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International Law - New Actors and New Technologies: Center Stage for NGOs

John King Gamble

Charlotte Ku
Texas A&M University School of Law, cku@law.tamu.edu

INTERNATIONAL LAW—NEW ACTORS AND NEW TECHNOLOGIES: CENTER STAGE FOR NGOS?*

JOHN KING GAMBLE** AND CHARLOTTE KU***

I. INTRODUCTION

Anyone whose head is not planted deeply in the sand must recognize that momentous changes are afoot with this phenomenon called the information age. Evidence of sweeping change at the mundane, day-to-day level is undeniable. Five-year-old children manipulate computer mice with astounding dexterity. Professors find the World Wide Web has become *the* principal research tool used by their students to prepare papers; six years ago neither those students nor their professors had heard of the web.[1]

Ronald Deibert argues persuasively that "changes in modes of communication—the various media by which information is stored and exchanged—have significant implications for the evolution and character of society and politics at a world level."[2] Will the information age have a significant effect on international law? International law has shown itself capable of moving along at its own lethargic pace, often influenced only marginally by the external world for which it is

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* The genesis of this piece is unusual. One of us (Gamble) began to investigate how new information technologies might affect international law. *See* John K Gamble, *International Law and the Information Age*, 17 MICH. J. INT'L. L. 747 (1996); John King Gamble, *New Information Technologies and the Sources of International Law: Convergence, Divergence, Obsolescence and/or Transformation*, 41 GERMAN Y.B. INT'L. L. 170 (1998). The other author (Ku), as Executive Vice President of the American Society for International Law, the principal professional organization in the world having international law as its focus, was forced to confront how to bring an established association into the information age without sacrificing traditional strengths. *See* Charlotte Ku, *The ASIL as an Epistemic Community*, 90 AM. SOC'Y INT'L. L. PROC. 224, 584 (1996); Charlotte Ku, *The American Society of International Law in the Electronic Age: Challenge and Opportunity*, 3 HAGUE JOINT CONF. 142 (1995). We found we were addressing many of the same issues and problems, although from different vantage points.

** Professor of Political Science and International Law, Pennsylvania State University.

*** Executive Director, American Society of International Law.

1. As part of an information age needs assessment, in 1997, the ASIL conducted a survey of its 4300 members, 40% of whom reside outside the U.S. The survey showed that 80% of members use e-mail, but 40% had never used the World Wide Web. The general conclusion was that ASIL members are not technology adverse, but want to guard their most precious resource, their time. *See* Charlotte Ku & John King Gamble, *International Law Communications Network: An ASIL Needs Assessment* (1998) (unpublished manuscript, on file with authors).

2. RONALD J. DEIBERT, PARCHMENT, PRINTING AND HYPERMEDIA: COMMUNICATION IN WORLD ORDER TRANSFORMATION 2 (1997).

developing norms. Behavior occurs at so many individual and institutional levels that profound change at the human level can be blunted, distorted, or blocked entirely before its influence is felt on the international law-making plane. These reservations notwithstanding, evidence exists that international law and the systems and assumptions that undergird it will be transformed by the information age.

Technology and the information age are changing the allocation of power and authority in the international system with non-state actors such as intergovernmental organizations (IGOs) and nongovernmental organizations (NGOs) assuming decision-making roles previously reserved primarily to states.[3] Professor David Johnston sees the information age as "creating deep and broad disruptive breaches in our society, disruptions equal to those of the agricultural or industrial revolutions."[4] Professors Keohane and Nye believe that the information age will alter the power structure of governments.[5] Jessica Mathews's stimulating article in *Foreign Affairs* argues both that the information revolution is shaking the foundations of state authority, the principal tenet of international law since 1648, and that the scholarly community has been slow to understand the profound ramifications of these changes.

> The most powerful engine of change in the relative decline of states and the rise of non-state actors is the computer and telecommunications revolution, whose deep political and social consequences have been almost completely ignored. Widely accessible and affordable technology has broken governments' monopoly on the collection and management of large amounts of information and deprived governments of the deference they enjoyed because of it. In every sphere of activity, instantaneous access to information and the ability to put it to use multiplies the number of players who matter and reduces the number who command great authority. The effect on the loudest voice—which has been the government's—has been the greatest.[6]

Mathews's analysis forces us to re-examine our assumptions about the allocation of authority and decision-making in international rela-

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3. *See* David Held, *Democracy and Globalization*, 3 GLOBAL GOVERNANCE 251, 261 (1997).

4. David Johnston, *Challenge of the Highway*, MACLEAN'S, Oct. 12, 1998, at 58, 58.

5. *See* Robert O. Keohane & Joseph S. Nye, Jr., *Power and Interdependence in the Information Age*, FOREIGN AFF., Sept./Oct. 1998, at 81, 93–94.

6. Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan./Feb. 1997, at 50, 51.

tions and international law. The changes she describes have been accelerated by the end of the Cold War and the bursting of the bipolar dam that for fifty years constrained and simplified the international system. Observations like these challenge the 300-year-old fundamental operating assumption of the international system that the authority and structure of states will dwarf all other elements. Reacting to this new authority structure, Professor James Rosenau recommends moving beyond *governments*, which are tied too closely to states, and instead focusing on the broader concept of *governance*, which he thinks will be "transcendent" in the late twentieth century.[7]

A key element of this challenge to state authority is globalization. Wolfgang Reinicke describes "the integration of a cross-national dimension into the very nature of the organizational structure and strategic behavior of individual companies."[8] Because these activities are undertaken to overcome the constraints of national boundaries, they pose a direct challenge to states that derive their authority by maintaining territorial boundaries to define the reach of their authority. Reinicke foresees a "threat to a government's ability to exercise internal sovereignty" and perhaps even a threat to democracy itself.[9] In response to this challenge, he proposes a partnership between public and private entities to formulate a global public policy using "cross-national structures of public interest" and the creation of "more dynamic and responsive institutions of governance."[10]

In presentations we made at the Fourth Joint Conference (American Society of International Law/ Nederlandse Vereniging voor Internationaal Recht) held in The Hague in 1997, we argued that the context within which international law operates has been shaped by two broad forces: (1) the state-centric character of the post-Westphalian international system; and (2) the Gutenberg global information system dominated by the printed word.[11] The former has been analyzed extensively;

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7. James N. Rosenau, *Governance, Order, and Change in World Politics*, *in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 1, 1 (James N. Rosenau & Ernst-Otto Czempie eds., 1992).

8. Wolfgang H. Reinicke, *Global Public Policy*, FOREIGN AFF., Nov./Dec. 1997, at 127, 127.

9. *Id.* at 130.

10. *Id.* at 137.

11. The panel was entitled "The Effect of New Electronic Technologies on the Sources of International Law," part of the Fourth Joint Conference (American Society of International Law/ Nederlandse Vereniging voor Internationaal Recht) held in The Hague. Participants were Professor John King Gamble (Pennsylvania State University); Professor Alfred Soons (University of Utrecht); Judge Gilbert Guillaume (International Court of Justice); Professor Donald McRae

the latter, at least so far as it affects international law, largely has been ignored.

