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ARE WE BEING PROPELLED TOWARDS A PEOPLE-CENTERED TRANSNATIONAL LEGAL ORDER?

Claudio Grossman*
Daniel D. Bradlow**

INTRODUCTION

Sovereignty is the fundamental concept around which international law is presently organized. This principle holds that "[e]xcept as limited by international law or treaty, each state is master of its own territory."¹ Consistent with this conception of absolute sovereignty, international law has traditionally been concerned with the relations between co-equal sovereign states. Each sovereign state can only be legally bound by those commitments it willingly makes to other sovereign states, and by those few principles which are viewed as binding on all states. Those issues that arise from the relationship between the state and its citizens, and between those citizens *inter se*, are viewed as part of the domestic affairs of each sovereign state and thus outside the scope of international law.

This theory of international law, founded upon a clear division between domestic and international issues, was reasonable, as long as most

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1. Louis Henkin, *How Nations Behave*, quoted in Barry Carter & Phillip Trimble, *INTERNATIONAL LAW* 17 (1991). For additional conceptions of sovereignty, see Clive Parry, *The Function of Law in the International Community*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 1, 8-14 (Max Sørensen ed., 1968); Bengt Broms, *States*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 41, 44 (Mohammed Bedjaoui ed., 1991).

human activity took place within clearly defined geographic boundaries; that is, within nation-states.² It became less satisfactory as technological and socio-economic developments expanded the range of activities whose causes or effects transcended national boundaries and increased national interdependence.

The international community responded to these changes by creating international organizations mandated to coordinate specific areas of international relations. Examples of these organizations include the League of Nations and the International Labour Organisation.³ These organizations, however, did not alter the basic orientation of international law because they were organized around the fundamental principle of sovereignty. In addition, the organizations lacked the effective powers needed to compel sovereign states to abide by their rules and decisions.⁴

The Second World War provided members of the international community with a powerful and tragic lesson in the dangers inherent in an international legal order based upon a notion of absolute sovereignty. The contemporary international order severely limited the ability of the international community to intervene in the internal affairs of sovereign states. This lesson provided the impetus for the creation of new international organizations. The new organizations were still organized around the principle of sovereignty, but they were given some ability to compel member states to comply with their rules and decisions.⁵

2. Classical international law, in the sense of the law between the states, has been criticized in recent years by governments of developing nations as the product of Western interests often discordant with the interests of developing nations. See, e.g., Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1, 1 (1979) (Adamantia Pollis & Peter Schwab eds., 1979) (asserting that the United Nations Charter is founded upon Western political philosophy); Clive Parry, *The Function of Law in the International Community*, in MANUAL OF INTERNATIONAL LAW 1, 38-42 (Max Sørensen ed., 1968).

3. *The Covenant of the League of Nations*, June 28, 1919, 2 Bevans 48; CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION, 62 Stat. 3490.

4. See CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION, 62 Stat. 3490, arts. 19-20 (describing the procedures for adoption of conventions); *id.* at arts. 24-25 (delineating the procedures to be followed in cases of non-observance of conventions by workers or employers); *id.* at arts. 26-34 (describing the complaints of member non-observance by other member states).

5. See U.N. CHARTER, art. 25, June 26, 1945, 59 Stat. 1031, 1041, U.N.T.S. No. 993 [hereinafter U.N. CHARTER] (requiring that members act in accordance with decisions of the Security Council); see also Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. V, sec. 5, 60 Stat. 1401, 1406, T.I.A.S. No.

These new organizations included the United Nations, the International Monetary Fund, and the International Bank for Reconstruction and Development.⁶ The United Nations was charged with the maintenance of peace and security. Its charter recognized, without further definition, the existence of human rights that imposed international obligations on all member states.⁷ This initial recognition was sufficient to initiate the development of human rights law and the process of international organizational supervision of those rights.⁸ The International Monetary Fund (IMF) was mandated to regulate an international monetary order based on the member states' commitment to freely convertible currencies and stable but 'flexible exchange rates.'⁹ The International Bank for Reconstruction and Development (World Bank or IBRD) was established to fund the reconstruction of war-torn Europe, and to develop the poorer

1501, 2 U.N.T.S. 39, 52 [hereinafter IMF] (providing that the IMF can restrict a member's use of the IMF's general resources if the funds are used in a manner inconsistent with the IMF's purposes).

6. U.N. CHARTER, *supra* note 5; IMF, *supra* note 5; Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134 [hereinafter World Bank].

7. See U.N. CHARTER, *supra* note 5, art. 1, para. 3 (proclaiming that one purpose of the United Nations (U.N.) is to promote the respect for human rights); see also U.N. CHARTER, *supra*, note 5, art. 55(c) (stating that the U.N. promotes respect for human rights).

8. For supervisory mechanisms in the area of human rights, see Shigeru Oda, *The Individual in International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 496, 498-503 (Max Sørensen ed., 1968); Frank Newman & David Weissbrodt, *International Human Rights: Law, Policy and Process* 2-17 (1990). For supervisory mechanisms in the IMF, see R. Barents, *Supervision Within the IMF*, in *SUPERVISORY MECHANISMS IN INTERNATIONAL ECONOMIC ORGANIZATIONS* 351 (P. van Dijk ed., 1984); G.J.H. van Hoof & K. de VeyMestdagh, *Mechanisms of International Supervision*, in *SUPERVISORY MECHANISMS IN INTERNATIONAL ECONOMIC ORGANIZATIONS* 1 (P. van Dijk ed., 1984).

9. See RICHARD W. EDWARDS, JR., *INTERNATIONAL MONETARY COLLABORATION* 491 (1985) (noting that the original Articles of Agreement required each IMF member to proclaim a par value of its currency in terms of gold or the United States dollar and that these par values could be altered only under limited circumstances). However, the Second Amendment to the Articles changed this mandate by giving legal sanction to a system of floating exchange rates. See Margaret Garritsen de Vries, 1 *The International Monetary Fund 1972-1978* 3-4 (1985) (stating that the international monetary agreements based on floating exchange rates prevalent after the 1971 United States decision to suspend convertibility of the dollar was given legal recognition by the Second Amendment); see also EDWARDS, *supra* at 521 (noting that the Second Amendment allows members to choose any exchange arrangements for their currency except one based on gold).

countries of the world. The mandate of the World Bank was to complement private capital and to facilitate the growth of both the borrower's and the world's economy.¹⁰

The international community's support for international organizations and willingness to place restrictions on state sovereignty was not unlimited. The international community ultimately failed to ratify the creation of a fourth international organization, the International Trade Organization (ITO).¹¹ The ITO would have regulated most non-monetary aspects of the international economy. The only surviving remnant of the ITO is the General Agreement on Tariffs and Trade (GATT).¹² This intergovernmental agreement establishes the framework for international trade in goods between the contracting parties.¹³

Even though the organizations were originally founded upon the principle of sovereignty, the establishment of the United Nations and the Bretton Woods Institutions constituted a movement away from an international legal order based solely upon absolute sovereignty. Both the United Nations and the IMF created a super-structure which operates above the level of the individual member states, and to which each member state agreed to surrender some aspect of its sovereignty in return for the political, economic or social benefits to be derived from membership in the organization. For example, by joining the United Nations, member states agreed to limit their ability to use force and to submit decisions relating to international peace and security to the U.N.

