tle. As Mr. Aust said earlier in the day: does the concerned instrument come from an authoritative source? That is the classical criterion.

In the other case, for social actors like Greenpeace or Amnesty International, the criterion for legitimacy is completely different. It is not technical, it is ideological; for right or wrong, this is not the problem here.

These actors pretend to be representative of the true interests, values and worries of the members of the international civil society. They pretend to be legitimate because they speak in the name of the interests of humanity.

Here, we face the issue not only of how to *classify* actors but also, not methodological anymore but fundamental, of how to acknowledge the right of participation of these actors in the international normative dialogue. Yes, indeed, the subject matter of Dr. Röben's report was a difficult one, and I remain critical, but I don't pretend that I would have dealt better with the matter than he did!

The Relevance of Non-State Actors to International Law

*Comment by Steve Charnovitz**

Non-state actors play an important role in the progressive development of international law.[1] Although this role is hardly new, the degree and significance of the participation of nongovernmental organizations (NGOs) and the private sector continues to increase.[2] In many international regimes today, such as human rights and the environment, if the non-state participants were to disappear, the remaining regime would be only a shell of what now exists, and future development of the law would be less robust.

The rise of NGOs on the international plane correlates well to the blossoming of conventional international law, and international organization, starting in 1900 or so. The science of customary international law in the 19th century did not have handgrips for NGOs. Yet when international lawmaking began to become more of a multilateral treaty and organization-based phenomenon, NGOs were drawn in the way that bees are to flowers. NGOs were natural participants in a "law of coopera-

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* Thanks to Isabelle van Damme for assistance in translations.

1 *Stephan Hobe*, Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations, 5 Indiana Journal of Global Legal Studies 191 (1997); *Tatsuro Kunigi*, Challenges Posed by Globalization and Synergistic Responses: Multilateral Institutions in Transition, in Economic Globalization and Compliance with International Environmental Agreements (Alexandre Kiss et al. eds., 2003), at 13.

2 NGOs are often referred to as civil society organizations (CSOs) because the term NGO is perceived as too negative. For example, see UNCTAD, CSO Newsletter Online Edition, available at <www.unctad.org>.

tion" because NGOs linked up individuals across borders who were united for the same cause.

One of the topics being examined by the Max Planck Institute Conference is whether lawmaking by treaty is now giving way to less formal techniques. If that is occurring, then the implications for NGOs of such a change should be considered. On the one hand, many of the so-called "alternatives" to treatymaking, such as non-binding standards, may provide more space for NGO influence. On the other hand, the trend toward more transgovernmental cooperation among technocrats may impose new barriers to the influence of private groups. The prevailing norm that NGOs should be able to engage in consultative activities with international organizations may not be applied to every new modality of intergovernmental cooperation. That said, this author would offer the vaticination that NGOs will find a way to achieve influence in whatever formalities are used to pursue world public order.

Several issues arise in assessing the relevance of non-state actors in contractual international lawmaking, in non-contractual lawmaking, and in the development of customary international law. First, there is a key conceptual question, namely, the proper definition of a non-state actor. Second, there are some important normative questions about the propriety of the participation of NGOs. Third, there is a question as to whether NGO activities are a source of international law. All of these issues came up in the discussions at the Conference, and this brief comment will discuss each in turn.

1. Defining a Non-State Actor

Many of the papers at this Conference have taken a very broad view regarding the identity of relevant actors. For example, the very thoughtful paper by Volker Röben, while not specifically defining such actors, characterizes as actors a variety of entities including expert bodies, international organizations, regional organizations, and treaty entities. The unifying characteristic of such actors would seem to be that they are relevant to international law without being a state. Such a definition effects a broad sweep, including entities as diverse as the U.N. Security Council, the World Trade Organization (WTO), the Codex Alimentarius Commission, and Conferences of Parties of multilateral environmental agreements.