A. *The Role of Information in the International Arena*

Professor Ethan Katsch, one of the first scholars to address broad normative questions about the information age, explained why the revolution in information would be much more significant than other technological changes that have influenced the law:

> Other new technologies, such as nuclear power or biotechnology or medical advances, have caused a reassessment of several areas of legal doctrine. Yet, information technology is different and presents the law with a very different challenge. It is different because . . . the law runs on information and because much of law *is* information. . . . Changes in our information environment are important for all institutions in society. They may, however, be particularly important for law. Law is not only a process that touches all other societal institutions but it is, as I have stressed, an institution that is fundamentally oriented around information and communication.[12]

The pace and complexity of life in the late twentieth century has set dramatically higher standards for the amount of information needed for decision-making. When analyzing the twentieth century from the vantage of the information age that drove its last decade, historians may see the leitmotif of the development and use of information on the structures and modes of that information. The NGOs that are our focus have heightened awareness of the information age they helped to create in the first place.

The importance of information is hardly limited to recent scholarship in international relations, international institutions, and international law; however, the volume of information and variety of subjects covered have expanded drastically, demanding new modes to deal with the information. Further, "privatizing" of the sources of information has significant implications for governance and law-making. Professor Inis Claude's classic treatment of the development of international

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(University of Ottawa); Dr. Charlotte Ku (American Society of International Law); and Professor Rein Müllerson (King's College London). *See* John King Gamble, *New Electronic Technologies and the Sources of International Law: Convergence, Divergence, Obsolescence and/or Transformation*, 4 HAGUE JOINT CONF. 314, 315 (1998).

12. M. ETHAN KATSH, LAW IN A DIGITAL WORLD 7, 239–40 (1995).

organizations noted,

> The third major stream of the development in the organization of international life arose from the creation of public international unions—agencies concerned with problems in various essentially nonpolitical fields. Whereas both the Concert [of Europe] and the Hague [Peace Conferences] reflected the significance of the quest for security and the importance of high political issues, this third phenomenon was a manifestation of the increasing complexity of the economic, social, technical, and cultural interconnectedness of the peoples of the modern world.[13]

The growth of international institutions—both IGOs and NGOs—in the twentieth century is attributable, in part, to the need for information necessary for collective action.

In his seminal introduction, Professor Harold Jacobson describes the major functions of international organizations, the first of which is informational. The others are normative, rule-creating, rule-supervisory, and operational.

> *Informational* functions involve the gathering, analysis, exchange, and dissemination of data and points of view. The organization may use its staff for these purposes, or it may merely provide a forum where representatives from constituent units can do these things.
>
> *Normative* functions involve the definition and declaration of standards. This function does not involve instruments that have legally binding effect, but rather proclamations that are designed to affect the milieu in which domestic and world politics are conducted.
>
> *Rule-creating* functions similarly involve the definition and declaration of standards; however, the purpose is to frame instruments that can have a legally binding effect. In the case of IGOs, to have legally binding effect, such instruments usually must be signed and ratified by some number of states, and the instruments generally apply only to those states that have taken such action. In a few IGOs, however, some decisions can be taken that are legally binding without the necessity of implement-

13. INIS L. CLAUDE, JR., SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 34 (4th ed., 1984).

ing action by member states. Several IGOs can adopt rules that are binding for the constituent units.

Rule-supervisory functions involve measures taken to insure compliance with the rules that are in force by those subject to them. This function could entail steps, ranging from detection of evidence that a violation has occurred, through verification of that evidence, to the imposition of sanctions.

Operational functions involve the use of the resources at the organization's disposal. Financial and technical assistance and deployment of military forces are examples.[14]

Given this range of functions, it is hardly surprising NGOs often seem to possess an amorphous, indeterminate nature, a situation with parallels in the late nineteenth and early twentieth century. Public international unions were not segments of governmental apparatus, drawing power from the circuits of a pre-established dynamo of sovereignty, but rudimentary pieces of a system of inter-governmental collaboration, dependent for their operation upon such power as could be generated in the new and drastically incomplete plant of international authority. . . . These agencies engaged in a range of activities which was something new under the international sun. . . . On the whole, however, this was a system for the provision of services to governments and the facilitation of cooperative relations among governments, not for the management of affairs or the government of people.[15]

This Article focuses on NGOs to test their newly achieved prominence in international law-making by examining their role in the Landmines Convention and in the thwarting of the Multilateral Agreement on Investment. Are NGOs a manifestation of new governance structures emerging in the information age? Can they be a check against non-democratic, unaccountable, and aloof intergovernmental institutions that may complicate, rather than solve, problems?[16] So that our discussion will be rooted in international law as usually understood, we examine both international law's encounters with NGOs and how NGOs relate to the sources of international law.

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14. HAROLD K. JACOBSON, NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATION AND THE GLOBAL POLITICAL SYSTEM 83 (2d ed. 1984).

15. *Id.* at 35–36.

16. Some would say the way the IMF dealt with the Asian financial crises of 1998 falls into this category.

B. *Defining NGOs*

First, this Article defines NGOs and examines some of the assertions made about them. There seems to be general agreement about a working definition for NGOs along with substantial disquiet with that definition. P. J. Simmons examined various definitions, including one promulgated by the United Nations (UN), and concluded only "private businesses, revolutionary or terrorist groups, and political parties" are *not* NGOs.[17] Professor H. K. Rechenberg's definition is typical:

> Nongovernmental organizations are private organizations . . . not established by a government or by intergovernmental agreement, which are capable of playing a role in international affairs by virtue of their activities, and whose members enjoy independent voting rights. The members of an NGO may be individuals . . . or bodies corporate. . . . There is some controversy as to whether an NGO has to be international, permanent and non-profit-making. Proper classification of NGOs is also lacking. In terms of their activities there are, generally speaking, two kinds of NGOs: those with non-profit, i.e., idealistic, objectives, and those with economic aims. . . . The categorization of an NGO may pose difficulties, as material and non-material objectives sometimes exist side by side.[18]

Professor Jacobson describes "an early decision of the United Nations [to] base the distinction [between NGOs and IGOs] on whether or not the international organization was established by an agreement among governments."[19] The Economic and Social Council defined an NGO as "[a]ny international organization which is not established by inter-governmental agreement."[20] The UN Charter, in many ways the logical place to have addressed this issue, mentions NGOs but does not define them. "The Economic and Social Council may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member

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17. P.J. Simmons, *Learning to Live with NGOs*, FOREIGN POL'Y, Fall 1998, at 82, 83.

18. Hermann H.-K. Rechenberg, *Non-Governmental Organizations*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 612, 612 (Rudolph Bernhardt et al., eds., 1997).

19. Jacobson, *supra* note 14, at 4.

20. E.S.C. Res. 288B, U.N. ESCOR, 10th Sess., Supp. No. 1, at 25 (1950).

of the United Nations concerned."[21] Despite avoiding NGOs in its constitutive document, the UN recognized, within months of its founding, the value of NGOs in conveying information about the organization and building bridges to the public.[22] Professor Bruno Simma went even further, asserting that NGOs are defined neither in the Charter nor in general international law.[23]

It is relatively clear what an IGO is, but NGOs have an "everything else" character to them, prompting many to turn away from definition towards classification. "NGOs includes everything from village associations in developing countries to large multi-faceted organizations active around the globe. As a result, the definition provided here is an effort to specify the range of actors which can be captured by the dimensions offered in the following sections."[24]

One should be suspicious of a definition rooted in the absence of a quality. "NGOs are named in terms of what they are not, rather than in terms of what they are."[25] Is the term NGO so imprecise that it should be done away with entirely? Kille, Peterson, and Smith suggested changing the term to "civil society organizations."