10. World Bank, *supra* note 6, art. I. See EDWARD S. MASON & ROBERT E. ASHER, *THE WORLD BANK SINCE BRETTON WOODS* 150 (1973) (remarking that initially the World Bank was not a major supplier of capital for development).

11. THE HAVANA CHARTER FOR THE INTERNATIONAL TRADE ORGANIZATION, Mar. 24, 1948, reprinted in CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* 231-327 (1947) [hereinafter HAVANA CHARTER].

12. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

13. The international community's failure to establish the ITO has come back to haunt GATT negotiations. The present Uruguay Round of the GATT is seeking to expand the international trade negotiation framework to include trade in services, intellectual property, agriculture, and foreign investment. *Remarks at the Annual Meeting of the Boards of Governors of the IMF and World Bank*, 22 WEEKLY COMP. PRES. DOC. 1309 (Sept. 30, 1986). Some of these sectors would have fallen within the ITO's jurisdiction. See HAVANA CHARTER, *supra* note 11, art. 12 (extending ITO coverage to foreign investment); see also *id.* art. 53 (extending ITO regulation to trade in services). In addition, the GATT negotiators are proposing to establish a Multilateral Trade Organization. John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 550 (1993).

Security Council.¹⁴ They also granted the General Assembly broad authority to discuss publicly issues of international concern.¹⁵

Similarly, by joining the IMF, member states agreed to surrender some of their control over their exchange rate and their monetary policy. Further, member states agreed to abide by the international monetary rules formulated at the Bretton Woods Conference.¹⁶ The IMF was mandated to monitor compliance with these rules through regular consultations with all member states.¹⁷ The benefits to be derived from compliance include an efficient international payments mechanism, IMF financial support if the country experienced difficulty in meeting its international monetary obligations; and membership in the World Bank, where the country could obtain financing for development projects.¹⁸ World Bank loans, whose covenants restricted the borrower's future conduct or imposed certain reporting requirements on the borrower, also contributed to the erosion of absolute sovereignty.¹⁹

14. See U.N. CHARTER, *supra* note 5, art. 33 (requiring that member states exhaust peaceful means of conflict resolution before turning to the use of military force). See *id.*, art. 24 (granting the U.N. Security Council primary responsibility for the maintenance of international peace and security). Furthermore, U.N. Security Council decisions are binding on all U.N. members. *Id.* art. 25. See also *id.* art. 37 (giving the U.N. Security Council the final competence to resolve armed conflicts through decisions and actions binding on all members).

15. U.N. CHARTER, *supra* note 5, arts. 10-11. The development of an International Bill of Rights, having as its point of departure the United Nations Charter, is a good example of the impact that the General Assembly can have on the behavior of member states. See 1 PACE Y.B. INT'L L. 21 (discussing International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Bill of Rights).

16. See International Monetary Fund, *supra* note 5, art. IV (limiting member's exchange rate policies); see also *id.* art. VIII (prohibiting restrictions on current payments and discriminatory currency practices and requiring freely convertible currencies); *id.* art. V (limiting the use of the IMF's general resources).

17. Enforcement of these rules would depend on how the member's deviation from the rules manifested itself. In cases of members whose monetary policies produced balance of payments problems that required IMF financial assistance, the IMF would use its conditionality policies to enforce its rules. In all other cases the IMF would use peer pressure to try to "encourage" members to abide by the rules of the international monetary order. Joseph Gold, *Strengthening the Soft International Law Exchange Arrangements*, in 2 JOSEPH GOLD, LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM: SELECTED ESSAYS 515, 527-30 (1984); RICHARD W. EDWARDS, INTERNATIONAL MONETARY COLLABORATION 638-42 (1985).

18. World Bank, *supra* note 6, art. II, sec. 1(a).

19. The World Bank's articles stipulate that the member states must either be the guarantor or the borrower on all IBRD loan agreements. *Id.* art. III, sec. 4. See DAN-

During the first few decades after World War II, the movement away from sovereignty often was not perceptible. Indeed, in the wake of decolonization, the role of sovereignty in international law appeared to be strengthened by the growing number of nation-states in the world and by their aggressive assertion of the rights of sovereign states.²⁰ These developments, however, masked a slow but steady diminution in the realities of sovereign power and a growing gap between the legal principle of sovereignty and the factual reality of a world of limited sovereign states.

This gap between theory and reality has manifested itself in two ways. First, there has been a steady increase in the number of activities whose effects spill over national boundaries and in activities which states are unable to regulate independently. Examples of these issues include global environmental issues; nuclear proliferation; financial flows; refugees; transfers of technology; the trade, labor, consumer, and tax consequences of globalized production patterns; and such criminal law problems as drug trafficking and gun control. Since effective resolution of the legal issues that arise from these activities can only occur at the international level, there is a growing body of international law that seeks to either regulate the activities or to coordinate national regulation efforts.²¹

IEL D. BRADLOW (ED.), *INTERNATIONAL BORROWING* 47-87 (1986) (providing a sample loan agreement and general conditions applicable to development credit agreements).

20. See *CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES*, reprinted in *CHANGING PRIORITIES ON THE INTERNATIONAL AGENDA: THE NEW INTERNATIONAL ECONOMIC ORDER* 206 (Karl P. Sauvant ed., 1971), art. 1, para. 1 (proclaiming that states shall have full authority over the natural resources and economic activity within their boundaries); see also *Declaration on the Establishment of a New International Economic Order*, reprinted in Sauvant, *supra* at 171 (proclaiming the sovereign equality of states, states' rights to determine their own development strategies, and full state sovereignty over natural resources).

21. *Vienna Convention for the Protection of the Ozone Layer*, 26 I.L.M. 1516 (1987); *Montreal Protocol on Substances that Deplete the Ozone Layer Including Chlorofluorocarbons*, 26 I.L.M. 1541 (1987); *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes*, 28 I.L.M. 649 (1989); *Vienna Convention on the Physical Protection of Nuclear Material*, 18 I.L.M. 1419 (1979). The *Agenda 21* is a complex document setting forth actions that need to be taken in relevant sectors. *Rio Declaration on Environment and Development*, in *Agenda 21*, 31 I.L.M. 874 (1992), *Convention on the Climate Change*, in *Agenda 21*, 31 I.L.M. 849 (1992), *Convention on Biological Diversity*, in *Agenda 21*, 31 I.L.M. 818 (1992), *Statement of Principles for a Global Consensus of the Management, Conservation and Sustainable Development of All Types of Forests*, in *Agenda 21*, 31 I.L.M. 881

The internationalization of these issues has also affected the traditional separation of powers between the executive and legislative branches of government.²² In a reality based on the internationalization of an increasing range of issues coupled with the resulting erosion of the distinction between domestic and international issues, the power of the executive, based on its authority in the realm of international affairs, has expanded at the expense of the legislature.