Röben is in the mainstream in how he describes international organizations.[3] In both political and legal discourse, we commonly hear the United Nations being described as a cogitating person. Consider U.S. President George Bush who in November 2003 declared that

> America and Great Britain have done, and will do, all in their power to prevent the United Nations *from solemnly choosing its own irrelevance* and inviting the fate of the League of Nations.[4]

Readers may take exception to many aspects of this statement, but I invite reflection on the question of whether the United Nations actually does sit along the East River and reflect on whether it should be relevant. Even if the U.N. does not itself choose and think, the idea of the U.N. as a person is an old idea that was boosted by the *Reparations* decision.[5] In that important advisory opinion, the International Court of Justice stated that the United Nations Organization has "a large measure of international personality and the capacity to operate upon an international plane."[6]

Although the portrayal of international organizations as actors is not necessarily wrong, we too often overpersonify the international organization. In my view, one should ascribe actorhood to an entity only if it acts purposively in pursuit of a goal, typically its perception of the public interest. The danger of excessive anthropomorphism is that when every entity is called an actor, the term may be drained of meaning for descriptive or analytical purposes.[7]

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[3] For example, see *William M. Reisman*, The Role of the Economic Agencies in the Enforcement of International Judgments and Awards: A Functional Approach, 19 International Organization 929, 932 (1965) (characterizing international organizations as "international actors").

[4] Remarks by the President at Whitehall Palace Royal Banqueting House, Whitehall Palace, London, England (emphasis added), 19 November 2003, available at <www.whitehouse.gov>.

[5] Writing four years before the decision, C. Wilfred Jenks questioned whether it was necessary to complicate the development of the law of international institutions with the idea of legal personality. *C.W. Jenks*, The Legal Personality of International Organizations, 22 British Yearbook of International Law 267, 271 (1945).

[6] Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, at 179.

[7] This is not to deny that political scientists may fruitfully study the behaviour of international organizations with a view to predicting outcomes.

Of course, some anthropomorphism and aggregation is appropriate. The discourse of international law would be stymied if it was limited to considering only natural persons, and foreclosed consideration of states. Thus, although human individuals are the only true, ultimate actors, amalgamations of humans as well as other units can be viewed as actors too. By tradition and doctrine, the "state" is considered an actor. Government leaders and agencies can also be actors. An organization of natural persons, such as an NGO, or a corporation set up by individuals can be an actor. Deciding whether a particular unit is or is not an actor will be a matter of judgment. Indeed, the right granularity of actorhood will always depend on context. Recalling the *Reparations* decision, how much of "a large measure" of international personality an international organization really has will depend on the activity being discussed.

In calling for a more refined view of "actor", I am not seeking linguistic clarity for its own sake. Rather, my concern is that the study of international law will be impeded if we do not more carefully distinguish between *actors* and the *arenas* in which they act.[8] Both the actors and the arenas have been subject to a great deal of "proliferation", to use the title of Röben's paper. But such proliferation itself is no reason to conflate these two distinct trends.

In general, an institution of collective decisionmaking among governments should not be called an "actor." Thus, the U.N. Security Council, the North Atlantic Treaty Organization, the Financial Action Task Force, and the WTO are not themselves actors, but rather are arenas for utilizing persuasion and applying power. This self-recognition of status can be seen in the text of the Agreement Establishing the WTO which calls the WTO a "forum for negotiations among its Members."[9]

Similarly, the institutions of judicial decisionmaking should not be called an actor. Thus, the International Court of Justice is more properly conceived as an arena rather than an actor. Judges, to be sure, are actors.

[8] Jan Klabbers has suggested that international organizations may be changing to reposition themselves as guarantors and facilitators of public debate, rather than as the embodiment of legislative reason. *Jan Klabbers*, The Changing Image of International Organizations, in The Legitimacy of International Organizations 221, 246 (Jean-Marc Coicaud/Veijo Heiskanen eds., 2001).

[9] Marrakesh Agreement Establishing the World Trade Organization, art. III:2.

The difference between viewing the Security Council as an actor versus an arena can be seen by the example of conflict diamonds. The Security Council has approved several resolutions to address that problem, but whether the Council itself was really the actor is debatable. To understand the Council's decisions, one has to peel away the skin and look inside. The key actors were the *demandeurs* that sought (or resisted) action in the Security Council. For example, the important actors on conflict diamonds included: the governmental Members of the Security Council, the target governments such as Sierra Leone, business interests represented by the World Diamond Council, NGOs such as Global Witness, and many others.

Clarifying and distinguishing the key actors and the key arenas is especially important for anyone who seeks to influence the world constitutive process. No one attempting to influence an outcome in the Security Council would make the mistake of viewing the Council as a unitary person to be influenced directly. Yet when analysts address the topic of non-state actors, we may attribute more personality to the Security Council than is empirically warranted.

The idea that an international organization is a person goes back about 100 years to the granting of legal personality to such organizations. This was needed so that these organizations would have legal capacity without coming under the jurisdiction of national law. But such personality should not be taken to mean that an international organization necessarily has the core attributes of personhood such as an autonomous will. Legal independence from states is also needed for an arena of lawmaking.

