive to the needs of people and where people—as individuals and as part of groups—had a separate and legitimate role as part of the international community.

Thus it can be shown that conceptually both sovereignty and the international community are relational and that the relevant relationships occur through interactions with other participants in international affairs. Both sovereignty and the international community are in a relationship with each other. As MARTTI KOSKENNIEMI expresses it:

[T]he state and the international are not only opposite but depend on each other, drawing their life blood from the combination of mutual desire and revulsion that marks their tormented relationship.⁵⁷

The relationship is not only tormented, it is symbiotic. Rather than being binary opposites or the same, sovereignty and the international community must be understood in relation to each other and need to interact closely with each other as their relationship develops and changes within the international legal system. This symbiotic relationship changes as the participants in the relationship change. Therefore, it is now necessary to clarify who are the participants in the international community.

56 K. ANNAN, “*We the Peoples*”: *The Role of the United Nations in the 21st Century* (UN, 2000) Part I.

57 M. KOSKENNIEMI, ‘Comments’ in M. BYERS and G. NOLTE, *United States Hegemony and the Foundations of International Law* (CUP, 2003) p. 92.

PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM

Under the dominant legal doctrine, states are the only legal participants in the international legal system. As seen above, this doctrine stated that

‘[s]ince the Law of Nations is a law between states only and exclusively, states only and exclusively are subjects of the Law of Nations’.⁵⁸

As states are the only ‘subjects’ then non-states are seen as purely “objects” of this system, either in the same sense as territory or rivers are objects of the system because there are (state created) legal rules about them, or in the sense that they are beneficiaries under the system, so that treaties on, for example, diplomatic persons or commerce, are seen as only indirectly benefiting individuals.⁵⁹ The dominant legal doctrine determined that the decision as to who was a ‘subject’ or ‘object’ of the international legal system was one for states alone to make. States decided that they were the only ‘subjects’ of international law, although this was later qualified by states to include collectives of states.⁶⁰ This division into ‘subject’ and ‘object’ led to the interpretation that only a subject of international law could be involved in international law-making (i.e. the creation, development and enforcement of international law) and hence that only states could make international law.⁶¹

58 L. OPPENHEIM, *International Law* vol 1 (Longmans 1905) p. 341.

59 For a further exposition see R. MCCORQUODALE, ‘The Individual in International Law’ in M. EVANS (ed) *International Law* (OUP, 2003).

60 See *Reparations for Injuries Opinion*, International Court of Justice Reports 1949 174, 178-179 and also *Legality of the Threat or Use of Nuclear Weapons Opinion (WHO)* International Court of Justice Reports 1996 66.

61 Hence it was considered that the actions of states alone, by their practice and opinions, constituted customary international law; see, for example, M. AKEHURST, ‘Custom as a Source of International Law’ 47 *British Year Book of International Law* (1974-5) 53.

Yet this binary opposition between ‘subject’ and ‘object’ is a created fiction of the dominant legal doctrine. It was created to serve its own conceptual purposes and is deeply flawed. ROSALYN HIGGINS exposed its fiction when she noted that:

[T]he whole notion of ‘subjects’ and ‘objects’ has no credible reality, and, in my view, no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint.⁶²

The ‘subject’/‘object’ dichotomy privileges and reifies the voices of states because all potential participants are compared to states and states alone decide the outcome. It is an exclusionary fiction, which silences alternative voices.⁶³ For example, even the process of recognition of entities as states (or not) is, under the dominant legal doctrine, determined solely by states, whereby existing states seek to ensure that any new states resemble themselves as far as possible. It is a process

[R]eminiscent of a men’s club... [where] new claimants [have] access to the exclusive privileges of statehood provided they do not overstep the accepted limits [such as use of force or being overtly racist].⁶⁴

Thus recognition is essentially a group-identification relationship process, where the new entity is identified solely with the existing models of states. This state-based approach also enables the dominant legal doctrine to ignore reality.⁶⁵ Thus the dominant legal doctrine

62 R. HIGGINS, *Problems and Process: International Law and How We Use It* (OUP, 1994), p.49.

63 See, for example, M. KOSKENNIEMI, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers Publishing Cooperative, 1989) and H. CHARLESWORTH and C. CHINKIN, *The Boundaries of International Law: A Feminist Analysis* (Manchester Univ Press, 2000).

64 H. CHARLESWORTH and C. CHINKIN, *The Boundaries of International Law: A Feminist Analysis* (Manchester Univ Press, 2000), p.142.

65 Indeed, Hersch LAUTERPACHT noted, over half a century ago (and while using the same dichotomy himself), the lack of reality of the dominant legal doctrine’s views in

does not enable the reality of international actions to be taken into account and given acknowledgement. Instead it is fixed to a prior, state-based, determination as to what actions, and by which actors, will be taken into account and by which actors.⁶⁶

An alternative approach to this subject/object dichotomy is to examine the ‘participation’ in the international legal system. Ideas of participation have been propounded by a number of eminent scholars, for example, it was used as a part of the non-industrialised states claims for a New International Economic Order,⁶⁷ by the New Haven School⁶⁸ and in more recent critical legal approaches, with KAREN KNOP noting that ‘in addition to actual involvement in the determination of meaning, participation refers to other means of building in consideration of [other’s] perspectives’.⁶⁹ Indeed, the notion of participation is a valuable framework to explore the reality of activity in the international legal system without the polarised expectations of the dominant legal doctrine.

this area when he wrote ‘in each particular case the question whether a person or a body is a subject of international law must be answered in a pragmatic matter by reference to actual experience and to the reason of the law as distinguished from a pre-conceived notion as to who can be subjects of international law’: H. LAUTERPACHT, ‘The Subjects of the Law of Nations’ (1947) 63 *Law Quarterly Review* 438, 444.

- 66 See, for example, J. KLABBERS, ‘Presumptive Personality: The European Union in International Law’ in M. KOSKENNIEMI, (ed.) *International Law Aspects of the European Union* (Kluwer, 1998).
- 67 As expressed, for example, in the Declaration on the Right to Development 1986, UN General Assembly Resolution 41/128, Article 1.1. Ideas of participation (usually meaning democracy) are also used in some liberal concepts of the international legal system, though for a different purpose – see for example, T. FRANCK, ‘The Emerging Right to Democratic Governance’ 86 *American JIL* (1992) 46 and G. FOX, ‘The Right to Political Participation in International Law’ 17 *Yale JIL* 539 (1992).
- 68 See, for example, R. HIGGINS, *Problems and Process: International Law and How We Use It* (OUP, 1994).
- 69 K. KNOP, *Diversity and Self-Determination in International Law* (CUP, 2002), p. 4. PHILIP ALLOTT adopts an even broader view in which he sees international society not as being comprised of states but as arising from the ‘self-creating’ of all human beings: P. ALLOTT, ‘Reconstituting Humanity – New International Law’ 3 *European JIL* (1992) 219.