Given that the legislative branch is the branch of government that most directly represents the sentiments of civil society and in which most of the battles for democratization of social life have been fought, this expansion of executive power has assumed an undemocratic character. It creates a substantial obstacle to the participation by the members of civil society in the affairs that most directly affect them. The expansion of executive power is also forcing private actors to adopt a broader definition of their interests and a more cosmopolitan perception of their political allies.

The second manifestation of the gap between theory and reality, therefore, has been an increase in the number of actors on the international stage. In addition to states, these actors now include national liberation movements; business, consumer, environmental, human rights and other non-governmental organizations (NGOs); political parties; and trade unions. These new actors have recognized that without internationalizing their operations their impact will be limited. They have, thus, begun to develop transnational affiliations and the capacity to operate internationally so that they can make their voices heard in a meaningful way.

The most significant example of this phenomenon is the Transnational Corporation (TNC). While TNCs have existed for centuries, their ability to plan and operate on a global basis grew dramatically as the post-World War II era unfolded.²³ Stimulated by new investment opportuni-

(1992). *See also* Basel Committee of International Bank Supervisors, *Consultive Paper on the International Convergence of Capital Measurement and Capital Standards of 1988*, 30 I.L.M. 967 (1991) (providing another international cooperative work on national bank standards).

22. *See generally* HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 67-149 (1990) (asserting that in the United States, the President almost always prevails in disputes over foreign affairs authority because of a pattern of executive initiative, congressional acquiescence, and judicial tolerance).

23. There is extensive literature on TNCs. *See generally* RAYMOND VERNON, *SOVEREIGNTY AT BAY* (1971); RICHARD J. BARNET & RONALD E. MULLER, *GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS* (1974); JEAN JACQUES SERVAN-SCHREIBER, *THE AMERICAN CHALLENGE* (1968); Robert R. Reich, *Who is*

ties and technological developments, TNCs have developed the ability to produce their goods and services in multiple interconnected locations. This development has encouraged global distribution patterns and transnational strategic planning.

One important effect of these developments is that TNCs have become "de-nationalized" in the sense that they view the world, rather than their home or host states, as their base of operations. The fact that they have multiple production facilities means that TNCs can evade state power and the constraints of national regulatory schemes by moving their operations between their different facilities around the world. Having multiple production facilities also means that those private actors such as trade unions, consumer groups, and environmental organizations, that traditionally interact with TNCs on a country-by-country basis, are being forced to transnationalize so that they can interact with the TNCs in a meaningful way.²⁴

This growth in corporate power raises a significant problem for traditional international law. First, it means that whatever the international legal status of states may be, the sovereign has less power, measured in terms of control over human, natural, financial and other resources, than those corporations that it is supposedly regulating.²⁵ This suggests that

Us?, HARV. BUS. REV., Jan.-Feb. 1990 at 53.

24. See Norbert Horn, *International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives*, 30 AM. U.L. REV. 923, 931-32 (1981) (testing successfully the Organization for Economic Cooperation and Development (OECD) guidelines for the conduct of multinational corporations in the *Badger* case); see also Timothy W. Stanley, *International Codes of Conduct for MNCs: A Skeptical View of the Process*, 30 AM. U.L. REV. 973, 1002 (1981) (discussing organized labor's use of existing codes for TNCs as tactical tools to limit TNC independence); THE COMMUNITY CHARTER OF THE FUNDAMENTAL SOCIAL RIGHTS OF WORKERS, available in LEXIS, Europe Library, EURSCP File (addressing among other issues the problem of runaway plants in the Internal Market in Europe with differing standards of labor law and work security in different member states). The charter was adopted by the Heads of State and Government of the Member States of the European Community at the European Council meeting in Strasbourg on Dec. 9, 1989. This charter has a non-binding character, but the commission adopted the Social Charter Action Programme, COM/89/568, thereupon. The latter will lead to further legislative measures that take workers' rights into account in the area of company law, takeovers regulation, and health standards, among other areas.

25. The power of private corporations is evident from a comparison of their financial resources relative to the gross domestic product of five of the richest countries. See *Rank by Sales Volume*, DUN'S BUSINESS RANKINGS, sec. VII, (Dun & Bradstreet eds., 1993) (citing the sales volume for 1992 of General Motors (\$123,056,000,000), Exxon (\$115,068,000,000), Ford Motors (\$88,286,300,000), IBM

in fact the sovereign is no longer "master of its own territory."

The growing power of the TNCs also poses a challenge to the notion that the primary focus of international law should be relations between states. Such a narrow view of international law allows TNCs to evade accountability for their actions at the domestic level by shifting production between different sites. The absence of clear international standards means that they can also avoid regulation at the international level. Thus, TNCs are able to operate in an unregulated manner. This regulatory situation is not beneficial for the TNCs and the multitude of stakeholders in their operations. The absence of an effective regulator complicates the efforts of TNCs to establish universally recognized standards of conduct for the host state-foreign investor relationship.²⁶

I. THE CHALLENGE TO INTERNATIONAL LAW

Such recent developments as the end of the Cold War; enhanced efforts at regional integration in North America, Europe, Latin America, and Africa; and the increasing integration of national economies into a global economy have dramatically increased the pressure on international

(\$64,523,000,000), and AT&T (\$63,089,000,000). *See also* THE CORPORATE FINANCE BLUEBOOK, sec. 8 (National Register Publishing ed., 1993) (providing figures on the assets of various companies including: General Motors (\$184,325,500,000); Exxon (\$87,560,000,000); Ford (\$174,429,400,000); IBM (\$92,473,000,000); and AT&T (\$53,355,000,000)); ANNUAL REPORT TO SHAREHOLDERS: FORTUNE 500 (Washington Disclosure, Inc., ed., 1993) (expanding upon these basic figures). *See generally* WORLD TABLES 257, 269, 349, 625, 629 (Johns Hopkins Univ. Press ed., 1993) (published for the World Bank) (providing figures on the 1990 gross domestic product of the following countries: France (Franc 6,484,109,000,000 = US\$1,162,026,000,000); Germany (DM 2,404,540,000,000 = US\$1,448,518,000,000); Japan (Yen 425,735,000,000 = US\$2,799,100,000); United Kingdom (Pound Sterling £549,181,000,000 = US\$315,621,000,000); United States (US\$5,392,200,000,000)). The conversion of foreign currencies into U.S. dollars was made upon the trading rate on the New York Stock Exchange on June 30, 1990.