I have termed the international organization an "arena", but perhaps a better term for it is a "community of interest." That was the conclusion reached by David J. Bederman in his 103-page masterful historical survey of legal personality in international organizations.[10] As Bederman points out, beginning with the Cape Spartel Lighthouse Commission in the 19th century, legal scholars began to understand the international organization as an autonomous, independent entity, with a "corporate will" separate from its member states and with "civil personhood."[11] Through these developments, the state-centric perspective of interna-

[10] *David J. Bederman*, The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel, 36 Virginia Journal of International Law 275, 277 (1995-96).

[11] *Id.* at 352-53.

tional law was rightfully overcome. Yet the metaphor of personality can also mislead. While international lawyers continue to describe international institutions "with the tired, traditional metaphor of *personality* ...", Bederman explains, other scholars have come to see them in terms of communities.[12] Bederman traces this view back to Otto von Gierke who in 1868 portrayed the international order as a community divorced from the contractual relations of absolute, atomistic sovereign states.[13] Additional contributions to the idea of international organizations as *places* rather than *persons* came from Paul Reinsch, Pierre Kazansky and Donisio Anzilotti.[14] Thus, as Bederman summarizes his thesis, international institutions do not "make" legal rules or norms. Rather, they facilitate such rules by being the centre of the community.[15]

2. Participation of Non-State Actors

As Eibe Riedel and Volker Röben have pointed out, non-state actors are active participants in international law processes. Such participation remains controversial, however, and throughout the Conference, questions were voiced about the legitimacy of NGO participation. For example, my co-commentator Pierre-Marie Dupuy has raised the question of an imbalance between the emerging role of NGOs in the invocation of certain rules of international law and the continuing lack of true international legal personality of the NGOs.[16]

Two questions are fundamental: First, is it legitimate for an NGO to seek to participate outside of the channel of its own state?[17] Second, is it legitimate for states to grant consultative status to NGOs and to give

[12] *Id.* at 371.

[13] *Id.* at 355-56, 371.

[14] *Id.* at 372.

[15] *Id.* at 372.

[16] See *Pierre-Marie Dupuy*, Sur les Rapports entre Sujets et "Acteurs" en Droit International Contemporain, in Man's Inhumanity to Man 261, 268 (L.C. Vohrah et al., eds., 2003).

[17] The question is put in this form for simplicity. In reality, however, NGOs that address world order issues almost always have a membership that is transnational, and thus the NGO does not belong exclusively to one state or another.

them a hearing? Although the questions are interrelated, they deserve separate attention.

As Röben points out, self-determination is the single source for legitimacy of participation in international lawmaking. He notes that self-determination justifies the participation of states, and then his paper contributes a deeper insight that self-determination also justifies enlisting the participation of actors other than states.[18] As examples, he points to the participation of individuals and private organizations.

In my view, Röben provides the correct answer to the question of why an individual or NGO should presume the capacity to participate in international lawmaking processes. That is, the right of participation is derivative of self-determination and the pursuit of self-interest. But there is still one intellectual hurdle to climb which is the argument that the individual should channel his energy and ideas exclusively through his own government because any extra-statal activity would be illegitimate. Unpacking this argument, the idea is that if an individual convinces his sovereign state to do or not do some action, then he has succeeded, but if that individual fails to convince his state, then he should keep trying at home. Yet if the issue being addressed is international in scope, then the solution will typically require cooperation between governments. For such issues, convincing one's own government is just one small step toward what needs to be accomplished, and no sentient individual will want to stop there. For example, if a Dutch citizen in the Netherlands wants to stem the problem of conflict diamonds, and convinces the Dutch Government to press for a Security Council resolution, surely no one would seriously argue that this individual has now exhausted all legitimate activities of persuasion.

Thus, the commonly-repeated argument against NGO activism misses the point. Typically, critics of NGOs notice that NGOs are pursuing (idealistic) causes in which their home governments are *not* convinced, and from that draw the conclusion that the NGO is acting illegitimately because it is pursuing a cause not shared by a majority at home. But the fallacy of this criticism is the assumption that the NGO is playing just a one-level game with its own government. Once it is appreciated that the international causes of NGOs can only be achieved by intergovernmental cooperation, then it becomes clear that whether an NGO has been successful in enlisting its own government is simply one blip on the

[18] See also *Thomas M. Franck*, The Empowered Self 35-37 (1999) (discussing the emerging self in self-determination).