> [C]ivil society organization is preferable to NGO because it provides a more accurate label of what these organizations actually are and it is the term which is now being used by parts of the UN System. . . . [C]ivil society refers to all of those institutions and associations which exist between the individual and the state. These structures allow groups in society to represent themselves *vis-à-vis* other groups and the state. As such they form cross-cutting networks which contribute to pluralism and balance of power of the state.[26]

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21. U.N. CHARTER art. 71.

22. *See* Farouk Mawlawi, *New Conflicts, New Challenges: The Evolving Role for Non-Governmental Actors*, 46 J. INT'L AFF. 391, 393 (1993) ("The U.N. General Assembly quickly recognized the importance of collaborating with NGOs and called upon the U.N. Department of Public Information . . . to work with NGOs interested in communicating information about the United Nations.").

23. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 905 (Bruno Simma ed., Oxford University Press) (1994).

24. Kent J. Kille et al., Sinking the Billiard Ball Model in the Corner Pocket: An Analytic Typology of NGOs and the Implications for IR Research 6, Paper Prepared for Delivery at the International Studies Association Annual Convention (April 16–20, 1996) (on file with *Law and Policy in International Business*).

25. *Id.* at 9.

26. *Id.* at 10.

Professors Leon Gordenker and Thomas Weiss took an interesting and more analytical approach to NGOs. "[T]he prince represents governmental power and the maintenance of public order; the merchant symbolizes economic power and the production of goods and services; and the citizen stands for people's power. As such, the growth of NGOs arises from demands by citizens for accountability from the prince and the merchant."[27] They concluded that, rather than getting mired in legal distinctions, it is more productive to examine "goals, relationships among various organisations and operating methods."[28] This leads them to suggest that NGOs be understood according to four dimensions: organization, governance, strategy, and output.[29]

Even those who make a convincing case for a new umbrella concept to replace "NGO" realize current usage is probably too firmly entrenched to be easily dislodged because "it is hard to replace an idea once it has become widely accepted."[30] This does not preclude many sub-types of NGOs. Our approach is conventional—we shall use the term NGO, but try to describe it more precisely in the models we develop later.

C. *Prospects for the NGO in the Information Age*

Especially in the 1990s, NGOs seem to have taken an almost Hegelian leap in significance. A typical example of this expanded awareness of NGOs can be seen in the views of former UN Secretary-General Boutros Boutros-Ghali:

> Nongovernmental organizations are now considered full participants in international life. . . . Today, we are well aware that the international community must address a human community that is transnational in every way. . . . The movement of people, information, capital, and ideas is as important today as the control of territory was yesterday. . . . "[P]eace in the largest sense cannot be accomplished by the United Nations system or by Governments alone. Nongovernmental organizations, academic institutions, parliamentarians, business and professional

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27. Leon Gordenker & Thomas G Weiss, *Pluralising global governance: analytical approaches and dimensions*, 16 THIRD WORLD Q. 357, 359 (1995). The analogy was developed from Marc Nerfin, *Neither Prince nor Merchant: Citizen—An Introduction to the Third System*, 56 IFDA DOSSIER 3–29 (1986).

28. Gordenker, *supra* note 27, at 377.

29. *See id.* at 382.

30. Nerfin, *supra* note 27, at 9.

communities, the media and the public at large must all be involved."[31]

Lester M. Salamon envisions a prominent role for NGOs within the context of the globalization occurring in the late twentieth century. "The upshot is a global third sector: a massive array of self-governing private organizations. . . . The proliferation of these groups may be permanently altering the relationship between states and citizens, with an impact extending far beyond the material services they provide."[32]

This expanded role for NGOs has produced a voluminous scholarly literature most of which is very positive.[33] Perhaps the apex of this hyperpositive view is the belief that NGOs may democratize the UN by creating a world assembly directly elected by the people.[34] Does such a positive view coupled with a loose definition militate against the rigorous analysis necessary for understanding NGOs in their myriad manifestations and roles? Typical of this juxtaposition of vagueness and positive view is the approach of Farouk Mawlawi, who wrote, "The significant proliferation of non-governmental organizations . . . in recent years, and their growing contributions to the improvement of the human condition, have led to increased—and long overdue—recognition of the important role they can and do play in preventing and resolving conflicts."[35]

There is agreement that one of the major contributions of NGOs is communicating information to governments, individuals, IGOs, and other NGOs.[36] Recently, information technology has transformed com-

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31. Boutros Boutros-Ghali, *Foreword* to NGOs, THE UN AND GLOBAL GOVERNANCE 7, 7–8 (Thomas G. Weiss & Leon Gordenker eds., Lynne Rienner Publishers, 1996) (quoting BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE (1995)).

32. Lester M. Salamon, *The Rise of the Nonprofit Sector*, FOREIGN AFF., July/Aug. 1994, at 109, 109.

33. *See, e.g.*, Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107 (1996); Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L. L. 183 (1997); Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions*, 18 WASH. U. L.Q. 45 (1995).

34. *See* ERSKINE CHILDERS & BRIAN URQUHART, RENEWING THE UNITED NATIONS SYSTEM 174–81 (1994).

35. Mawlawi, *supra* note 22, at 392.

36. A concise description of the range of activities can be found in 1 ENCYCLOPEDIA OF ASSOCIATIONS, at vii (Tara E. Sheets & Sarah J. Peters eds., 1995). Among the activities they list are "[e]ducating their members and the public; . . . [i]nforming the public on key issues; . . . [d]eveloping and disseminating information;. . . [e]stablishing forums for the exchange of information and ideas;. . .[e]nsuring representation for private interests."

munications so that it has become possible to mobilize worldwide political networks almost overnight to address specific issues. The most tangible manifestation of this transformation is the Internet. The Internet, established in the 1970s by the U.S. military, originally was designed to be "a computer network . . . that could withstand nuclear attack."[37] The decentralized character of the Internet, essential for it to continue operating after military conflagration, permitted it to metamorphose into the global system we know today.[38] It can be difficult to grasp the reach and complexity of the Internet because it is a constantly expanding group of systems. It has been described as "an enormous computer network in which any existing network can participate. It encompasses satellites, cable, fiber and telephone lines, and it seems to have grown exponentially."[39] Microsoft co-founder Bill Gates believes the Internet is the most important development in computing since the personal computer was introduced fifteen years ago.[40]

In chronicling the development of NGOs, both Lester Salamon and Peter Spiro have recognized the importance of technology. Salamon wrote,

> The combined expansion of literacy and communications has made it easier for people to organize and mobilize. Communications between capitals and hinterlands that once required days now takes only minutes. Authoritarian regimes that had successfully controlled their own communications networks have grown powerless to stop the flow of information through satellite dishes and faxes. Isolated activists can therefore more easily strengthen their resolve, exchange experiences and maintain links with sympathetic colleagues in their own countries and abroad.[41]

In a similar vein, Spiro noted the importance of technology to support effective dissemination of information, including political positions and advocacy by NGOs: "Modern communication is much less dependent on location; increased travel, the fax, and perhaps the most important the Internet have created the possibility of a cohesion that is not tied to territory."[42]

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37. DEIBERT, *supra* note 2, at 131.

38. *See id.*

39. Robert E. Calem, *The Network of All Networks*, N.Y. TIMES, Dec. 6, 1992, at 12F.

40. *See* BILL GATES, THE ROAD AHEAD 91 (1995).

41. Salamon, *supra* note 32, at 117–18.

42. Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions*, 18 WASH. Q. 45, 47 (1995).