26. *United Nation Draft International Code of Conduct on Transnational Corporations*, 23 I.L.M. 626 (1984); *see generally* Hans Baade, *The Legal Effects of Codes on Conduct for Multinational Enterprises*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 4 (Norbert Horn ed., 1980) (discussing generally codes of conduct for TNCs); Norbert Horn, *International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives*, 30 AM. U. L. REV. 923 (1981); Seymour J. Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between Legal Cooperation and Economic Development*, 30 AM. U. L. REV. 903 (1981); Samuel Asante, *Stability of Contractual Relations in the Transnational Investment Process*, 28 INT'L & COMP. L.Q. 401 (1979).

law to respond to the expansion of international legal issues and actors. These developments challenge international law to either adapt its key principles, such as sovereignty, to these new realities, or to develop new principles that more adequately reflect the world in which international law must operate.

With the objective of exploring the issues raised by these developments and their effects on the various actors on the international stage, the Washington College of Law organized a conference on "Changing Notions of Sovereignty and the Role of Private Actors in International Law." The conference sought to explore the changing role private actors play in peace and democratization, human rights, international economic organizations, the transnational economy, and the regulation of the international environment. Conference panelists were asked to present case studies of the role of private actors in specific organizations or areas of activity. In some cases, the speakers highlighted the important role that private actors have played in international fora and suggested ways in which the benefits to be derived from their participation could be strengthened. In other cases, the speakers discussed the problems that can result when international decision makers fail to take proper account of the interests of private actors in the formulation of international agreements or in the regulation of international conduct.

Collectively, the conference presentations highlighted four historical forces which are inexorably undermining sovereignty and the special status that states occupy in traditional international law. These four forces are: (1) the technological changes that are facilitating the creation of a global economy and global society; (2) the growing concern about the environment; (3) the expanding role of international organizations in the world; and (4) the changing perceptions of peace and security. Each of these developments and their implications for international law are discussed in more detail in the following section.

These four forces are also accelerating the collapse of the distinction between domestic and international issues. It is becoming less tenable to classify issues as "international" and therefore as inside the boundaries of international law or as "domestic" and therefore within the jurisdiction of each sovereign state. All issues now have both international and domestic features, in the sense that they influence or are influenced by developments in both the domestic and international arenas. This collapsing distinction between the domestic and the international calls for a reconceptualization of international law so that these issues can be addressed in their totality and free of the constraints that are created by the artificial distinction between domestic and international issues. This

conclusion is explored in more detail in the last section of this paper.

II. THE FORCES FOR CHANGE

A. TECHNOLOGICAL CHANGES

In the past fifteen to twenty years, developments in information technologies and telecommunications have revolutionized the world economy and the way in which human beings conduct their day to day affairs.²⁷ These developments are "globalizing" the international economy and creating transnational linkages between private actors.

Investors can use computer programs to plan their investment strategies and electronic funds transfers to move instantaneously their funds around the world in search of better returns.²⁸ Engineers working for the same company but in different countries can use computer technologies to work simultaneously on the same design project. Researchers and scholars located around the world can conduct an ongoing international dialogue over electronic mail or E-Mail networks.²⁹ Human rights and other social activists can use facsimiles and E-mail to inform the world of developments in their countries. The global media can then spread this information instantaneously around the world.³⁰

27. It should also be noted that developments in biotechnologies and material sciences are also having important effects on national and international affairs. For example, the invention of the abortion pill RU486 has begun to influence the debate over abortion in the United States. Also, developments in material sciences are beginning to weaken the international economic position of those states that depend on the export of natural resources for their foreign exchange earnings. See Edouard Sakiz, *Five Years to Introduce RU486*, CHEMICAL BUS. NEWS BASE, July 10, 1993, available in LEXIS, Nexis Library, ALLNWS File (discussing the introduction of abortion pill in the United States); *Hoechst Wants to Give Schering Abortion Pill*, DIE WELT, Oct. 4, 1993, available in LEXIS, Nexis Library, ALLNWS File (noting the reaction to the abortion pill in Germany).

28. See JOEL KURTZMAN, *THE DEATH OF MONEY* 17 (1993) (noting that more than \$1.9 trillion is exchanged daily in New York at nearly the speed of light).

29. ROBERT B. REICH, *THE WORK OF NATIONS* 111 (1991).

30. See *Island of Oppression - The Funeral Massacre in East Timor*, TIMES (London), Nov. 22, 1991, available in LEXIS, Nexis Library, ALLNWS File (reflecting the instantaneous spread of international news); *Who Pulled the Trigger on Aquino*, N.Y. TIMES, Aug. 25, 1983, available in LEXIS, Nexis Library, ALLNWS File (discussing dissemination of worldwide news instantly); Donatella Lorch, *Burundi After Mutiny: Horror Stories Everywhere*, N.Y. TIMES, Nov. 21, 1993, at 3 (discussing use of cellular phones and radio to mobilize opposition to coup).

While these technological developments open up exciting possibilities for human development, they also significantly diminish state control over such activities. All the activities described above can occur at speeds that make it difficult for state regulators to detect the activity. Even if they can detect the action, regulators experience difficulty in sanctioning the actor. The speed of the transaction impedes the state's ability to trace the action and identify the actor. In addition, the public's relatively easy access to the computer and telecommunication networks that constitute the infrastructure for these new technologies makes it difficult for states to regulate their use. In fact, those states that have sought to limit the public's access to these new technologies or their ability to use these technologies have found that the price in terms of their ability to participate in the international economy is higher than they can afford.³¹

The result of these developments is that private actors can use these technologies not only to neutralize the regulatory efforts of their sovereign states, but also to undermine the legitimacy and authority of the current government. Moreover, these technologies enable individuals and groups to develop connections with others outside their sovereign states that may be stronger than the connections felt towards their compatriots. Accordingly, there is a resulting weakening of national consciousness and the inchoate beginnings of a global consciousness.³²

In such an environment, the relevance and efficacy of an international legal order based on sovereign states is open to debate. This international legal order affords no formal recognition to the corporations, industry associations, NGOs and other private actors who, by virtue of their access to these new technologies, play an increasingly active role in

31. See ROBERT B. REICH, *supra* note 29, at 212 (explaining that costs include those born by persons who do not have the skills to use the new technologies nor the resources to acquire the necessary hardware); see also Jeffrey S. Palmer, *The New European Order: Restructuring the Security Regime Under the Conference on Security and Cooperation in Europe*, 5 TEMP. INT'L & COMP. L.J. 51 (1991) (discussing the effect of the United States and the Coordinating Committee on Multilateral Controls' denial of technological exports to the Soviet Union).