An approach that examines the reality of participation is also consistent with the view of the International Court of Justice (ICJ), where it stated that

‘[t]hroughout its history, the development of international law has been influenced by the requirements of international life.’⁷⁰

These ‘requirements of international law’ change over time, for example, from dealing with state colonialism in the past to the activities of transnational corporations today. Participation may be extensive and over a wide range of international matters or it can be limited to a few issues. Participation will depend on the particular area of the international legal system concerned and the activity and involvement of entities in that area, rather than on the determination by states as to whether any non-states are “subjects” for a specific purpose. Indeed,

The topics of minimum standard of treatment of aliens, requirements as to the conduct of hostilities and human rights, are not simply exceptions conceded by historical chance within a system that operates as between states. Rather, they are simply part and parcel of the fabric of international law, representing the claims that are naturally made by individual participants in contradistinction to state-participants.⁷¹

Acknowledging the reality of these different degrees of participation in the international legal system is consistent with the position in most national legal systems, where different areas of law, such as company law and family law, will involve different participants. Thus there could be many participants in the international legal system, in the sense that there are many different ‘entities’ or actors, from states and international organisations to transnational

70 *Reparations for Injuries Opinion*, International Court of Justice Reports 1949 174, 178.

71 R. HIGGINS, *Problems and Process: International Law and How We Use It* (OUP, 1994) p. 50.

corporations and individuals, who might engage in international activity.

This broader approach to considering the activities of state and non-states —without the limiting bilateral oppositional approach of the dominant legal doctrine— is also consistent with the understanding of the relational aspect of both the international community and sovereignty. Those participating in the international community will change depending on the nature of the issue involved (for example, landmines and climate change) and the requirements of international life (for example, regulating world trade). Similarly, as the international community changes and the areas governed by international law develop, then so will participation in the international legal system. It cannot remain, as the dominant legal doctrine insists, static. This is perceptively noted by Judge CANÇADO TRINDADE, President of the Inter-American Court of Human Rights:

The doctrinal trend which still insists in denying to individuals the condition of subjects of international law is... unsustainable [and] that conception appears contaminated by an ominous ideological dogmatism, which had as the main consequence to alienate the individual from the international legal order. It is surprising —if not astonishing— besides regrettable, to see that conception repeated mechanically and *ad nauseam* by a part of the doctrine, apparently trying to make believe that the intermediary of the state, between the individuals and the international legal order, would be something inevitable and permanent. Nothing could be more fallacious.⁷²

Indeed, this participation in the international legal system cannot be solely determined by states (or by others, including international legal writers) deciding who is a ‘subject’ or an ‘object’ of international law. It is determined by the relationships between states and other participants. Accordingly,

72 *Advisory Opinion on the Legal Status and Human Rights of the Child 11 International Human Rights Reports* (2004) 510, Concurring Opinion of Judge CANÇADO TRINDADE, at paras 26-27.

[W]e should adjust our intellectual framework to a multi-layered reality consisting of a variety of authoritative structures... [in which] what matters is not the formal status of a participant... but its actual or preferable exercise of functions.⁷³

Therefore, it is necessary to explore briefly some of the actual activities of a few key non-state actors —non-governmental organisations, transnational corporations and individuals— to see the extent to which there is participation by them in the international community. After this, the effect of these non-state actors on aspects of international law-making will be considered.

NON-STATE ACTORS IN THE INTERNATIONAL COMMUNITY

NON-GOVERNMENTAL ORGANISATIONS

Non-governmental organisations (NGOs)⁷⁴ have had important roles in international law for a very long time, as seen in the activities of the Anti-Slavery Society being crucial to the abolition of slavery and the role of women's groups in the creation of the League of Nations and the UN.⁷⁵ In more recent times NGOs have assisted in the drafting of treaties as diverse as the Convention on the Rights of the Child⁷⁶ and the Convention on the Conservation of Migratory

73 C. SCHREUER 'The Waning of the Sovereign State: Towards a New Paradigm for International Law' 4 *European JIL* (1993) 447, 453.

74 NGOs are often considered to be part of 'international civil society': see H. CULLEN and K. MORROW, 'International Civil Society in International Law: The Growth of NGO Participation' 1 *Non-state Actors in International Law* (2001) 7 and M. EDWARDS, *Civil Society* (Polity, 2004). Any definition of NGOs or civil society or other similar terms are beyond the scope of this paper.

75 See A. BIANCHI, 'Globalization of Human Rights: The Role of Non-State Actors' in G. TEUBNER (ed) *Global Law Without a State* (Dartmouth, 1997).

76 The NGO's role is acknowledged in the *travaux préparatoires* of the Convention on the Rights of the Child: S. DETRICK, (ed.), *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* (NIJHOFF, 1992).

Species of Wild Animals 1979.⁷⁷ They were crucial in organising a systematic campaign towards the adoption the Convention Against Torture,⁷⁸ the creation of the International Criminal Court⁷⁹ and the banning of landmines,⁸⁰ as well as fostering proposals for the establishment of a UN High Commissioner for Human Rights.⁸¹ For issues relating to labour conditions, trade unions and employer organisations have played a significant role, as they are institutionally part of the International Labour Organisation, which has adopted many treaties and other international documents.⁸²

NGOs often participate in international fora, from the UN itself to its agencies, and as a distinct part of international conferences. Indeed, NGOs can be ‘sought-after participants in a political process... that allow NGOs to move from the corridors to the sessions’.⁸³ Procedural aspects can be very important, as shown when the UN Working Group created to formulate a UN Declaration on the Rights of Indigenous Peoples was comprised of many representatives of indigenous peoples, who participated fully in the debate.⁸⁴

77 M. BOWMAN, ‘International Treaties and The Global Protection of Birds’ 11 *Journal of Environmental Law* (1999) 87-119 and 281-300.

78 See T. VAN BOVEN, ‘The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite for Democracy’ 20 *California Western ILJ* 207 (1990).

79 See W. PACE and M. THIEROFF, ‘Participation of Non-Governmental Organisations’ in R. LEE (ed.), *The International Criminal Court* (Kluwer, 1999).

80 See K. ANDERSON, ‘The Ottawa Convention Banning Landmines, The Role of International Non-Governmental Organisations and the Idea of International Civil Society’ 11 *European JIL* (2000) 91.

81 See A. CLAPHAM, ‘Creating the High Commissioner for Human Rights: The Outside Story’, 5 *European JIL* (1994) 556.

82 See www.ilo.org.

83 K. KNOP, ‘Re/statements: Feminism and State Sovereignty in International Law’ 3 *Transnational and Contemporary Legal Problems* 293 (1993) p. 310.