New technologies such as the Internet have created enormous opportunities for NGOs. Enterprising individuals with little institutional infrastructure beyond a computer can mobilize thousands of people over huge distances. The drawing power of computers is enormous because it allows individuals who are similarly equipped (set up with computers) to join a cause based on their own interests without active solicitation. Technology permits NGOs to organize large numbers from multiple sectors, and to do so quickly, empowering NGOs in the international political and international law-making arenas. Even assuming good intentions, this new power will not necessarily have positive results. It may become so cheap to start new NGOs that competition for scarce resources will become more intense. NGOs can coalesce around many different causes, good and evil.[43]

II. NEW GOVERNANCE STRUCTURES, NGOS, AND THE INFORMATION AGE

A. *The Evolving Perception of the Role of the NGO*

Professor James Rosenau's description of the nature of change can be applied to NGOs: "Change means the attrition of established patterns, the lessening of order, and the faltering of governance, until such time as new patterns can form and get embedded in the routines of world politics."[44] This creates the daunting challenge of discerning what "new patterns" will emerge when change is occurring at many levels and involves many centers of power, actors, and systemic assumptions.

In 1648, when the current state system emerged, decision-making authority in international relations was given to autonomous states that were expected to control activities within their borders and to function as equals on the international plane. A secular, hierarchical model was rejected—understandable in the context of the religious wars of that period—leaving power in the hands of states. Three hundred and fifty years later a new possibility has arisen, that governance which has "been usurped by governments" needs to expand beyond those governments.[45]

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43. *See* Simmons, *supra* note 17, at 88. Simmons takes a very balanced view pointing out many ways NGOs have done harm. Most are not deliberate, and most importantly, "the record for such NGOs is surely no worse than that of governments." *Id.*

44. Rosenau, *supra* note 7, at 1.

45. Rajni Kothari, *On Human Governance*, 12 ALTERNATIVES 277, 277 (1987).

The new routine of international relations that is emerging will see an expanded and qualitatively different role for NGOs. Networks of information providers are formed by individuals drawn together by a shared interest. The importance of information to contemporary governance means those with information will influence political and legal processes. As Keohane and Nye noted,

> Cheap flows of information have enormously expanded the number and depth of transnational channels of contact. Non-governmental actors have much greater opportunities to organize and propagate their views. . . . The future lies neither exclusively with the state nor with transnational relations: geographically based states will continue to structure politics in the information age, but they will rely less on material resources and more on their ability to remain credible to a public with increasingly diverse sources of information.[46]

Rosenau's concept of governance that "embraces governmental institutions, but . . . also subsumes informal, non-governmental mechanisms whereby those persons and organizations within its purview move ahead, satisfy their needs, and fulfill their wants"[47] encapsulates the new milieu within which international law will operate. How will international law, which has centered on the state as the principal actor as well as the locus of authority and power, respond in this new era? Rosenau asks "whether the emergent, successor order rests on new systemic foundations or whether it derives from the reconstitution of the existing system."[48] His answer is that it is too early to tell. "[M]uch depends on how the key concepts are defined, thus enabling different analysts to offer different interpretations as they accord greater or lesser weight to the post-Cold War competence of states, the strength of transnational issues, the power of sub-group dynamics, and the changing skills of citizens."[49]

It would be inaccurate to imply that international law—primarily as described by leading scholars—has ignored NGOs. Before World War II, NGOs were thought to play only a secondary role. Even those international law scholars who seemed most progressive and willing to extend the reach of the law showed a certain hesitance about NGOs.

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46. Keohane & Nye, *supra* note 5, at 94.
47. Rosenau, *supra* note 7, at 4.
48. *Id.* at 22.
49. *Id.* at 23–24.

Twenty years ago, Professor Louis Henkin wrote,

> While international society today recognizes other entities—intergovernmental and other international organizations (the United Nations, the International Committee of the Red Cross), national and multinational companies with major transnational activities, even individual human beings—these are normally of concern only when, and because, their actions and the effects of their actions spill over national boundaries. Even to the extent that the individual has become a "subject" of international law, it is *international law* he is a subject of. Even the new concern for the human rights of individuals finds expression to date only through treaties and practices between nations, or through organizations of nations or bodies created by nations.[50]

In his more recent writings, Professor Henkin saw new possibilities presented as information technology facilitated the extension of international law to the individual. "States can control physical penetration, as by overflight in their airspace, but they cannot easily prevent communication or exclude information, they cannot prevent inspection by satellite from outer space, and national frontiers can do little to keep out or combat a growing number of environmental threats."[51]

An early theme about NGOs—made even before the term NGO was widely used—dealt with the formation of groups, often technical experts, to assist policy makers. Professor Malcolm Shaw discussed the nineteenth century origins of these groups:

> The nineteenth century also witnessed a considerable growth in international nongovernmental associations. . . . These private international unions, as they have been called, demonstrated a wide ranging community of interests on specific topics, and an awareness that co-operation had to be international to be effective. Such unions created the machinery for regular meetings and many established permanent secretariats. The work done by these organizations was, and remains, of considerable value in influencing governmental activities and stimulating world action.[52]

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50. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 15 (2d ed.1979).

51. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 280 (1995).

52. MALCOLM N. SHAW, INTERNATIONAL LAW 743 (3d ed. 1991).

In describing the immediate post-World War I period, Professor Ellery Stowell observed that states had expanded the scope of their "voluntary coöperation through the establishment of international unions and commissions, and have recently organized the League of Nations and the World Court which give promise of better things to come."[53]

A recurring emphasis in scholarly writing about NGO activity has been on groups of experts who provided an objective scientific basis to guide the development of international law. Professor Quincy Wright at the American Society of International Law's 1960 Annual Meeting described the positive role of NGOs:

> Private organizations have many advantages over official organizations in the scientific exposition of international law. . . . Today the need for "an eye to the welfare of Society at large" is greater than ever. Private institutions, whose members combine legal wisdom with wisdom in the other social disciplines and who view the problems of the world as a whole, can serve this need.[54]

In this earlier era, the role of NGOs usually was seen as informational. This same 1960 American Society meeting included the observation that "international law is developing as the result of *scientific* activities planned by non-governmental groups, not because of the conscious concern of such groups with the development of international law."[55]

Contemporary international law is much less rigid and more inclusive—NGOs have benefited from this disposition. This outlook found early expression in the work and ideas of Professor (later World Court

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53. ELLERY C. STOWELL, INTERNATIONAL LAW XXX (1931).

54. Quincy Wright, *Activities of the Institute of International Law*, 54 AM. SOC'Y INT'L L. PROC. 194, 196–99 (1960). Wright commented that, as early as 1866, Dr. Francis Lieber wrote: "It would be much better if a private Congress were established, whose work would stand as an authority by its excellence, truthfulness, justice, and superiority in every respect." *Id.* at 197

55. John A. Johnson, *Scientific Organizations and the Development of International Law*, 54 AM. SOC'Y INT'L L. PROC. 206, 211 (1960) (emphasis added). A number of the research and study activities of the ASIL in the 1970s were meant to channel scientific information to the legal community through its program on Science, Technology, and International Law. Studies which came out of this project included ones on ocean dumping, the international telecommunications union, global fisheries management, direct broadcasting from satellites, deep sea mining and the environment, regulation of pesticide residues in food, regulation of pharmaceutical drugs, and a global satellite observation system.

Judge) Philip Jessup and is captured in the phrase "transnational law."