NGO's radar screen, and can hardly be the criterion of the legitimacy of using the instrument of voice outside one's homeland.

The same is true in reverse. Successfully convincing one's own government to resist an international policy hardly prevents the policy from being foisted on one's country anyway. Thus, the individual or NGO who wants to oppose a policy will not limit activities to the home arena. In other words, if one admits that self-determination is a morally valid goal for an individual, then one cannot assert that he needs only pursue it within national borders.

Another reason why NGOs may want to act is to *oppose* the position of their home state. As many commentators have pointed out, the largest states often seem to be less interested in the development of international law than the smaller states. This asymmetry may put a drag on the development of law. Recognizing this problem, NGOs in large countries like the United States often seek to act as a counterbalance to the parochial attitude of their own government.

The second fundamental question is whether governments should invite the participation by NGOs in international organizations and negotiations. The question of legitimacy comes up because some commentators try to justify the phenomenon of NGO participation as "representation" by NGOs of discrete groups, such as environmentalists or workers. This claim of representation, quite rightly, leads to several criticisms including (a) that NGOs are self-selected rather than elected, and (b) that the NGO may not in fact accurately represent the persons it claims to represent (i.e., a principal-agent problem).

In my view, the true justification for listening to NGOs is not that they represent a discrete group opinion. Rather, it is that the ideas of and information from the NGOs can be helpful to governments working together to solve problems. The most valuable input from an NGO will often be expertise and facts that are not readily accessible from government officials or international bureaucrats. In addition, another valuable contribution emerges when the NGO uses its voice to strengthen the enforcement capacity of international law. As Daniel Thürer has explained, "... by reminding states to fulfil their obligations entered into under international law, NGOs could often be said to express the juridical conscience of the international community."[19]

[19] *Daniel Thürer*, The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State, in Non-State Actors as New Subjects of International Law 37, 46 (Rainer Hofmann ed., 1999).

In recent years, the governmental practice has deepened of including NGOs in international negotiations and treaty processes. For example, in his Conference paper regarding the Council of Europe, Jörg Polakiewicz notes "the role of NGOs" as a factor in the success of the regime. In the environmental field, Rüdiger Wolfrum and Nele Matz have pointed out that, with regard to the development of international law and the monitoring of compliance, there is clear evidence of increasingly close cooperation between treaty regimes and NGOs.[20] Such trends have been endorsed by the Institut de Droit International which, in 1997, approved a Resolution on Procedures for the Adoption and Implementation of Rules in the Field of the Environment.[21] Article 6 of the Resolution states that

> States and international organizations should provide to interested non-governmental organizations opportunities to contribute effectively to the development and implementation of international environmental law through, *inter alia*, appropriate participation in the law-making process, provision of technical advice to States and international organizations, raising of public awareness of environmental problems and public support for regulation, and monitoring of compliance by States and non-State actors with environmental obligations.

Similar trends exist in the field of trade law. In recent years, many analysts have proposed that the WTO provide a consultative status for non-state actors.[22] In 2003, some progress was made as the WTO Director-General established advisory bodies from business and NGOs.[23] At the regional level, the recent conference of Ministers negotiating the

[20] *Rüdiger Wolfrum/Nele Matz*, Conflicts in International Environmental Law 205 (2003).

[21] Session of Strasbourg, 1997, available at <http://www.idi-iil.org>.

[22] For example, see *Wolfgang Benedek*, The Constitutionalization of the World Trading Order: Competences and Legal Order of the WTO, in Entschädigung nach bewaffneten Konflikten. Die Konstitutionalisierung der Welthandelsordnung 326, 327 (2003).

[23] *Daniel Pruzin*, WTO Chief Sets up Advisory Bodies with Business, NGOs to Boost Dialogue, BNA International Trade Reporter, June 19, 2003, at 1044.

Free Trade Area of the Americas approved a Declaration that highlighted the "Participation of Civil Society" in the process.[24]

One similarity in treatymaking regarding environment and trade is that although new law still tends to be addressed to governments (the so-called "subjects" of law), the units who are most directly affected are the private economic and social actors. Nevertheless, an interesting development recently occurred. The WTO General Council approved a waiver of the controversial rule in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that had been making it difficult for governments authorizing a compulsory license to produce generic drugs for the purpose of exporting those drugs to countries without manufacturing capacity to produce generics.[25] The General Council approved this waiver subject to a Chairperson's Statement that noted "best practices" by pharmaceutical companies (such as Novartis) to prevent diversion of products (from low-price to high-price markets). In addition, the formal Statement declared that

> Members and producers are encouraged to draw from and use these practices, and to share information on their experiences in preventing diversion.[26]

This episode is noteworthy because it is apparently the first time that the WTO has directed recommendations to private economic actors.