32. See Guido de Bruin, *North-South: Environmental Bid Could Herald New Conflict*, 1993 INTER PRESS SERV., June 4, 1993, available in LEXIS, Nexis Library, CURRNT File (commenting that non-governmental organizations play a significant role in the efficacy of UNCED's efforts); see also Colm Bolland, *NGOs' Demand Role in Drafting of Declaration*, IRISH TIMES, June 17, 1993, available in LEXIS, Nexis Library, CURRNT File (noting that NGOs must be included in the Drafting Committee of the Human Rights Declaration so as to preserve the universality principle in human rights).

international affairs. In addition, the legal order does not reflect the fact that the new technologies have so enhanced the power of private actors relative to the state that, in many cases, it is not feasible to establish sustainable international standards of conduct without the participation of these private actors or without creating an international body that exercises greater power over its member states than states appear to be willing to surrender.

A good example of an area where the desirability of an international regulatory body is clear is the banking industry.³³ As banks now have the ability and the client-driven need to move instantaneously funds around the world, it is no longer possible for each individual nation state to regulate effectively its banks.³⁴ In the absence of a central bank that has global jurisdiction, the only sustainable regulatory framework is one that has the support of all the participating banks and financial actors. If not, banks can easily avoid the effects of any regulatory framework that they oppose by moving their money and activities to a non-regulated jurisdiction. Essentially, the banks will exercise this option as long there is one non-participating jurisdiction.

In short, these technological developments have so undermined the concept of sovereignty that, on some issues, effective rule making and enforcement cannot take place, either at the domestic or the international level, without the full participation of interested private actors. Moreover, the globalized nature of these issues suggests the need for a coherent set of rules that will be applicable at both the domestic and the international level.

33. See Allan Murray-Jones & Andrew Gamble, *Managing Capital Adequacy: A Handbook of International Regulations* (1991) (discussing international regulations for capital adequacy in the banking industry); Joseph J. Norton, *Capital Adequacy Standards: A Legitimate Regulatory Concern for Prudential Supervision of Banking Activities*, 49 OHIO ST. L.J. 1299 (1989) (noting concern for banking regulation and supervision of capital adequacy standards).

34. See Daniel M. Laifer, *Putting the Super Back Into the Supervision of International Banking, Post-BCCI*, 60 FORDHAM L. REV. 467 (1992) (pointing out that while banking has become international, supervision has not). See also Giusti, *Banking Crises of the Early 1970s Demonstrated a Need for Coordinated Supervision of International Finance*, AM. BANKER, Dec. 16, 1983, at 26; A. MULLINEUX, *INTERNATIONAL MONEY AND BANKING: THE CREATION OF A NEW ORDER* (1987); D. KHAMBATA, *THE PRACTICE OF MULTINATIONAL BANKING* 35 (1986) (noting that banks by their worldwide operation are often able to circumvent national regulations).

B. ENVIRONMENT

There is growing recognition that the global environment, because it cannot absorb all the waste that the international economy generates, imposes a fixed constraint on economic growth. This realization has profound implications for both domestic and international affairs, resulting in a paradigmatic shift in human thinking.³⁵ Until recently, social scientists and policy makers analyzed human activity in terms of how people arranged themselves for the production and distribution of the goods and services needed for individual and social well-being. The recognition of the environmental constraints forces them to factor in to the equations both the process of production as well as that of consumption. All costs must be internalized in the production and consumption process, including not only the costs of direct production and consumption but also the costs of the indirect effects caused by these activities. These costs include not only the treatment of waste and traditionally externalized costs but also "consumption opportunity costs," *i.e.*, the cost of foregoing alternative consumption opportunities. To determine the latter category of costs, social scientists must now consider the sustainability of human activities and the impact of these activities on intra- and intergenerational equity.

The new environmental awareness affects international law in two ways. First, international law must address the increased number of transnational environmental issues. Environmental problems such as the depletion of the ozone layer, the protection of tropical forests, biodiversity, and global warming, are problems that can only be solved at the global level with the participation of all the stakeholders in these issues.³⁶ This international collaboration necessarily involves the surren-

35. See, *e.g.*, HERMAN E. DALY & JOHN B. COBB, JR., *FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARDS COMMUNITY, THE ENVIRONMENT AND A SUSTAINABLE FUTURE* 2 (1989) (discussing the intersection of the economy and sustainable growth); ROBERT REPETTO, ET AL., *WASTING RESOURCES AND NATURAL RESOURCES IN THE NATIONAL INCOME ACCOUNTS* 6 (1989) (discussing the need to incorporate environment developments in the national income accounts); EDITH B. WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY* 45-46 (1989) (explaining that there is a planetary obligation to ensure that each generation inherits an environment of relatively similar conditions which may be attained by balancing the application of the preservationist and opulent models of planetary behavior regarding the environment).

36. Many of the most severe environmental problems are still "domestic" problems. For example, in many developing countries, the most prevalent and lethal environmental problems are the air pollution, caused by charcoal and wood burning

der of certain national prerogatives and the willingness of each nation-state to surrender part of its sovereignty to the rule of the international community.

The shift to an environmental paradigm is also beginning to affect the jurisdictional boundaries between different international and domestic issues. For example, environmental and consumer advocates have pointed out that it is not tenable to limit international trade negotiations to the treatment of products. Equal attention must be paid to the process of production. This means that many traditionally domestic issues, such as health and safety, consumer protection, and internalization or socialization of the full costs of production, are becoming legitimate trade issues. Conversely, traditional trade issues such as non-tariff barriers and subsidies are becoming important consumer, labor, and environmental issues.³⁷

The blurring of the distinctions between domestic and international issues also increases the number of parties who wish to participate in the formulation and implementation of these international arrangements. Those organizations and individuals who participate, at the domestic level, in the formulation of health and safety or consumer protection standards wish to participate in the international fora in which these issues are or could be discussed. Moreover, because of the opportunities created by the new technologies, they have the knowledge, power, and

stoves, found inside people's houses, and the problems caused by lack of access to safe, potable water. *See Development and the Environment: World Development Report 6* (World Bank ed., 1992) (stating that between 400 to 700 million people are affected by inhaling smoky indoor air and that two million deaths are attributable to water pollution each year). This suggests that the high priority attached to these global environmental issues is as much a reflection of the priorities of the rich countries and of the lack of democratic processes in international law as of the severity of the problems.

37. Three areas of traditional consumer, environmental, and labor issues have presented themselves as contentious trade issues. *See, e.g., Chilean Crabs Latest Threat to U.S. Wildlife Laws, Says Defenders of Wildlife; Chilean Minister to Discuss Dolphin Kills, NAFTA Impact*, 1991 U.S. NEWSWIRE, Oct. 13, 1993, available in LEXIS, Nexis Library, CURRNT File (commenting that Chile's practice of tuna fishing creates a trade against the environment); *Regulation of Environmental Standards by International Trade Agreements*, Int'l Env't Daily (BNA) (Sept. 15, 1993), available in LEXIS, Nexis Library, CURRNT File (noting that certain countries use of hormones in livestock and cattle breeding have become trade issues in the international arena); *Jobs at Center of NAFTA Debate*, 1993 DLR 199, Oct. 18, 1993 (commenting that the North American Free Trade Agreement has stirred labor issues and debate in the United States).

international connections to make their presence felt in trade negotiation fora.