84 See M. C. LÂM, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Transnational Publishers, 2000).

NGOs can be essential to the continuing operation of some international (inter-state) bodies, as the African Commission on Human Rights has acknowledged, due to their provision of information, people and resources.⁸⁵ In the area of international environmental law, the role of NGOs has been particularly crucial, for example, in relation to the protection of birds, where it has been shown that:

[T]he role of [NGOs] has proved to be of vital importance. Not only have they regularly pressed for the adoption of agreements... they have frequently shown a willingness to undertake much of the preliminary drafting work necessary to make such projects a reality. Insofar as these agreements, once concluded, have required to be sustained by technical resources and expertise, NGOs have been prominent in the provision of such support... [In relation to one treaty,] one such [NGO] has also provided the administrative infrastructure for the establishment of a secretariat.⁸⁶

This extensive role has been recognised with NGOs being parties, with states, to Memoranda of Understanding concerning conservation measures about particular species, with responsibilities being placed on both states and NGOs under these Memoranda.⁸⁷ NGOs also assist the bringing of international claims, or bring claims themselves, and they provide information to international bodies that will often not be provided by states. These roles of NGOs are accepted now in practice by states,⁸⁸ by the rules of procedure of

85 See A. MOTALA, 'Non-Governmental Organisations in the African System' in M. EVANS and R. MURRAY (eds.) *The African Charter on Human and Peoples' Rights* (CUP, 2002).

86 M. BOWMAN, 'International Treaties and The Global Protection of Birds' 11 *Journal of Environmental Law* (1999) 87-119 and 281-300, p. 298.

87 *Ibid.* See also H. CULLEN and K. MORROW, 'International Civil Society in International Law: The Growth of NGO Participation' 1 *Non-State Actors in International Law* (2001) 7.

88 See, for example, European Convention on the Recognition of the Legal Personality of International NGOs 1991, the UN Declaration on the Rights of Human Rights Defenders 1998 and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc A/RES/53/144.

the international bodies,⁸⁹ and are even specifically referred to in some treaties, such as Article 45 of the Convention on the Rights of the Child.

TRANSNATIONAL CORPORATIONS

International economic law has seen the significant involvement of transnational corporations (TNCs)⁹⁰ in its processes and procedures. TNCs (and other non-state actors) can now bring claims to ad hoc arbitration bodies and inter-state bodies, both treaty- and non-treaty based.⁹¹ Each of these mechanisms allows TNCs to bring claims against a state to an international body, which makes a decision, usually legally binding and enforceable, in relation to the claim.⁹² In addition, many of the claims brought by states to international economic legal bodies, such as under the dispute settlement procedures of the World Trade Organization, are initiated, sponsored and prosecuted in effect by the TNCs that are affected by the trade action that is the subject of the claim.⁹³

89 See, for example, Protocol 11 of the European Convention on Human Rights and Rules of Procedure of the Inter-American Court of Human Rights, approved by the Court at its 49th session, 16-25/11/2000.

90 Any definition of TNCs, multinational enterprises or other similar terms are beyond the scope of this paper.

91 For example, claims can be made to the Iran-US Claims Tribunal, the UN Compensation Commission and the European Court of Justice, and international legal access is available under the International Chamber of Commerce and the International Centre for the Settlement of Investment Disputes, and through the model law of the UN Commission on International Trade Law.

92 See A. REDFERN and M. HUNTER, *International Commercial Arbitration* (3rd ed, Sweet & Maxwell, 1999). See also, in relation to public procurement, S. ARROWSMITH, 'The EC Procurement Directive, National Procurement Policies and Better Governance: The Case for a New Approach' (2002) 27 *European Law Review* 3 and S. ARROWSMITH, 'Review of the GPA: The Role and Development of the Plurilateral Agreement after Doha' (2003) 6 *Journal of International Economic Law* (forthcoming).

93 See S. CROLEY and J. JACKSON, 'WTO Dispute Procedures, Standard of Review and Deference to National Governments' 90 *American JIL* 193 (1996) and S. CHARNOVITZ,

Indeed, the drafting of key international economic treaties is often done at either the instigation of, or with the direct involvement of, TNCs, as seen in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).⁹⁴ This pressure from TNCs for more control over international activity in the economic area will increase with globalisation.⁹⁵ One further example of the recognition of the participation of TNCs on the international plane has been the development of a set of international human rights obligations of TNCs by the UN Sub-Committee on the Promotion and Protection of Human Rights.⁹⁶

INDIVIDUALS

Individuals have been involved in international actions as victims, claimants, defendants and experts, amongst other roles.⁹⁷ One major area of the international legal system where this can be seen is international human rights law. In this area, states have agreed by treaty to enable individuals to bring claims against states within the international legal system. These rights encompass economic, social and cultural rights, as well as civil and political rights, and group rights as well as individual rights. Incredibly, every single state in the world has ratified at least one human rights treaty that imposes legal

'Economic and Social Actors in the World Trade Organization' 7 *ILSA Journal of International and Comparative Law* 259 (2001).

94 Agreement on Trade-Related Aspects of Intellectual Property Rights 33 *International Legal Materials* (1994) 81.

95 See, for example, S. JOSEPH, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 46 *Netherlands International Law Review* 171.

96 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, United Nations Sub-Commission on the Promotion and Protection of Human Rights, August 2003, E/CN.4/Sub2/2003/38/Rev.1

97 For further discussion in this area see R. MCCORQUODALE, 'The Individual in International Law' in M. EVANS (ed.) *International Law* (OUP, 2003).

obligations on them.⁹⁸ There is now an institutional structure, including supervisory mechanisms to check compliance with the legal obligations on states to respect, protect and fulfill human rights.⁹⁹ Decisions are made, or ‘views’ given, by international bodies in which states are found to be in violation of their human rights obligations and remedies are indicated,¹⁰⁰ although the degree of compliance varies as does the nature of the obligations. In addition, procedures developed by some international organisations, such as the International Labour Organisation and the World Bank, allow complaints by individuals.¹⁰¹ Claims can even be brought by people against a state in whose jurisdiction they happen to be, even if temporarily, irrespective of whether they are a national of that state,¹⁰² and even if that state’s jurisdiction over the person is unlawful.¹⁰³

98 See www.ohchr.org.

99 See, for example, the analysis by the UN Committee on Economic, Social and Cultural Rights, General Comment No. 13 on the Right to Education, where the Committee states (at para 46): ‘The right to education, like all human rights, imposes three types or levels of obligations on states parties: the obligations to respect, protect and fulfill. In turn, the obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide’.

100 See D. SHELTON, *Remedies in International Human Rights Law* (OUP, 1999).

101 See P. K. MENON, ‘The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine’ 1 *Journal of Transnational Law and Policy* 151 (1992) and A. ORAKHELASHVILI, ‘The Position of the Individual in International Law’ 31 *California Western ILJ* (2001) 241. The World Bank has created an Inspection Panel, which allows those who believe that they will be affected detrimentally by a project in a state that is to be funded by the World Bank, to ask the Panel to investigate their claim, even if the state is opposed to such investigation: World Bank Resolution No. 93-6, 1993. A similar system is operated by the Asian Development Bank and the Inter-American Development Bank.