> The term "transnational law" [includes] all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories. . . . Transnational situations, then, may involve individuals, corporations, states, organizations of states, or other groups.[56]

Today, international law scholars and practitioners have taken Jessup's concept much further. A good example is the widely-used Weston, Falk, and D'Amato text, which states: "More and more nongovernmental transnational actors . . . are becoming primary actors in this human rights sphere, manifesting their primary allegiance to world order values with no territorial constraints."[57] The most recent version of this text finds a qualitative change in NGOs reaching the point where they "exert pressures, and [are] increasingly capable of ensuring constructive results through direct action."[58]

A good example of this broader view is presented by Judge Rosalyn Higgins, who wrote: "[I]nternational law is not rules. It is a normative system . . . harnessed to the achievement of common values."[59] She rejects the traditional concept of "subjects" and "objects" of international law as too narrow and prefers the phrase "international legal participants," which includes individuals, corporations and NGOs.[60] The law-making process in which all these participants are engaged is open and competitive. "Everyone is entitled to participate in the identification and articulation as to what they perceive the values to be promoted. Many factors, including the responsive chords struck in those to whom the argument is made, will determine whether particular suggestions prevail."[61]

NGOs already engage actively in issue identification and value setting, steps towards the "authoritative decision-making" that is definitive of international law. However, NGOs have had difficulty finding a seat at the table of authoritative decision-making. This is somewhat

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56. PHILIP C. JESSUP, TRANSNATIONAL LAW 2-3 (1956).

57. Richard A. Falk, *Contending Approaches to World Order*, 31 J. INT'L AFF. 171, 192 (1977).

58. BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 1–2 (3d ed. 1997).

59. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 1 (1994).

60. *Id.* at 49–50.

61. *Id.* at 10.

ironic because states long have relied on NGOs to provide the information that is essential to the entire process of decision-making. Their influence on governments or organs of intergovernmental organizations have brought them closer to the source of authoritative decision-making, but, important as this role has become, NGOs are not yet authoritative decision-makers. A principal question for this analysis is whether globalization and technology will elevate the status of NGOs.

B. *The Expanding Role of NGOs in the Information Age*

Contemporary circumstances have created opportunities for NGOs to play more direct roles in international law-making. This stems in part from international law's shift in focus from concerns of the state to those of the individual. One theory attributes the shift to the fact that little additional progress was being made in the state centric mode. As Professor Henkin put it: "More states, diversity of states, have slowed the movement from state values ('sovereignty') to human values, as in the law of human rights or law for the environment."[62] These are areas where states acting alone seemed not only incapable of solving problems, but seemed to have become part of the problem, e.g., in their failure to protect the environment, weak economic and political development, and abuses of human rights. This results in an expanded "band of activism" within which NGOs operate. For example, the second report from the International Law Association's Committee on Cultural Heritage Law discussed "the role of NGOs . . . both in defining the larger process of regulation and in implementing the harder law forged by intergovernmental agreement and custom."[63]

The technical character of many issues now facing policy-makers continues to make them, as they have been for decades, if not centuries, receptive to expert information. "New technology and the increasingly complex and technical nature of issues of global concern not only increase decision makers' uncertainty about their policy environment but also contribute to the diffusion of power, information, and values among states, thereby creating a hospitable environment for epistemic communities."[64] Thus, NGOs starting in the 1990s may see their

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62. Louis Henkin, *Notes from the President*, ASIL NEWSL. (Am. Soc'y Int'l L., Washington, D.C.), Jan.–Feb. 1994, at 1, 2.

63. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-EIGHTH CONFERENCE 219–20 (1998). The report goes on to suggests six categories for NGOs: private dealers, auction houses and collectors; museums and art galleries; anthropologists and archaeologists; indigenous and ethnic groups; artists; and historic preservationists, archivists and art historians. *See id.* at 220.

64. Emanuel Adler & Peter M. Haas, *Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program*, 46 INT'L ORG. 367, 387 (1992).

traditional nineteenth century-based role enhanced at the same time as technology permits a new range of functions that can bypass state borders.

Intergovernmental organizations have contributed to the prominence of NGOs by circumventing governments. As governments seem less able or willing to meet the financial needs of intergovernmental organizations, IGOs have tapped the vast private wealth available through the intermediation of NGOs. One result of this practice, however, may be an exaggerated perception of the ability of NGOs to carry out a wide range of activities. The potential fragmentation in information, resources, and decision-making may, in the long run, be a serious threat to the order and authority that are requisite to civil society. The hesitancy of international law to accord full participatory rights to NGOs in the law-making process stems in part from this situation.

Structurally, international law remains constrained by a preoccupation with territorial states that conduct activities across borders. Change is occurring, albeit slowly, to accommodate new actors and new voices. Pressure from complex new issues and the intense involvement of non-state actors like NGOs accelerate the change. NGOs do not operate in a vacuum; they often gain stature by cooperating with states. Although there are manifestations of new actors in areas previously reserved to states, a new structure for law-making has yet to emerge. Our work here is an assessment of how far the traditional law-making structure has been stretched as NGOs operate in a new information environment.

Most scholars acknowledge the positive influence NGOs have had on contemporary international law in areas such as the well being of individuals, human rights, gender and race equality, environmental protection, sustainable development, indigenous rights, nonviolent conflict resolution, participatory democracy, social diversity, and social and economic justice.[65] In the broadest sense, we may be moving towards the point where effective and sustained attention to these issues requires the political and financial mobilization of resources at all levels from local to global. This is where the voluntary, local, and issue specific character of NGOs make them a useful link between the sub-national community and national and international communities and institutions. By providing a link, NGOs supplement the human and financial resources of governments and intergovernmental organiza-

65. *See, e.g.*, Otto, *supra* note 33, at 140–41

tions. Cynthia Price Cohen described these functions when she wrote,

> The primary purpose of consultations with NGOs is to enable governments to take advantage of the vast array of expertise that can be provided by these groups. A secondary purpose is to provide the necessary connection between the abstract deliberations of governments and the practical needs and wishes of their citizens.[66]

Successful NGOs combine enlightened policies with the ability to mobilize constituents and the expertise to add to the competition described by Judge Higgins. For international law, the contributions of NGOs need to be tested against this need for authoritative decision-making. "[A] crucial factor in the effectiveness of organizations is their perceived legitimacy, [which] is linked to participation and transparency in their decision-making processes and to the representative nature of bodies that exercise authority."[67] Although consideration of these factors may help to develop a role for NGOs as authoritative decision-makers, the diffuse and varied structure as well as the process of international law-making makes an across-the-board law-making role for NGOs difficult to formulate. Nevertheless, opportunities for NGO involvement and their information collection capacities are likely to increase as international law-making becomes a more continuous, iterative process in moving towards a common objective rather than merely establishing a specific, static norm.

NGOs have been extending their activities from issue identification to the monitoring of state and IGO compliance with and implementation of international legal obligations. Professor Christine Chinkin described this new role in terms of soft law: "The international legal order is an evolving one that requires a wide range of modalities for change and development, especially into new subject areas. They must draw upon the entire continuum of mechanisms ranging from the traditional international legal forms to the soft law instruments."[68]

NGOs have achieved a measure of recognition at UN-sponsored intergovernmental conferences through participation in preparatory

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66. Cynthia Price Cohen, *The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child*, 12 HUM. RTS. Q. 137 (1990).