The greater attention to the private sector is an important new trend in global governance. For example in July 2003, U.N. Secretary-General Kofi Annan appointed a high-level Commission on the Private Sector and Development. It is remarkable that even today, the International Labour Organization is the only U.N. specialized agency to permit business representatives to be delegates to conferences that draft treaties.

[24] Free Trade Area of the Americas, Eighth Ministerial Meeting, Ministerial Declaration, November 20, 2003, available at <www.ftaa-alca.org>.

[25] See TRIPS art. 31(f); WTO General Council, Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (1 September 2003); WTO, Decision Removes Final Patent Obstacle to Cheap Drug Imports, Press/350/Rev. 1, 30 August 2003.

[26] WTO General Council, General Council Chairperson's Statement, WT/GC/M/82, para. 29 (13 November 2003).

3. Sources of Law

A third issue discussed at the Conference is whether the statements and activities of NGOs can qualify as a source of law. To be sure, Article 38 of the Statute of the International Court of Justice (ICJ) does not mention NGOs. But it does point to one group of non-state actors, namely, "highly qualified publicists", whose teaching can be a subsidiary means for the determination of the rules of law. Thus, the scholarship of the publicists can provide evidence of what customary practice is.

The other sources of law noted in Article 38 are international conventions, international custom, general principles of law, and judicial decisions. Although the Judges on the ICJ are aware of the pervasive influence of NGOs on the drafting of international conventions and on state practice in many fields, and of a more limited influence on various courts and tribunals as a party or an *amicus curiae*, the Judges can (and usually do) carry out their responsibilities under Article 38 without any direct consideration of NGO activities or work products that may be fermenting under the veil of the states.

In an important case in the 1990s, however, one very distinguished Judge on the ICJ took a tentative step toward lifting the veil. That was in the dissenting opinion by Judge Shigeru Oda in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.[27] Judge Oda's position was that the Court should have refrained from rendering an Opinion in response to the request by the U.N. General Assembly. He lists numerous factors leading up to his position, one of which was that the idea of requesting an Advisory Opinion had previously been advanced by "a handful of non-governmental organizations" that had initiated an unsuccessful campaign for a total prohibition of nuclear weapons. Having failed in this purpose, according to Judge Oda, the NGOs "tried to compensate for the vainness of their efforts by attempting to get the principal judicial organ of the United Nations" to determine the absolute illegality of nuclear weapons. He then cites as evidence statements made at the World Health Assembly by two NGOs (the International Physicians for the Prevention of Nuclear War and the World Federation of Public Health), and he quotes a newsletter from the World Government of World Citizens which discussed how the World Court Project sought to lobby Member governments of the World Health Organization and the U.N. General Assembly. Judge

[27] Dissenting Opinion of *Judge Shigeru* Oda, paras. 8-9, 35 I.L.M. 809, 843-44 (1996).

Oda concludes that the NGO activity "gives the impression that the Request for an advisory opinion which was made by the General Assembly in 1994 originated in ideas developed by NGOs." Unfortunately, this portion of Judge Oda's decision is all too brief and does not explain how much weight he gives to the NGO "factor" or why the source of the proposal for the Advisory Opinion provides justification for the Court to decline to render such Opinion.

However brief that portion of the Opinion, it is an important judicial landmark because Judge Oda lifts the veil of the international organization to consider the NGO activities inside.[28] Judge Oda found this information helpful in answering the legal question of whether the request for an Advisory Opinion was valid and whether the Court should respond. Judge Oda's approach is iconoclastic because a more traditional view would have been that the nature of the origination of an official action by the U.N. General Assembly is irrelevant. Instead, Judge Oda called the Court's attention to the NGO activities because he apparently believed that they were worthy of judicial notice. Although he seemed to dislike the constructivist NGOs, Judge Oda's Opinion gave them dignity.