102 For example, *Soering v. United Kingdom*, European Court of Human Rights, (1989) 11 *EHRR* 439.

103 For example, *Loizidou v. Turkey* European Court of Human Rights, (1995) 20 *EHRR* 99.

Responsibility for violations of international law is not limited to responsibility by states but includes responsibility by individuals. Some actions, such as slavery and piracy, have been considered violations of international law, for which people were directly responsible, for centuries.¹⁰⁴ Other actions by individuals, even when acting as part of the organs of the state and under orders from the state, are now accepted as leading to an independent responsibility of individuals within the international legal system.¹⁰⁵ This individual responsibility is occasionally enforced in national courts¹⁰⁶ and has begun to be enforced through international criminal tribunals and courts.¹⁰⁷

In addition, individuals play a distinct and important role in the clarification and interpretation of international law. Individuals, in their personal capacity, and not as representatives of states, sit on international courts, tribunals and other international dispute settlement bodies.¹⁰⁸ Their influence can be seen in, for example, the inclusion of persecutions on the basis of gender being considered as crimes against humanity,¹⁰⁹ the drafting of guidelines on human rights¹¹⁰ and the drafting of

104 The justification for this was that “the pirate and the slave trader... [are each] *hostis humani generis*, an enemy of all mankind’ (*Filartiga v. Pena-Irala* 630 F.2d 876 (1980), Second Circuit of the US Court of Appeals). See further, S. RATNER and J. ABRAMS, *Accountability for Human Rights Atrocities in International Law*, (2nd ed, OUP, 2001).

105 *Nuremberg Judgment*, 22 Trial of the Major War Criminals before the International Military Tribunal 466 (1948).

106 For example, *Attorney-General of the Government of Israel v. Eichmann* 36 ILR (1961) 5.

107 See, for example, D. VAN ZYL SMIT, ‘Punishment and Human Rights in International Criminal Law’ 2 *Human Rights Law Review* (2002) 1 and W. SCHABAS, *Introduction to the International Criminal Court* (CUP, 2001).

108 See I. BROWNIE, *Principles of Public International Law* (5th ed., OUP, 1998), pp. 24-25.

109 See A. BIANCHI, ‘Globalization of Human Rights: The Role of Non-State Actors’ in G. TEUBNER (ed.) *Global Law Without a State* (Dartmouth, 1997), p. 201.

110 Jurists have also been very important in the drafting of guidelines on human rights, such as the Siracusa Principles on the Limitation and Derogation Provisions in the

important clarifications on international law in the various Articles of the International Law Commission.¹¹¹

SOVEREIGNTY AND THE INTERNATIONAL COMMUNITY

From this brief overview, it is clear that some NGOs, TNCs and individuals do participate in the international community. Their participation is varied, differs from one area of international law to another and can include engagement in the substance and/or the procedures within the international legal system. There are some areas of the international legal system where non-state actors have participated more than in other areas, but even in areas that seem most resistant to participation by non-state actors, such as the laws on the use of force, non-state actors are present. For example, the International Committee of the Red Cross (ICRC) has been crucial in the creation, development and enforcement of international humanitarian law, with the Geneva Conventions 1949 and its 1977 Protocols, most aspects of which are now customary international law,¹¹² providing that states can entrust the fulfillment of their duties to the ICRC,¹¹³ they must co-operate with the ICRC during conflicts,¹¹⁴ and the ICRC must be consulted before any proposed amendment by a state to the Protocols can be acted upon.¹¹⁵ In addition, the activities of

International Covenant on Civil and Political Rights, 7 *Human Rights Quarterly* (1985) 1, and the Limburg Principles on the Implementation of The International Covenant on Economic, Social and Cultural Rights, 9 *Human Rights Quarterly* 121 (1987).

111 See, for example, the ILC Draft Articles on State Responsibility discussed above.

112 The Colombian Constitutional Court has applied international humanitarian law to the internal conflict in that state and declared that Protocol II of the Geneva Conventions represents *jus cogens*: Corte Constitucional de Colombia, C-225/95, as quoted in J. ESQUIROL, 'Negotiating Colombia's Peace Process: Disagreements of International Law' 13 *Leiden JIL* (2000) 495, 525-6.

113 Article 10 Geneva Conventions 1949.

114 Article 81 Geneva Conventions 1949.

115 Article 97 Protocol I and Article 24 Protocol II.

non-state actors in their actions against states and against each other can change international law. There is a persuasive argument that non-state actors, including those on Colombia, should be bound by international humanitarian law.¹¹⁶ This can be seen in the development of international law so that terrorist activities by themselves are a breach of international law without a need to link these non-state activities to a state participant.¹¹⁷ So certain actions by non-state actors (being terrorist actions) are now considered to be a breach of international law and, it must be assumed, therefore give rise to international obligations by those non-state actors.¹¹⁸

Of course, these non-state actors do not all share the same aims or values across the international community. For example, NGOs can act in opposing ways due to their different objectives, such as during the Beijing Conference on Women,¹¹⁹ and they can operate as a 'largely unregulated free-for-all',¹²⁰ being often partial in their

116 See, for example, Centre for Humanitarian Dialogue, *Humanitarian Engagement with Armed Groups: The Colombian Paramilitaries* (Geneva, 2003).

117 See, for example, Resolution 1373 (2001) 28 September 2001, in particular para 5, which 'Declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.'

118 A similar approach of placing direct international legal responsibilities on non-state actors has been advocated in relation to international human rights law, see, for example, A. CLAPHAM, *Human Rights in the Private Sphere* (OUP, 1993). See also D. FRIEDMANN and D. BARAK-EREZ (eds.) *Human Rights in Private Law* (Hart, 2001) and note J. RAZ, 'Legal Rights' (1984) 4 *Oxford Journal of Legal Studies* 1: 'there is no closed list of duties which correspond to the right... A change of circumstances may lead to the creation of new duties based on the old right'. For further discussion see R. MCCORQUODALE and R. LA FORGIA, 'Taking off the Blindfolds: Torture by Non-State Actors' 1 *Human Rights Law Review* (2001) 189.

119 See D. OTTO, 'A Post-Beijing Reflection on the Limitations and Potential of Human Rights Discourse for Women' in K. ASKIN and D. KOENIG (eds.), *Women and International Human Rights Law* (vol 1, 1999).