67. Spiro, *supra* note 42, at 53 (quoting a pamphlet from the Commission on Global Governance)

68. C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 866 (1989).

activities and, to a degree, the conferences themselves. Participation has varied with the recent addition of separate NGO fora that parallel and complement the intergovernmental effort. The controversy over the location and role of the NGO Forum at the Beijing Women's Conference provided a pointed reminder of the ambiguity of the NGO role in authoritative decision-making.[69]

Traditionally, NGOs have helped to mold treaty language, although usually working through national delegations. Increasingly, they are also assisting with monitoring, compliance, and implementation of those instruments.[70] NGOs can enter the picture at many points from creating pressure—making demands—for norm change, to participating in treaty-drafting conferences. As treaties increasingly are seen not as static statements of norms, but as organic entities constantly changing and meeting new contingencies, NGOs have a wider range of opportunities to influence norms. This new situation is clear in the myriad of roles for NGOs in the fifty-year history of the International Whaling Commission.[71]

Proposals to allow NGOs some level of representation in the UN General Assembly illustrate a new mode. UN organs like the General Assembly aid in "the creation and shaping of contemporary international law."[72] Professor Jonathan Charney wrote,

> Today, major developments in international law often get their start or substantial support from proposals, reports, resolutions, treaties or protocols debated in such forums. There, representatives of states and other interest groups come together to address important international problems of mutual concern. Sometimes these efforts result in a consensus on solving the problem and express it in normative terms of general application. At other times, the potential new law is developed through the medium of international relations or the practices of specialized international institutions and at later stages is addressed in international forums. The process draws attention to the rule and helps to shape it and crystallize it.[73]

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69. *See generally* Ann Marie Clark et al., *The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women*, 51 WORLD POL. 1, 20 (1998).

70. *See* Cohen, *supra* note 66, at 145.

71. *See* M. J. Peterson, *Whalers, Cetologists, Environmentalists, and the International Management of Whaling*, 46 INT'L ORG. 147, 147 (1992).

72. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 543 (1993).

73. *Id.* at 544.

Professor Oscar Schachter has used a metaphor from architecture to describe the law-making process. He envisions a three level structure.

> On the ground floor, I place the action of states—including the demands and goals of the governments and other organized groups in furtherance of their needs, wishes and expectations.
>
> On the second level are the activities of a legal character—the formation and invoking of legal norms, and their application to particular situations.
>
> On the third level, I would place the broad policy goals, aspirations and ideals that influence governments and the other actors.
>
> Each of these levels exhibits its own values and processes. But there is continuous movement from level to level. The sphere of law in the middle level is influenced by the interests expressed below and the ideals and policy manifested above. . . . Legal norms have an impact on the perceptions of interest and needs in the lower level and on the policies of the top level. This image helps us to see that the UN Legal Order is influenced by the multitude of political demands and interests from below (as it were) and by the general ideals and principles on the higher level. It also reminds us, that law exercises its influence in both directions, up and down. The stairways run both ways.[74]

The place of NGOs within this building is a major issue for international law. How many steps have NGOs taken up from the ground level? Has NGOs' command of information, magnified by the technological capacity to disseminate their message widely and to mobilize political forces rapidly, started them up the stairway to Schachter's second level?

III. MODELS OF NGO INFLUENCE ON THE SOURCES OF INTERNATIONAL LAW

This Section will use the sources of international law to assess the influence exerted by NGOs. It examines three case studies of NGO influence: (1) the 1982 UN Convention on the Law of the Sea (UNCLOS III), (2) the 1997 Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and Their

74. Oscar Schachter, *The UN Legal Order: An Overview, in* 1 UNITED NATIONS LEGAL ORDER 31, (Oscar Schachter & C. Joyner eds., 1995).

Destruction (the Ottawa Convention), and (3) the "false start" of the Multilateral Agreement on Investment (MAI) in 1998. These three cases demonstrate how technology has enhanced the political capacity and power of NGOs and what might be expected in the future.

A. *The Sources of International Law*

The four sources of international law, recognized in the Statute of the International Court of Justice and taught in every course in international law, are:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations; and
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[75]

Professor Oscar Schachter explained the centrality of sources:

> The principal intellectual instrument in the last century for providing objective standards of legal validation has been the doctrine of sources. That doctrine which became dominant in the nineteenth century and continues to prevail today lays down verifiable conditions for ascertaining and validating legal prescriptions. The conditions are the observable manifestations of the "wills" of States as revealed in the *processes* by which they are formed—namely, treaty and State practice accepted as law.[76]

Although there is a voluminous literature on the sources of international law,[77] we have found no diagrammatic representation of the

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75. Statute of the International Court of Justice, Article 38(1).

76. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 35 (1991).

77. *See, e.g.*, ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); Maarten Bos, *Will and Order in the Nation-State System: Observations on Positivism and Positive International Law*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 51 (R. St.J. Macdonald & Douglas M. Johnston eds., 1986) [hereinafter STRUCTURE & PROCESS].

sources, except for a few that do nothing more than list the four.[78] Understanding possible interrelationship patterns among the sources, along with the possible information flows and roles for NGOs is greatly enhanced through the use of diagrams. The four main sources—treaty, custom, general principles of law, and judicial decisions/teachings of publicists—do not stand in isolation, as is often implied by a ranked list. While the two pre-eminent sources, treaty and custom, certainly are the clearest and most frequently used, often all four work as an interrelated system to develop international law.

B. *The Ability of NGOs to Influence the Sources of International Law*

Figure I represents the most general case and illustrates interrelationship patterns among states, IGOs, NGOs, and the four main sources of international law. The most important question addressed in the diagram is the directness of the link between NGOs and international law. Is there any instance where NGOs *directly* influence a source that, in turn, "creates" international law? The answer appears to be "yes," but with debilitating qualifications. It is almost impossible to make a case for a direct link between NGOs and the three most important sources, treaty, custom, and general principles. Each of the three sources is cast almost exclusively in terms of state action.

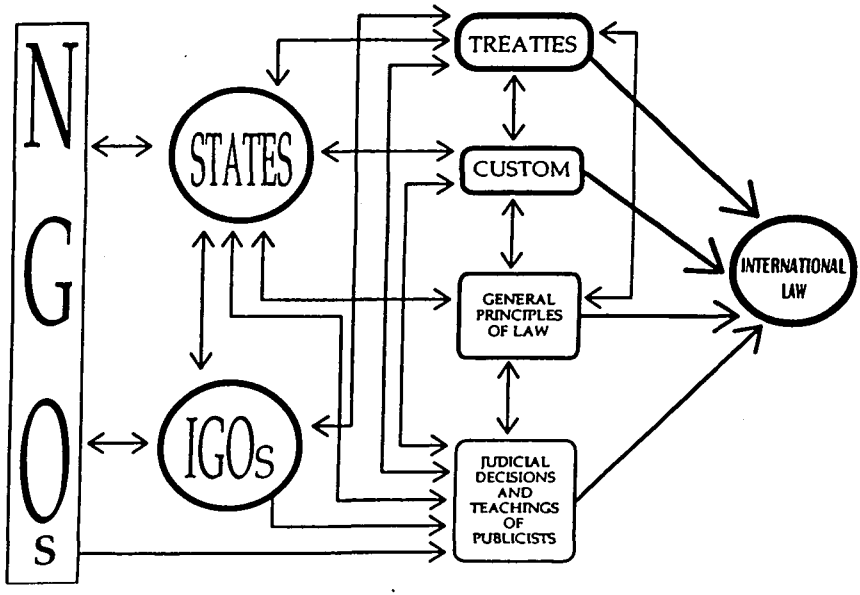
The definition of treaty provided in the 1969 Vienna Convention on the Law of Treaties, "an international agreement concluded between states in written form and governed by international law,"[79] does not seem to leave the door open for a direct NGO role. One could argue that entities other than states are entitled to be parties to treaties, but when that envelope has been expanded it almost never has included NGOs.