The failure of international fora to incorporate these private actors deprives the international negotiators of an important source of expertise and information. Furthermore, this failure creates the impression that international law is sanctioning the use of international procedures to undermine the standards set by the democratic processes of the participating sovereign states.³⁸ The environment is therefore posing an important challenge to international law and the concept of sovereignty. This challenge comes not only from the evolving environmental paradigm, but also from the growing interest private actors have in international negotiations. Faced with this challenge, international law needs to conceptualize environmental issues in ways that incorporate both their domestic and international dimensions and to establish rules that define the international rights and responsibilities of private actors.

C. THE ROLE OF INTERNATIONAL ORGANIZATIONS

The role of international organizations has undergone substantial evolution in the wake of the process of decolonization, the growing recognition of poverty and environmental issues as fundamental international

38. Interested private actors are being deprived of an important part of their democratic rights if they cannot meaningfully participate in the formulation of the regulatory frameworks applicable to their areas of interest. The debates in European countries over the ratification of the Maastricht Treaty and in the United States over NAFTA both demonstrate the significance of this issue. The approval of the Maastricht treaty in some member states required a referendum, and in others only a parliamentary ratification. In the United Kingdom, people pleaded in vain for a referendum to decide on Maastricht. Miles Kington, *A Referendum? Much too Democratic for Britain*, INDEPENDENT (London), May 19, 1993, at editorial page. Sarah Womack, *Lib-Dems Call for People Power Ministers*, PRESS ASSOC. NEWSFILE, July 28, 1993, available in LEXIS, Nexis Library, ALLNWS File. People were not asked to vote on Maastricht in Germany either. Their dissatisfaction with the way Maastricht was adopted was one of the reasons why the Green Party brought the Maastricht Treaty before the German Constitutional Court to examine its constitutionality. *Bonn Goes on Trial Over Maastricht*, DAILY TELEGRAPH (London), July 1, 1993, at 13. Moreover, the narrow result of the Danish Referendum shows that the Maastricht Treaty did not have the people's broad support. *Denmark: 56.8% of Danes Accept the Treaty of Maastricht*, AGENCE EUROPE, May 20, 1993 available in LEXIS, Nexis Library, ALLNWS File. NAFTA was disputed in a similar way. Kelly McParland, *NAFTA - The Battle Heats Up: Elite Backing Goes For Naught as Popular U.S. Revolt Swells*, FIN. POST, Sept. 25, 1993, at S14; Victor Olson, *NAFTA is So Sweeping that We Should Vote on It*, TORONTO STAR, Jan. 21, 1993, at A25.

problems, and the increasing globalization of the world economy. The United Nations has become a universal forum in which any issue of interest to any member of the international community can be raised and debated. In addition to its peacekeeping functions, the United Nations is now interested in and involved with a wide range of social, economic, and political development programs.

A good example of this fundamental evolution is the United Nations' growing involvement in the promotion and protection of human rights. This involvement has resulted in the recognition of the universality of human rights³⁹ as well as the development of instruments to supervise the protection of human rights. The present system of supervision provides individuals with opportunities to hold their governments accountable in myriad arenas.⁴⁰ While this system does not yet assure redress to all victims of human rights abuses, it has succeeded in making human rights performance an essential attribute for political legitimacy and respectability at the international level.⁴¹ The system promotes and is stimulated by an international movement of private actors that reflect the emerging international civil society.⁴²

39. See *Vienna Declaration and Program of Action*, WORLD CONFERENCE ON HUMAN RIGHTS, U.N. Doc. A/Conf. 157122, June 14-25, 1993 (demonstrating the importance of human rights issues in the global arena).

40. GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (Hurst Hannum ed., 1984) (edited for the International Human Rights Law Group) (providing a guide for gaining access to various international organizations and procedures for redress of human rights violations). See Claudio Grossman, *Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation*, 15 HASTINGS INT'L & COMP. L. REV. 363 (1992) (discussing the origin of the Inter-American system and the need for direct legal representation).

41. Progress has been greater at the regional than at the global level, particularly in Europe and the Western Hemisphere. See Thomas M. Frank, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); *Final Act of the Conference on Security and Cooperation in Europe, Helsinki 1975*, 14 I.L.M. 1292-1325 (1975); Thomas Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 AM. U.L. REV. 155 (1981) (comparing and contrasting approaches to the preservation of human rights).

42. More than 1,500 NGOs from all regions of the world participated in the World Conference in Vienna, Summer 1993. THE REPORT OF THE NGO FORUM, U.N. Doc. A/Conf. 15717. There were more than 3,000 participants representing the NGOs who influenced the conference agenda on an unprecedented level. *Id.* Delineated by region, Vienna welcomed 202 NGOs from Africa; 178 from North America; 236 from South America; 270 from Asia; 38 from Australia; 426 from Western Europe; and 179 from Eastern Europe. *Id.* The NGOs influence within the United Nations can only continue to increase. The NGO forum in Vienna created a new NGO Liaison

The IMF, over time, has assumed more responsibility for dealing with the payments to and the structural problems of developing countries.⁴³ The IMF has expanded the period of time that it uses in its analyses and over which it makes financial assistance available to its member states. As a result, the IMF has been able to incorporate more supply side responses into the design of its adjustment programs. Consequently, the IMF pays relatively more attention to the structural causes of balance of payments problems and is relatively more sensitive to the difficulties involved in changing the structural features of national economies.⁴⁴ This shift in emphasis, in turn, means that the IMF has been forced to address many of the developmental, in addition to the monetary, problems that confront its member countries.

The functions of the IBRD have undergone an even more dramatic transformation than those experienced by the United Nations and the International Monetary Fund. Confronted by the developmental problems of borrowing countries and the inability of many World Bank funded projects to perform as expected in deficient macroeconomic environments, the World Bank has broadened its focus from an exclusive concern with discrete development projects to include a concern with the general policy environment within which the project must function. The World Bank has thus begun to fund both general and sector-specific adjustment programs. The loans for these programs provide borrowers with general balance of payments support conditioned upon the borrower adopting certain policy reforms. Since the borrower's acceptance of these conditions results in contractually binding obligations, the conditions relate to the adoption of certain institutional or legislative measures

Committee (NLC), which will coordinate the work of the NGO community with the United Nations and its conferences. *Id.* Seats on the NLC were allocated according to the following regional and thematic constituencies: Africa (3); Asia (3); Pacific (1); Western Europe (3); Latin America and Caribbean (3); Central and Eastern Europe (1); Women (3); Indigenous People (3); International NGOs (3); Children (1); Unrepresented Peoples and Nations (2); Youth (1); Refugees and the Displaced (1); and the Disabled (3). *Id.*

43. See DANIEL D. BRADLOW, *The International Monetary Fund, The World Bank Group and Debt Management*, in LEGAL ASPECTS OF DEBT MANAGEMENT (UNITAR forthcoming) (discussing the IMF's increasing responsibilities towards developing countries).