120 B. KINGSBURY, 'First Amendment Liberalism as a Global Legal Architecture: Ascriptive Groups and the problems of the Liberal NGO Model of International Civil Society' 3 *Chicago JIL* 183 (2002), p. 193.

interests, with, for example, few NGOs in some areas of international concern, such as poverty.¹²¹ Many non-state actors are criticised for their lack of legitimacy, few democratic processes and limited representativeness.¹²² They can also reflect the hierarchies and political agendas within states,¹²³ and can be captive to states and to power.¹²⁴

Yet the decision to participate in the international community is made by the particular non-state actor itself and is not dictated by states' views, though it may be prompted by state action (e.g. to seek investment in a national industry) or state inaction (e.g. to fill the need for a secretariat of a treaty body). The degree of participation by a non-state actor will vary, often depending on its own resources and on the attitude of other participants, including states, but the participation is not determined or mediated solely by the states. Thus the reality today is that the participants in the international community are not limited to states.

NEW INTERNATIONAL LAW-MAKING

The above conclusion is unsurprising to any observer of international affairs and yet it is a conclusion that cannot fit with the fictions of the dominant legal doctrine. For that doctrine ignores any participation or relationships in the international community other than those by or between states. It justifies this by arguing that it is only those who can make international law that actually matter within the international

121 See C. JOCHNICK, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' 21 *Human Rights Quarterly* (1999) 56.

122 See H. CULLEN and K. MORROW, 'International Civil Society in International Law: The Growth of NGO Participation' 1 *Non-State Actors in International Law* (2001) 7.

123 See H. CHARLESWORTH and C. CHINKIN, *The Boundaries of International Law: A Feminist Analysis* (Manchester Univ Press, 2000), especially pp. 169.

124 See M. KOSKENNIEMI, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2001).

legal system.¹²⁵ In all instances, they would argue, any ability of non-state actors to bring international claims, participate in international fora, and assist in the drafting or enforcement of international law, is entirely dependent on state consent.¹²⁶ For example, any international claims by non-state actors could only be brought by those actors if the state has ratified the relevant treaty or treaty provision.¹²⁷ The dominant legal doctrine also relies on Article 38 of the Statute of the ICJ, which, they argue, sets out state practice and state *opinio juris* (which creates customary international law) and state treaty-making as the pre-eminent sources of international law.

However, the evidence does not support such a narrow conclusion. Whilst it is beyond the scope of this paper to deal with all the issues in detail, a few key issues will be considered here. Whilst the ratification of treaties by states is vital for international law-making, the terms of the treaties that are eventually ratified are often drafted and negotiated by non-state entities, as was seen above. The participation of NGOs in the treaty process itself also ensures greater transparency and accountability of states for their negotiating positions, especially as accountability will usually be increased with greater participation within a community.¹²⁸ Thus the relationships between states and non-state actors, which are part of the social relations inherent in international law-making, directly affects the

125 It has been argued that the dominant doctrine is used to argue against including non-state actors within the framework of international law, and so restrict possible peace processes; see J. ESQUIROL, 'Negotiating Colombia's Peace Process: Disagreements of International Law' 13 *Leiden JIL* (2000) 495.

126 In *The Lotus Case* (1932) PCIJ, Series A, No. 10, the Permanent Court of International Justice held that 'the rules of law binding upon states therefore emanate from their own free will'.

127 See D. SHELTON, *Remedies in International Human Rights Law* (OUP, 1999). In many instances any international action could, it is argued by the dominant legal doctrine, only occur if there has first been an exhaustion of domestic remedies in the relevant state.

128 See, for example, the impact of NGOs on states during the drafting of the Climate Change Convention: R. ECKERSLEY, 'Soft Law, Hard Politics, and the Climate Change Treaty' in C. REUS-SMIT (ed.) *The Politics of International Law* (CUP, 2004) 80.

terms of the law made. So the law made is directly affected by non-state actors. To look solely at the end process (i.e. the treaty)—which is what the dominant legal doctrine does—without any examination of the process by which that law is made, ignores the discursive context, power structures and interests involved in international law-making.¹²⁹

Even the process of ratification is often not one undertaken freely by states. For example, in many instances a state, particularly a non-industrialised state, has little ability to resist a powerful TNC's demand that a state ratify a treaty that will prevent that TNC being subject to that state's national laws but, instead, to make international economic law applicable. This is because the economic power of these TNCs is far greater than that of many states.¹³⁰ To all intents and purposes, TNCs now have an independent capacity to ensure that they can bring an international claim in some areas of international economic law. Thus the sovereignty relationship between many states and TNCs is one of relatively equal participants in this area of law or, as some argue, it is now unequal as TNCs have become the principal participants for this (decentralised) international law-making.¹³¹ Indeed, the reality of this international law-making through the power of TNCs—which is almost a form of privatised public international law—is now such that there is a discernible effect on non-industrialised states, as BHUPINDER CHIMNI warns:

[The transnational ruling elite are] seeking to create a global system of governance suited to the needs of transnational capital but to the disadvantage of third world peoples. The entire ongoing process of redefinition of state sovereignty is being justified through the ideological apparatus of Northern states and international institutions it controls... [T]he

129 See J. HABERMAS, *Between Facts and Norms* (Polity, 1996).

130 See R. MCCORQUODALE, 'Human Rights and Global Business' in S. BOTTOMLEY and D. KINLEY (eds.), *Commercial Law and Human Rights* (Ashgate, 2002).

131 See, for example, G. TEUBNER, 'The King's Many Bodies: The Self-Destruction of Law's Hierarchy' 31 *Law and Society Review* (1997) 763 and the contributors in G. TEUBNER (ed.) *Global Law Without a State* (Dartmouth, 1997).

changing constellation of power, knowledge and international law needs to be urgently grasped if the third world peoples are to resist recolonisation.¹³²

Even industrialised states may not have full freedom in relation to ratification of treaties. For example, the amendment of the European Convention on Human Rights (ECHR) by the adoption of Protocol 11 (after considerable pressure from NGOs) makes the right of individual petition no longer optional for states parties to the ECHR. As ratification of the ECHR is a requirement before a state can be party to the European Union,¹³³ all European states are now, in practice, no longer able to prevent individual claims under that regional international human rights system. This effectively gives about 800 million people the right to bring human rights claims under the ECHR.¹³⁴ Whilst states can withdraw from these treaties, the practical consequences of withdrawal in terms of economic, political and social aspects, including pressures from non-state actors, are now such that a European state's ability to do this has effectively disappeared.

States may even be held to obligations that they have expressly rejected if their reservations to a treaty are determined by an international dispute settlement body (of a treaty to which they are a party) to be contrary to the object and purpose of a treaty.¹³⁵ Similarly, states can be found in breach of obligations never directly accepted by them, such as where 'a consistent pattern of gross and

132 B. CHIMNI, 'Third World Approaches to International Law: A Manifesto' in A. ANGHIE, B. CHIMNI, K. MICKELSON and O. OKAFOR (eds.), *The Third World and International Order* (M. NIHOFF, 2003), 47 at p. 60.