Prospects for direct NGO participation through custom are hardly more promising. Customary international law must meet two requirements: habituality and a feeling of legal obligation (*opinio juris*). A rule of customary international law comes into existence when almost all states behave almost exactly the same way for a long time and feel a legal obligation to do so. Judge Manley O. Hudson

78. *See, e.g.*, MAARTEN BOS, A METHODOLOGY OF INTERNATIONAL LAW 16 (1984). Professor Bos does not attempt to introduce the complexities into the diagram, but he describes them in the narrative portions of his monograph. *See id.*

79. Vienna Convention on the Law of Treaties, May 23, 1969, art. 2.1(a), 1155 U.N.T.S 331, 333.

FIGURE I
GENERAL CASE



provided this excellent description of the essential elements of custom:

> (a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
> (b) continuation or repetition of the practice over a considerable period of time;
> (c) conception that the practice is required by, or consistent with, prevailing international law; and
> (d) general acquiescence in the practice by other States.[80]

It is clear that states, and states alone, dominate in the creation and legitimization of customary international law. This does not mean that NGOs have no influence, but that they must work through intermediate entities, principally states and IGOs.

A direct link between general principles and NGOs is equally difficult to establish. Professor Georg Schwarzenberger listed general principles

80. M. O. HUDSON, [1950] 2 Y.B. INT'L L. COMM'N 26, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

as the last "subsidiary" of three "law-creating processes,"[81] with the following three requirements that must be met:

> (1) Pit must be a *general* principle of law as distinct from a legal rule of more limited functional scope;
> (2) it must be recognized by *civilised* nations as distinct from barbarous or savage communities;
> (3) it must be shared by a fair number of civilised nations, and it is arguable that these must include at least the principal legal systems of the world.[82]

Perhaps a case could be made that NGOs help to clarify when a principle has become general enough to fit within this definition, but again NGOs, at most, help to apply icing to a cake prepared and baked by states and IGOs.

Figure I shows a direct link between NGOs and the fourth source, "judicial decisions and the teachings of the most highly qualified publicists." In interpreting this link, one must remember this is a much less significant source than the first three. Professor Schwarzenberger went so far as to call it a "subsidiary law-determining agenc[y]," in contrast to the first three which he characterized as "law-creating agencies."[83] Within this already devalued category, there is an additional hierarchy with international courts first, municipal courts second, and the writings of publicists bringing up the rear.[84] It *is* possible to conceive of groups of scholars and experts, working through NGOs, having direct access to this fourth source.[85] But opportunities for NGOs to affect any of the sources directly remain marginal.

C. *NGO Participation in Negotiating the 1982 UN Convention on the Law of the Sea*

Figures II and III illustrate how this model of sources and NGOs might be applied to a specific situation, the negotiation of the 1982 UN Convention on the Law of the Sea.[86] UNCLOS III, stretching from

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81. GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 28 (5th ed. 1967).

82. *Id.* at 33–34.

83. *Id.* at 35.

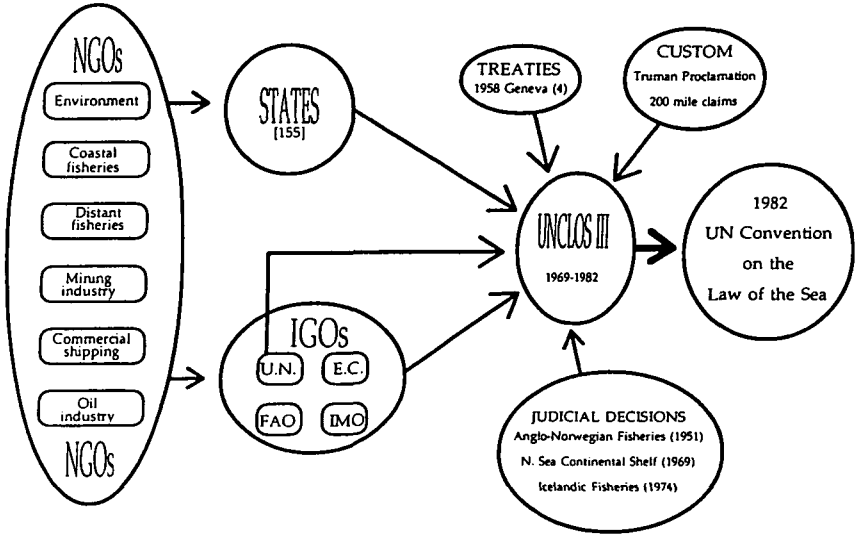
84. *See* THE LAW OF NATIONS: CASES, DOCUMENTS AND NOTES 48–50 (Herbert W. Briggs ed., 2d ed. 1953).

85. *See* THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW 30 (1985).

86. Convention on the Law of the Sea, Dec. 10, 1982, UN Doc.A/CONF.62/122, reprinted in 21 I.L.M. 1261–1354 (1982).

FIGURE II

THE CASE OF THE 1982 UN CONVENTION ON THE LAW OF THE SEA



Ambassador Pardo's speech in 1967, through a decade-long conference, to the entry into force of the Convention in 1992, was the last great pre-information age, law-making conference. Figure II shows the elements of the model to highlight factors especially important to this treaty-creating exercise. The NGO portion of the model (far left) identifies six important clusters of NGOs[87] active in the law of the sea.

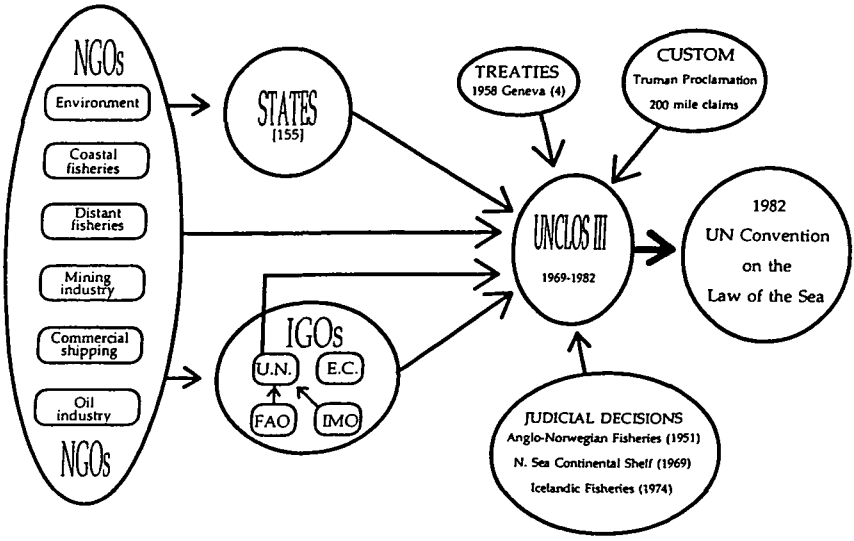
In Figure II, the way NGOs exert influence is identical to Figure I, i.e., through states and IGOs. However, there have been major changes to other portions. Although four IGOs have been specified, the UN is the preeminent IGO because it had administrative responsibility for this huge conference.[88] Of course, virtually all specialized agencies of the UN had some interest in the conference, but two, the Food and Agriculture Organization and the International Maritime Organization, had the most salient interests. The European Community was also actively involved and is included in the diagram.