44. See *The IMF and Stabilization: Developing Country Experiences* (T. Killick ed., 1984) (noting that the IMF has been criticized for failure to pay adequate attention to the social impact of its policies); CORNIA ET AL., *ADJUSTMENT WITH A HUMAN FACE: PROTECTING THE VULNERABLE AND PROMOTING GROWTH* (1987) (noting the need to incorporate concern for human welfare into IMF adjustment programs).

that are designed to "adjust" the structures within which economic activity or development policy is made.⁴⁵

This shift in the focus of World Bank lending operations has forced the institution to address explicitly the institutional constraints that influence the ability of the borrower to implement and sustain the policy reforms. In doing so, the World Bank has been forced to consider all aspects of a country's governance that can influence its policymaking capacity.⁴⁶ By converting these concerns into the conditions attached to its loans, the World Bank influences the form and substance of the borrower's policymaking processes. The reason for this emphasis is that the efficiency and the efficacy of the country's governance will influence the borrower's ability to repay the loan and its ability to use successfully the funds to achieve the desired structural changes. As a result, the World Bank has become an active participant in the policymaking process of its borrower countries.⁴⁷

The fact that these international organizations have been compelled by the evolution in their mandates to involve themselves in the internal affairs of their member countries has necessarily undermined the sovereignty of its member states. This involvement has also forced these international organizations to become more receptive to the calls by private actors for increased public participation in their affairs.⁴⁸ These

45. See JOAN M. NELSON, INTRODUCTION: THE POLITICS OF ECONOMIC ADJUSTMENT IN DEVELOPING NATIONS, 3-4 (Joan M. Nelson ed., 1990) (discussing stabilization of debt procedures as well as structural changes that stimulate economic growth); Paul Mosley et al., *Aid and Power: The World Bank and Policy-Based Lending*, Vol. 1, 65-67 (1991) (discussing the World Bank's use of conditionality in its lending operations and the policy dialogue between the World Bank and its member countries); IBRAHIM F.I. SHIHATA, THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS (1991) (focusing on the evolving role of the IBRD in a world which demands more of the World Bank than it has in the past).

46. SHIHATA, *supra* note 45, at 53-96. The World Bank does seek to limit the issues it considers in examining a country's governance. *Id.* at 85-93.

47. See Mosley, *supra* note 45, at 51 (noting that borrowing countries' policy makers occasionally encounter the problem of successfully complying with the World Bank's conditions, confusing these conditions with those of the IMF); see also Jonathon Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159, 171-80 (providing a description of the objective, the scope, and the implementation of the concept of policy-based lending); Sigrum I. Skogly, *Structural Adjustment and Development: Human Rights - An Agenda for Change*, 15 HUM. RTS. Q. 751 (1993) (commenting on the interplay between human rights and development).

48. The most significant example of this is the World Bank's adoption of a new information disclosure policy and establishment of an Independent Review Panel in

developments suggest a need to reformulate the operating procedures and responsibilities of international organizations in such a way that they incorporate both the domestic and international consequences of their activities.

D. PEACE AND SECURITY

As the world is becoming more integrated, the range of factors that influence both national and international peace and security has expanded. Threats to national and international well-being can arise from environmental, social, economic and human rights problems, as well as from traditional military sources.⁴⁹ For example, social conflict in one area of the world can interrupt the supply of goods and services to countries across the globe, as well as cause human migrations that overtax the resources of other countries and internationalize local conflicts.

In addition, global integration has enhanced the general awareness of the interconnectedness of human beings. On occasion this awareness has stimulated a sense of solidarity in the international community. As a result, the international community has taken a growing interest in local conflicts that directly affect only the internal peace of sovereign states.⁵⁰

1993. The panel investigates complaints from directly affected private parties regarding the World Bank's failure to follow its own operating rules and procedures. See *IBRD Resolution on the Inspection Panel No. 93-10 and IDA 93-6; IBRD Resolution on Disclosures of Operational Information*, in *IBRD OPERATION MANUAL - BANK PROCEDURES*, BP17.50 (World Bank ed., 1993). See generally Daniel D. Bradlow, *Why World Bank Needs an Ombudsman*, *FIN. TIMES*, July 14, 1993, at 13 (commenting on the World Bank's need for an independent monitor of its actions); Daniel Bradlow, *A Proposal for a World Bank Ombudsman* (May 1993) (presenting testimony submitted to the International Subcommittee of House Banking Committee).

49. See Michael Prieur, *Protection of the Environment*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 1017, 1019 (Mohammed Bedjaoui ed., 1990) (discussing the range of factors which may threaten the environment); Barbara Stark, *Conceptions of International Peace and Environmental Rights: The Remains of the Day*, 59 *TENN. L. REV.* 651 (1992) (reviewing the global environment and its possible maintenance).

50. The global effort to assist famine victims in Africa in the 1980s is a good example of this sense of solidarity which was stimulated by private actors and facilitated by the ease of global communications. See Frances Westley, *Bob Geldof and Live Aid: The Effective Side of Global Social Innovation*, 44 *HUM. REL.* 1011-36 (1991) (discussing the massive fundraising projects undertaken to assist African famine victims); David Fricke, *Bob Geldof: Rock and Roll's World Diplomat*, *ROLLING STONE* 18 (July/Aug. 1985) (noting the rock-and-roll singer's role in the aid to African fam-

These developments, fueled by the end of the Cold War, have enabled the international community to recognize its interest in playing a more active role in the promotion of peace and security among nation-states. The international community has also begun to acknowledge that peacekeeping involves resolving the causes of conflict as well as the manifestations of that conflict. As a result, the international peacekeeping forces organized by the United Nations and regional organizations have been given mandates that extend beyond peacekeeping to include peacemaking. The most significant examples of this development include the cases of Namibia and Cambodia. In each of these cases, the peacekeeping operation assumed many of the traditional attributes of national sovereignty such as the maintenance of law and order, the organization of elections, and the provision of key governmental functions during the period of transition from conflict to peace.

The problematic examples of international involvement in conflicts such as those in Angola, Haiti and Bosnia suggest that the international community has not yet defined the scope of its obligation to intervene to protect human life and the domestic peace and security of its member countries; nor has it been able to establish a uniformly applicable set of rules for intervention in the internal affairs of other states and social groups. These examples further demonstrate that the international community is not yet ready to accept the political and financial consequences of peacemaking. Nevertheless, these examples also demonstrate that there are powerful forces pushing the international community towards acceptance of this new reality.

Those cases in which the international community has been willing to undertake complex peacemaking operations, involving the assumption of certain governmental functions, raise important considerations of responsibility and accountability. The peacekeepers relate to the general population within the country in much the same way that governmental actors relate to the population within a country. This suggests that the international community, in defining the mandate and in the execution of these operations, needs to ensure that the international peacekeepers perform their responsibilities to these private actors to the same extent and in a comparable manner to what would be expected of a national government.