133 Treaty on European Union, Article 6. See also M. NOWAK, 'Human Rights "Conditionality" in Relation to Entry to, and Full Participation in, the EU' in P. ALSTON (ed.) *The EU and Human Rights* (OUP, 1999).

134 Committee of Ministers, Report of the Evaluation Group on the European Court of Human Rights, 22 *Human Rights Law Journal* (2001) 308.

135 See UN Human Rights Committee General Comment No. 24, 2 *International Human Rights Reports* (1995) 10.

reliably attested violations of human rights' is found,¹³⁶ they can be considered to be bound to obligations that are directly contrary to that state's practice,¹³⁷ and a successor state may not be able to rely on the 'clean-slate' doctrine in relation to some treaties but would be automatically bound by them.¹³⁸ So states no longer have complete control over the negotiation, drafting, ratification, limitations and application of treaties. In fact, the entire process of treaty making is where a significant amount of the important conceptual discourse about the content, values and direction of the international legal system occurs between state and non-state actors.

The other 'source' of international law-making, being customary international law, has been considered by the dominant legal doctrine to be the preserve of states, by their practice and opinions. Yet in the processes of states determining and changing their practice and opinions, the role of non-state actors is important, particularly in those states where civil society is able to express itself freely. Examples are the development of international law prohibiting slavery and anti-personnel land-mines¹³⁹ and creating the right of self-determination, in all of which international law has been largely driven by the practice and opinions of non-state actors.¹⁴⁰ Indeed, it

136 See, for example, UN Economic and Social Council Resolutions 1235 (XLII), 1503 (XLVII) and 2000/3.

137 For example, in *Namibia Opinion* (Legal Consequences for states of the Continued Presence of South Africa in Namibia), International Court of Justice Reports 1971 22, 56-57, the ICJ considered that South Africa was bound by international obligations in relation to racial discrimination despite its clearly persistent contrary practice.

138 Judge WEERAMANTRY argued this (concerning the Genocide Convention) in *Application of the Genocide Convention (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Indication of Provisional Measures)* ICJ Rep 1993 325.

139 See R. PRICE, 'Emerging Customary Norms and Anti-Personnel Landmines' in C. REUS-SMIT (ed.) *The Politics of International Law* (CUP, 2004) 106.

140 New states have arisen despite the expressed wish of some very powerful states that this should not happen, such as in the early stages of the break-up of the former Yugoslavia and states must also now accept that self-determination applies to groups within states, such as the Quebecois: *Reference Re Secession of Quebec*, Canadian Supreme Court, 37 *ILM* 1340 (1998).

could be considered that the right of self-determination of peoples has changed the international legal system significantly, as any dealing with territory by states requires consideration about the rights of the people on the territory, whether or not the particular state involved wishes for this to be the case.¹⁴¹ Similarly, there is individual responsibility under customary international law for piracy and genocide, and no one state now has the ability to limit this responsibility, even if it may try to limit any particular means of enforcement.¹⁴² The individual is responsible without any need to link her/him with the state and so ‘in this context, the participation of the state becomes secondary, and generally, peripheral.’¹⁴³ The real practice and *opinio juris* is determined by the non-state actors.

Even an acceptance that non-state actors do influence state practices and opinions is conceptually flawed as it is still analysing international law-making through the blurred prism of the dominant legal doctrine. To consider only state practice and state opinions—whether or not these are influenced by non-state actors—to determine customary international law as a ‘source’ of international law is a fiction created by the dominant legal doctrine. Article 38(b) of the Statute of the ICJ refers to ‘international custom, as evidence of a general practice accepted as law’. It neither mentions the word “source” nor the word “state”. In relation to the former, as the Article itself is expressly directed to the ICJ for its use in its interpretation of disputes before it, and as contentious actions can only be brought to the ICJ by states, an interpretation of “sources” of international law by the dominant legal doctrine to include only actions by states across the entire international legal system is a deliberate exclusive limitation on the foundations of the international legal system. In relation to

141 See R. McCORQUODALE, ‘Self-Determination: A Human Rights Approach’ 43 *International and Comparative Law Quarterly* (1994) 857.

142 The US government has tried to limit the enforcement of some individual responsibility by the International Criminal Court: see, for example, S. MURPHY (ed.), ‘International Criminal Law’ 96 *American Journal of International Law* 724 (2002).

143 *Prosecutor v. Kunarac, Kovac and Vukoic*, International Criminal Tribunal for the former Yugoslavia, case no.IT-96-23-T, 22 February 2001, para 493.

the latter, if reliance is placed on Article 38 as reflecting (some or even all of) the methods to determine international law-making, it is conceptually incoherent to exclude actions, practices and views of non-state actors in the determination of “sources”. In an international legal system where non-state actors are participants, the practice of these actors, their role in the creation, development and enforcement of law and their actions within the international and national communities (whether or not this forms part of ‘state practice’), can, and should, be considered to form a part of customary international law.

This is especially important in areas such as human rights and the environment, where, as shown above, a simple reliance on state practice and opinions distorts the reality of participation and offers a narrow, exclusive and silencing explanation of the relevant law. For example, in relation to the prohibition on torture, a simplistic examination of state practice may lead to the conclusion that states do still practice torture and so there can be no international legal prohibition on it. Yet a fuller examination, not just of the statements by states and their *opinio juris* but also of the activities of non-state actors, reveals a different picture. Indeed, the determination by international human rights courts and other dispute settlement bodies that there is a customary international legal prohibition on torture has relied on the statements and actions of non-state actors and even led to the extension of the legal responsibility for acts of torture to include those situations where those acts have been carried out by non-state actors.¹⁴⁴ All these developments has led international judges to consider that the actions of non-state actors ‘cannot be completely discounted in the formation of customary international law today’.¹⁴⁵

144 For a fuller explanation see R. MCCORQUODALE and R. LA FORGIA, ‘Taking off the Blindfolds: Torture by Non-State Actors’ 1 *Human Rights Law Review* (2001) 189.

145 *Case Concerning the Arrest Warrant (Belgium v. Congo)* ICJ Reports 2002, Judge VAN DEN WYNGAERT (Dissenting Opinion), para 27.