On substance, however, another jurist might draw a different conclusion than Judge Oda does.[29] In Oda's view, seemingly, the NGO involvement reduced the legal valence of the requests from the U.N. General Assembly. By contrast, a different jurist might perceive NGO

[28] Or perhaps double-lifts the veil, to look at the NGO activities inside the states and inside the international organizations. Note that in his individual Opinion (paras. 2-3) in: Nuclear Weapons, Judge Gilbert Guillaume also discusses the NGO "activism", particularly the International Association of Lawyers Against Nuclear Arms, and considers whether the Court should dismiss the Requests for the Advisory Opinion for that reason. Expressing the "hope that governments and intergovernmental institutions still preserve sufficient decisionmaking autonomy towards powerful pressure groups," he points out that none of the states had asked for a dismissal, even though such a dismissal could have found justification in the circumstances of the Request.

[29] *Laurence Boisson de Chazournes/Philippe Sands*, Introduction, to International Law, the International Court of Justice and Nuclear Weapons 1, 9-10 (Laurence Boisson de Chazournes/Philippe Sands eds., 1999) (discussing reaction to NGO involvement); *Judge Rosalyn Higgins*, The Reformation of International Law, in Law, Society and Economy 207, 214 (Richard Rawlings ed., 1997) (pointing out that during oral presentations before the ICJ, two states had taken note of the NGO activities).

involvement as *increasing* the quality of a communication by governments and international organizations.

This could occur in two ways: First, NGO involvement could enhance the authoritativeness of governmental action by demonstrating popular support. Second, NGO involvement could signal that governments have a stronger control intention. For example, a dispute system that allows private actors to lodge complaints, such as the Investment Chapter of the North American Free Trade Agreement, might render a treaty more binding than would be achieved by a government-only dispute system.

Does NGO practice (i.e., invocation of norms by NGOs) constitute international law? No one would claim precisely that. But here is a more difficult question: Can the *reaction* of states to NGO practice constitute international law? If the answer is sometimes yes, then NGO expression would be part of the process of clarifying and developing international law.

Although Judge Oda would make use of information about the interaction between states and NGOs in order to decide what the ICJ should hold, circumstances like that may be unusual. The more typical legal posture will be making use of information from and about NGOs in order to better accomplish two tasks. As Michael Reisman observed, two key challenges will be persuasion and prediction. The advocate seeking to persuade an international court or administrative process will marshal the best information and arguments available, and that may well include input from NGOs. Similarly, the analyst seeking to predict the outcome of an adjudication or a negotiation will also find information from and about NGOs to be helpful. Consider, for example, the negotiations leading up to the International Criminal Court and to the Kyoto Protocol, or the failed WTO negotiations in Seattle and Cancún. Surely no serious analyst would argue that the NGO activities surrounding those negotiations were irrelevant to the intellectual task of accurately predicting the paths those negotiations would take.

Statements by NGOs may also be useful in ascertaining the "general trend" of law because NGOs surely shape those trends. As Tullio Treves reminds us in his paper, the ICJ has pointed out (in the *Nuclear Weapons* Advisory Opinion) that in stating and applying the law, "the Court necessarily has to specify its scope and sometimes note its general trend."

Conclusion

In this short paper, I have stated my agreement with the general thesis of Volker Röben's analysis about the thick constellation of entities that inhabit the international plane and help to formulate international law. What I have disagreed with is the nomenclature of indiscriminately characterizing intergovernmental organizations as "actors." For some purposes, like performing services for individuals, such an organization may be an actor. Yet for many purposes, the international organization is more properly viewed as an arena or a community where the various worldwide participants interact.

When Oscar Schachter died earlier this month, I spent an afternoon studying some of his voluminous scholarship, and was intrigued with the architectural metaphor of the "U.N. legal order" that he proposed nine years ago.[30] He visualized a three-level structure: (1) on the ground floor, the actions of states, including the demand of the governments and other organized groups in furtherance of their needs, wishes, and expectations, (2) on the second level, the formation and invoking of legal norms, and (3) on the third level, the broad policy goals, aspirations, and ideals that influence governments and other actors. As Schachter explained, each of the levels is influenced by the others, and the U.N. legal order is influenced by the multitude of demands and interests from below and by the ideals and principles on the upper level. In that architecture, the governments and the organized groups operate on the same ground floor. Also noteworthy is the fact that the ground floor does not include the United Nations Organization itself.

[30] *Oscar Schachter*, United Nations Law, 88 American Journal of International Law 1, 22-23 (1994).

Lawmaking through the Interpretation and Application of International Law

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht

Begründet von Viktor Bruns

Herausgegeben von
Armin von Bogdandy · Rüdiger Wolfrum

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