These developments also pose an important challenge to international law: to balance the ability to intervene so as to maintain peace and

ine victims); Paul McGrath, *Delivering Live Aid*, 98 MACLEAN'S 12 (1985) (commenting on the social effort to deliver relief to African famine victims).

security with concerns about undue interference by the most powerful members in the international community. As a result, the international legal process needs to redefine the respective rights and obligations of the different actors in the international community in a way that promotes both effective peacekeeping and the ability of all actors to determine and implement peacefully their own social, political, cultural, and economic policies.

E. RECONCEPTUALIZING INTERNATIONAL LEGAL ISSUES

The deficiencies of the present international legal order based on the *de jure* sovereignty of the nation-state and a relatively clear distinction between international and domestic legal issues are obvious. The nation-state is no longer functionally "the master of its own territory." Some private actors and international organizations have at least as much power as the sovereign state. They are able to use their power to influence the decisions and policies of the individual nation-state in the domestic realm and of the community of states in the international arena. This shift in power is beginning to produce an international civil society, based on shared interests and new loyalties, the members of which are beginning to demand the right to be full participants in the formulation of international rules and decisions.⁵¹

These developments pose two challenges for international law. First, it needs to recognize and incorporate into its jurisdiction all international actors. The states, international organizations, and private actors such as transnational corporations; trade unions; consumer, environmental, development and human rights NGOs; and private individuals,⁵² are now all engaged in the ongoing process of formulating and implementing international legal standards. An international legal process that fails to allow non-state actors to participate fully in the process cannot develop legal norms that are fully responsive to the needs of the international community.

Second, international law must adapt to the reality that the instantaneous transmittal of information around the globe ensures that the im-

51. See JOHN CLARK, *DEMOCRATIZING DEVELOPMENT* 125-30 (1990) (noting not only NGOs' international advocacy powers, but also their ability to effect change in their respective governments); DAVID C. KORTEN, *GETTING TO THE 21ST CENTURY* 95-100 (1990) (discussing the development and objectives of voluntary organizations as well as their role in facilitating political participation in a democracy).

52. Grossman, *supra* note 40.

pact of all significant social, economic, cultural, and political issues transcend national boundaries. This development transforms all of these issues into either domesticated international issues or internationalized domestic issues in the sense that they simultaneously affect all societies and are influenced by the national debates in each of these societies. Furthermore, this concept reveals that the belief in a clear distinction between domestic and international legal issues is fundamentally flawed.

International lawyers cannot meet these challenges by merely redefining international legal issues. Any redefinition that retains the standard distinction between domestic and international issues will be inadequate because it will not incorporate both the domestic and the international dimensions of each issue. Instead we need to develop new legal norms that consider both the domestic and international dimensions of the issues to which they are applicable, as well as new institutional arrangements that accommodate all the participants in the international legal process. This undertaking requires a fundamental reconceptualization of the norms and institutions of international law. While the new norms and institutional arrangements will ultimately evolve out of the world being shaped by the four forces described above, two of the principles that should shape the new legal process can be identified.

The first of these principles is that of participation. Essentially, all parties that will be directly affected by the decisions and actions taken, regarding any particular issue, should be able to participate in the formulation of those decisions.⁵³ While the form of participation may vary according to the nature of the issue involved, all affected parties should be assured of meaningful participation in the fora in which decisions are made. A corollary to this principle is that all affected parties should have appropriate access to the information needed to ensure that their participation is meaningful.⁵⁴

The second principle is that all affected parties should be able to hold

53. THE AFRICAN CHARTER FOR POPULAR PARTICIPATION IN DEVELOPMENT, U.N. Doc. E/ECA/CM.116/11; see also Daniel D. Bradlow, *Regional Developments: Africa*, 25 INT'L L. 1053 (1991) (commenting on the African Charter); Agenda 21, *supra* note 21 (compiling the latest four UNCED documents); Edith B. Weiss, *Introductory Note on UNCED Meeting*, 31 LL.M. 814 (1992) (commenting on the latest four documents of the UNCED). See *supra* note 39 and accompanying text (discussing the 1993 Vienna Human Rights Conference).

54. The World Bank has acknowledged this principle in its new information disclosure policy. According to this policy, the World Bank will be establishing Public Information Centers and will be expanding the range of documents it makes available to the public. IBRD Resolution on Disclosure of Information, *supra* note 48.

those who make and implement policies that affect them accountable for their actions. The form of the accountability may vary, but generally a sustainable legal order must provide all those affected by a particular decision with the ability to hold those who make and implement the decision responsible for the consequences of their actions.

Neither of these principles is linked to sovereignty or to the international or domestic nature of an issue.⁵⁵ The sole criterion used to identify the parties who should be able to participate in decision making is the nature and the impact of the decision to be taken. Similarly, the criterion used to identify who should be given the ability to hold decision makers accountable is who is actually affected by the decisions that have been taken and the consequences thereof. The identity of those to be held accountable depends only on who actually has the power to make and implement decisions.

The fact that sovereignty is irrelevant to these two principles means that they will help shape an international legal order that is people-centered, rather than state-centered. This focus creates the possibility for a much more cooperative and rights based legal order than exists under the present state-centered international order. However, a people-centered legal order provides no obstacle to stronger states or social groups interested in making an unjustified intervention in the internal affairs of weaker states or social groups. This in turn creates the risk that a people-centered legal order could result in the centralization of power in the international community.

The new international legal order, therefore, needs a means to distinguish between legitimate international action in solidarity with other members of the global community and the unjustified use of power. The two basic principles offer a good starting point for finding a solution to this problem. Participation establishes the duty of every state or group, that seeks to intervene in the affairs of any other state or group, to obtain authorization for its actions through a decision-making mechanism in which all interested parties will have the right to participate. Account-

55. It may also be noted that these two principles are essential characteristics of any democratic society. In this sense they merely represent the extension of the principles of democracy from the domestic to the international realm. See C. Hides, *On the Citizen and the Legal Person: Toward the Common Ground of Jurisprudence, Social Theory and Comparative Law as the Premise of a Future Community*, and the *Role of the Self Therein*, 59 U. CIN. L. REV. 789 (1991) (discussing the issues of democracy and responsibility on the international plane); Jochen Frowein, *The European Community and the Requirement of a Republican Form of Government*, 82 MICH. L. REV. 1311 (1984) (pondering democracy within the European Community).

ability establishes the right of the target state or group to hold the intervenors responsible for the consequences of their actions.

These principles obviously need further development and need to be tested in the crucible of the international order which is evolving under the influence of the four historical forces discussed above. The discussions at the conference were designed to spark debate on the challenge posed to international law by these four historical forces. Our purpose in publishing the papers in this symposium issue is to further stimulate discussion of the role of private actors in the new international legal order and on the movement towards a people-centered transnational legal order.