Even if states are the primary creators of international law (but not the sole creators as shown above) then it cannot be assumed that this creation is the end point of international law. Rather, the international legal system is a dynamic system and so its development continues after the initial creation of international law, as new forms and understandings of what is international law arise after the initial creation. This position is most clearly seen in the role of international dispute settlement bodies. The vast majority of these bodies, such as the ICJ, the UN Human Rights Committee, the Inter-American Court of Human Rights and the Panels of the World Trade Organisation, are comprised of non-state actors. They are independent experts in their fields. These individuals reach conclusions about international disputes, including disputes between states, usually by the interpretation and clarification of treaties and customary international law. In doing this, these individuals decide what is international law and change that international law, in the same way as national courts can change the understanding of national law—and what is law—by their decisions.¹⁴⁶ For example, it is clear that the judges of the ICJ make international law when they decide what is the relevant customary international law or the appropriate interpretation of a treaty. This was seen starkly in the *LaGrand Case* where the ICJ decided that an interim measures order by that Court was legally binding on a state party to the case, even though there is no mention in either the Statute of the ICJ or the Court's own rules of procedure that this was the legal position.¹⁴⁷ The Court here created new international law, which was binding on states.¹⁴⁸ In making this international law, the decision may be

146 For example, the change to the understanding of the interaction between UK law and European Union law as a consequence of the decision by the UK House of Lords in *R v. Secretary of State for Transport ex parte Factortame* [1990] 2 AC 85, [1991] 1 AC 603.

147 *LaGrand Case (Germany v. United States)* ICJ Rep 2001, paras 102-3.

148 See commentary on the case in, for example, 96 *American Journal of International Law* (2002) 210 and 51 *International and Comparative Law Quarterly* (2002) 449.

largely dependent on the individual judge's concepts of the international legal system.¹⁴⁹ A similar statement can be made with regard to individuals on other international dispute settlement bodies, as well as individuals on international bodies which seek to clarify international law, such as the International Law Commission, which drafts clarifications on international law.¹⁵⁰

In addition, these international dispute settlement bodies usually decide who appears before them, including who is prosecuted in international criminal law, which can affect significantly the final decision.¹⁵¹ They are also affected by the arguments put to them, which are often arguments drafted and crafted by non-state actors even if the actual claimant is a state.¹⁵² These decisions and arguments can directly and indirectly affect the development of international law and is assisted by greater use of comparative law across the international legal system. The interpretive role of these individuals in international dispute settlement bodies as to what is international law is even more important because, as noted above,

149 See, for example, the different approaches of the ICJ Judges in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons Opinion (General Assembly)* International Court of Justice Reports 1996.

150 The views of these individuals, as eminent jurists, are, of course, under Article 38(d) Statute of the ICJ, a 'subsidiary means for the determination of rules of [international] law'.

151 For example, there is the independent ability of the Prosecutors of the International Criminal Tribunals to decide who, and when, to bring an indictment (which also influenced the role of the Prosecutor in the International Criminal Court) – see S. FERNÁNDEZ DE GURMENDI, 'The Role of the independent Prosecutor' in R. LEE (ed.), *The International Criminal Court* (Kluwer, 1999), 175.

152 This often occurs in international economic law, where the main arguments put to the WTO panels are often drafted by TNCs - see S. CHARNOVITZ, 'Economic and Social Actors in the World Trade Organization' 7 *ILSA Journal of International and Comparative Law* 259 (2001).

‘the choice of an interpretive theory determines how to speak; it sets limits and terms of the conversation about meaning that may be had in international law’.¹⁵³

Indeed, the ignoring by the dominant legal doctrine of the vital role that the interpretation of law by individuals has on the law itself exposes the inherent flaws beneath that doctrine’s acceptance that only states create, develop and enforce international law.

Finally, non-state actors can be crucial in the enforcement of international law. They can operate as fact-finding bodies, lobbyists and advocates in a way that generates publicity about violations of international law and they can sometimes act in ways that states cannot act.¹⁵⁴ They have also used national courts and political processes to force states to comply with their international obligations.¹⁵⁵ In doing this non-state actors can operate as a means of creating a pull towards compliance with international law. This pull towards compliance means that states are alerted to their international legal obligations and need to justify their actions by reference to international law. In addition, non-state actors can create a pull towards compliance with international law where a practice,

153 K. KNOP, *Diversity and Self-Determination in International Law* (CUP, 2002), p. 4.

154 See, for example, the actions of Greenpeace, an environmental NGO, in relation to the disposal of Brent Spar oil rig by Shell: H. KENSHALL, *Risk, Social Policy and Welfare* (Open University Press, 2002) p. 36. Indeed, the actions of this NGO led to the French government ordering some of its agents to sink the Greenpeace ship ‘Rainbow Warrior’ in a New Zealand harbour: *Rainbow Warrior Arbitration* (New Zealand v. France) Special Arbitration Tribunal 82 ILR (1990) 499. As a consequence of this breach of international law (which led to new exceptions to treaty law being developed), France had to pay compensation to New Zealand for interference in its sovereignty (though not to Greenpeace) and had to send its agents to a remote Pacific Ocean island.

155 See, for example, C. VÁZQUEZ, ‘Treaty-Based Rights and Remedies of Individuals’ 92 *Columbia Law Review* 1082 (1992) and the *Pinochet Case* (*R v. Bartle and the Commissioner of Police for the Metropolis ex parte Pinochet*) 38 ILM 581 (1999) before the UK House of Lords and cases arising from the illegal incarceration of prisoners by the government of the United States of America at Guantanamo Bay, such as *Hamdi v. Rumsfeld* (US Supreme Court, 28 June 2004).

understanding or idea that has not yet hardened into a clear legal obligation can become a sociological influence, and even a restraint, on state action. An example of both types of pulls of compliance can be seen in relation to the use of force by NATO in Kosovo in 1999, where

[E]ven the world's most powerful military alliance recognised the need to justify its actions [by the use of international legal arguments] before the court of domestic and world public opinion. And the fact that the Alliance leaders knew that they would be called upon to defend their choice of targets was an inhibiting factor on what could be attacked.¹⁵⁶

Thus the actions of non-state actors can be a means to hold states and state-based organisations to account and can increase the transparency of international decision-making and law-making. This pull towards compliance by non-state actors where the international legal obligation is not yet developed may also have other effects, for example, there was pressure placed by pharmaceutical TNCs on non-industrialised states for the latter to limit their decision-making in areas that directly affect public health because of the TNC's supposed international 'entitlements'.¹⁵⁷

This example also shows how other non-state actors can resist the pull towards compliance, sometimes through the mobilisation of social movements, that can lead to other voices being heard and alternative discourses occurring that can change the direction of the pull of international law.¹⁵⁸ Indeed, as the dominant legal doctrine

156 N. WHEELER, 'The Kosovo Bombing Campaign' in C. REUS-SMIT (ed.) *The Politics of International Law* (CUP, 2004) 189, p.213. Cf H. CHARLESWORTH, 'International Law: A Discipline of Crisis' 65 *Modern Law Review* (2002) 377.

157 See S. JOSEPH, 'Pharmaceutical Corporations and Access to Drugs: The "Fourth Wave" of Corporate Human Rights Accountability' (2003) 25 *Human Rights Quarterly* 425 and H. Sun, 'The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health' 15 *EJIL* (2004) 123.

158 See, for example, B. RAJAGOPAL, 'International Law and Social Movements: Challenges of Theorizing Resistance', 41 *Columbia Journal of Transnational Law* 397 (2003) and S. CHARNOVITZ, 'Economic and Social Actors in the World Trade Organization' 7 *ILSA Journal of International and Comparative Law* 259 (2001).

'presupposes and depends upon viable, effective states and accountable law enforcement bodies at the domestic level, which is not the case for many states',¹⁵⁹ it ignores the reality that some states are not able to administer the territory in a way that protects those living in it. In situations such as Colombia, where there are areas of territory that are not under the control of the state,¹⁶⁰ where the armed opposition groups seek some international legitimacy¹⁶¹ and where other states seek to press their own agendas,¹⁶² an acceptance that the armed opposition groups do have some participation in the international legal system may open the possibility of them acknowledging international humanitarian and human rights obligations. This may then assist both the protection of those affected on the territory, as both the state and the non-state actors have some national and international obligations to protect those within their power and control (though the state remains primarily responsible under international law)¹⁶³ and open new potential peace processes.

159 See, A. GOLDSMITH, 'Policing Weak States: Citizen Safety and State Responsibility' 13 *Policing and Society* (2003) 3, 9.

160 For a regular report on the situation in Colombia, especially in regard to human rights issues, see the annual Reports to the UN Commission on Human Rights (now the UN Human Rights Council) by the UN High Commissioner for Human Rights: www.ohchr.org.

161 Many armed opposition groups have web-sites that are in a number of languages in order to seek funding and international legitimacy (see, for example, <http://www.facep.org> – which has English, German, Italian, Portuguese and Russian versions).

162 See, for example, J. ESQUIROL, 'Negotiating Colombia's Peace Process: Disagreements of International Law' 13 *Leiden JIL* (2000) 495. In regard to the role of other states, there was a comment in a newspaper that 'in the war on drugs, the United States is ready to fight to the last Colombian': quoted in A. GOLDSMITH, 'Policing Weak States: Citizen Safety and State Responsibility' 13 *Policing and Society* (2003) 3, 14.

163 See, for example, the decision of the Colombian Constitutional Court on the obligations of the state for the protection of economic, social and cultural rights: *Álvarez v. Estado Colombiano*, SU.819/99, quoted in A. E. YAMIN, 'The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social and Cultural Rights into the Mainstream Human Rights Agenda' 27 *Human Rights Quarterly* (2005) 1200, 1202.

Overall, non-state actors have affected the enforcement of, and compliance with, international law and have been ‘elaborating further interpretative rules in connection with already existing international instruments... [which have come to be] referred to as... authoritative sources’,¹⁶⁴ as part of the social embeddedness of international law. Indeed, this use of international law by non-state actors is part of the idea of an international legal community, as ‘through the law as a medium and through its use, we have the makings of a genuine *community* with its own sense of identity, values, vision, and solidarity’.¹⁶⁵

CONCLUSIONS

This consideration of the participation of non-state actors in terms of international law-making shows that, in all major respects, non-state actors are part of the law-making process. The principal international law-makers remain the states but, despite the dominant legal doctrine’s attempts to pretend otherwise, states are not the only international law-makers. However, it is necessary to ensure that the state still has primary responsibility for international humanitarian and human rights law, so that it can remain accountable to all its inhabitants.¹⁶⁶

The direct impact of non-state actors on all aspects of treaty making and in the determination of customary international law, both as part of influencing state practice and opinions, and independent of this, is part of their participation as members of the international community. Indeed, as JÜRGEN HABERMAS demonstrates, law-making and opinion formation are mutually informing

164 T. VAN BOVEN, ‘The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite for Democracy’ 20 *California Western ILJ* 207 (1990), p. 357.

165 D. KRITSIOTIS, ‘The Power of International Law as Language’ 34 *California West Law Review* (1997) 397, 409 (his emphasis).

166 Author’s discussions with NGOs in Bogotá, September, 2003.

processes, which are shaped by a variety of participants, national and international, and not only by states.¹⁶⁷ As a consequence, there has become ‘[a] peculiar process of interaction between traditional law mechanisms and transnational social processes with the mediation of non-state actors [to become] a novel method of law-making and law enforcement’.¹⁶⁸

Accordingly, the conceptual approach adopted by the dominant legal doctrine to explain the international legal system and international law-making, through the sole ‘subject’ of an exclusive sovereign state acting in an international community of states, does not reflect the reality of international participation. Their conceptual foundations contain fictions and flaws that do not withstand the changes in international affairs or international relationships over time. After all, the international legal system is like ‘an egg-box containing the shells of sovereignty; but alongside it a global community omelet is cooking.’¹⁶⁹ The participants in the international community include non-state actors and they form part of the relationships on which the symbiotic concepts of sovereignty and international community are properly conceptually based. All of these participants, state and non-state, are part of international law-making and this needs to be reflected in an inclusive international legal theory.¹⁷⁰

An inclusive conceptual approach to the international legal system would acknowledge that non-state entities have values, identities and roles distinct from the geographic limitations of states and that these are reflected both in their daily lives and in the international

167 J. HABERMAS, *The Inclusion of the Other* (MIT Press, 1998).

168 A. BIANCHI, ‘Globalization of Human Rights: The Role of Non-State Actors’ in G. TEUBNER (ed) *Global Law Without a state* (Dartmouth, 1997), p. 201.

169 K. BOOTH, ‘Security in Anarchy: Utopian Realism in Theory and Practice’ 67 *International Affairs* (1990) 530 at 542.

170 For an elaboration of an inclusive international legal theory, see R. MCCORQUODALE, ‘An Inclusive International Legal System’ 17 *Leiden Journal of International Law* (2004) 477-504.

legal system.¹⁷¹ The acceptance of these identities, participants and international legal system is possible and can be applied by international lawyers to sweep away the limited vision of ‘venerable Europe’:

Faced with this awesome reality that must have seemed a mere utopia through all of human time, we, the inventors of tales, who will believe anything, feel entitled to believe that it is not yet too late to engage in the creation of the opposite utopia. A new and sweeping utopia of life, where no one will be able to decide for others how they die, where love will prove true and happiness be possible, and where the races condemned to one hundred years of solitude will have, at last and forever, a second opportunity on earth.¹⁷²

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171 It should enable a more critical reflection on what is ‘international law’: see, for example, M. KOSKENNIEMI, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers Publishing Cooperative, 1989), D. KENNEDY, ‘A New Stream of International Legal Scholarship’ *7 Wisconsin ILJ* 1 (1988), P. ALLOTT, ‘The Concept of International Law’ *10 European JIL* (1999) 31, H. CHARLESWORTH and C. CHINKIN, *The Boundaries of International Law: A Feminist Analysis* (Manchester Univ Press, 2000).

172 GABRIEL GARCÍA MÁRQUEZ, final words of his speech on being awarded the Nobel Prize for Literature, 8 December 1982 (see http://www.themodernword.com/gabo/gabo_nobel.html).

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