87. There are of course many others, but these represent some of the most important active NGOs.

88. *See* Edward L. Miles, *An Interpretation of the Negotiating of UNCLOS III, in* ESSAYS IN HONOUR OF WANG TIEYA 551, 551 (Ronald St. J. Macdonald ed., 1994).

FIGURE III

THE CASE OF THE 1982 UN CONVENTION
ON THE LAW OF THE SEA
(Conference-induced additional opportunities for NGOs)



The most significant change from Figure I to Figures II and III is the insertion of the conference that created the 1982 Convention labeled "UNCLOS III." This changed the dynamic completely. The sources of international law—concretized for this example—had a direct impact on the conference in the form of existing international law such as the Truman Proclamation,[89] the 1958 Geneva Convention on the Continental Shelf,[90] and the Icelandic Fisheries Case.[91] The model illustrates that these manifestations of existing international law permeated the conference; after all, existing law has been made, followed, interpreted, and enforced by the very states negotiating the treaty.

Figure III differs from Figure II principally in that it indicates an important, *direct* link between NGOs and UNCLOS III. On what basis do we infer such a link? Multilateral conferences are strange phenomena. Their goal is to negotiate treaties, they have "no regular sessions, no permanent venue and no constitutional infrastructure."[92] In the

89. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945).

90. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311.

91. Fisheries Jurisdiction Case (F.R.G. v. Ice.), 1974 I.C.J. 175

92. M. C. W. Pinto, *Modern Conference Techniques: Insights from Social Psychology and Anthropology, in* STRUCTURE & PROCESS, *supra* note 77, at 305, 308.

case of UNCLOS III, the conference was so complex, so lengthy, and had so many participants (at times more than 5,000 people), it developed its own character that was more hospitable to NGOs:

> The Third United Nations Conference on the Law of the Sea is composed of delegates of some 160 participating states. These are the principal actors in the negotiation, exercising full rights as legislators, including the right to vote, and thus to influence decisions on issues in a direct or immediate way. Observers have a substantial, if mediate, impact as through the provision of information.[93]

How was it that NGOs were able to gain access? First, the size and complexity of the conference gave NGOs many points of access to those charged with deciding on the treaty. Access could come through the UN or a specialized agency. Furthermore, NGO representatives often were part of national delegations. Once access to conference sessions was achieved, NGOs could exert influence on more than just the entity (usually a government) that got them through the door. The highly technical nature of the conference increased the potential role for NGOs.[94] For example, when trying to negotiate Part XI, the provision for mining the deep sea-bed, the parties needed assistance in understanding technical issues such as mining operations and geological factors affecting the distribution of polimetallic nodules. This help was available from NGOs representing the mining industries in North America, Europe, and Japan. These interests were part of national delegations and could form informal coalitions within the conference.

Two ironies should be acknowledged. First, if NGOs did play a more significant, direct role, it was because sources, a major part of the model, were moved to the periphery. NGOs were important in spite of sources rather than operating through them. Second, UNCLOS III was not an immediate success. It took more than a decade to negotiate, needed another decade to garner the requisite sixty ratifications and accessions to enter into force, and had to be renegotiated on the fly (essentially suspending most of Part XI) to become widely acceptable to key maritime states.[95] It could be argued that the increased access given to NGOs made negotiations less efficient and more protracted.

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93. *Id.* at 310.

94. *See* Miles, *supra* note 88, at 552.

95. *See* Bernard, Oxman, *The 1994 Agreement and the Convention*, 88 AM. J. INT'L. L. 687, 688 (1994).

We do not wish to skirt an important issue, to wit, how different is the situation with UNCLOS III than that occurring constantly within the UN system? A myriad of interests, including those of NGOs, are represented every time the UN hosts a meeting or conference and, to a lesser extent, during regular sessions of the General Assembly and its committees. We believe that the combination of length and size of the conference, the huge number of participants, and the highly technical subject matter provided an increased opportunity for NGOs to have a fairly direct influence on the formulation of a major treaty. Further, political bargains struck early in the conference, e.g., the package deal and consensus decision-making, helped to produce a lengthy, protracted conference with a concomitant increase in opportunity for NGO influence.[96]

D. *NGO Participation in Negotiating the Ottawa Convention*

The 1982 UN Convention on the Law of the Sea generally was viewed as involving a massive, highly technical set of issues that were difficult for governmental leaders to interpret and almost impossible to explain to the general public. One is hard pressed to think of a greater contrast than the 1997 Ottawa Convention on Land Mines. Professors Ramesh Thakur and William Maley described the process as "social networking across national frontiers."[97] The way massive public support was mobilized for this treaty is astounding given the slow pace usually characterizing the treaty-making process. In fact, a panel discussion convened at American University had the title "Is the Experience of the Landmines Campaign Unique or is it a Model for International Law-making?"[98]

The Ottawa Convention's final result seems superficially comparable to UNCLOS III in that 120 states went to Ottawa in December 1997 to sign the convention. But the process leading up to this event was much different. As explained by Professor Kenneth Anderson in materials

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96. *See, e.g.*, Miles, *supra* note 88; Jonathan I. Charney, *United States Interest in a Convention on the Law of the Sea: The Case for Continued Efforts*, 11 VAND. J. TRANSNAT'L L. 39, 43 (1978); Barry Buzan, *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea*, 75 AM. J. INT'L. L. 324, 328 (1981).

97. Ramesh Thakur & William Maley, *The Ottawa Convention on Landmines: A Landmark Humanitarian Treaty in Arms Control?*, 5 GLOBAL GOV. 273, 283 (1999).

98. The panel was sponsored by the Washington College of Law of American University and the American Society of International Law. It was held on February 27, 1998. One of the authors, Ku, participated on the panel.

prepared for the American University/American Society of International Law panel, the NGO presence was much more prominent:

> The landmines campaign . . . combined together from the beginning several areas of international law and affairs that had traditionally been thought of as conceptually very far apart . . . . Several features of the NGO movement's strategy bear noting. First, much of the campaign's early impetus came from strongly organized national campaigns that pushed in the first place for a unilateral governmental or legislative ban.[99]

Earlier efforts by NGOs to participate in a review conference encountered a traditional roadblock, i.e., "NGOs were excluded from full participation . . . because conference members considered discussions to be matters of disarmament and therefore national security."[100] The saga of the Ottawa Convention depended on unprecedented cooperation and mobilization of political forces that would not have been possible before the information age. The international network that was created served many functions, the most important of which was linking activists around the world. Other complementary roles included "spotlighting recalcitrants, whether they be governments or private industries that produce (land)mines."[101] A driving force was Ms. Jody Williams, who brought order to an umbrella NGO confederation, the International Campaign to Ban Landmines (ICBL), "making full and innovative use of the Internet, prodding coordination between groups with agendas that often had no other common ground."[102] The magnitude of NGO involvement is astounding; it has been estimated that 225 NGOs actively lobbied the U.S. government.[103] Success came from Ms. Williams's effectiveness and commitment, on the one hand, and new technologies on the other:

> The other key factor was electronic mail, which enabled Ms. Williams and other campaign workers to keep in regular contact with their far-flung ground troops.

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99. Kenneth Anderson, Memorandum to Attendees of Roundtable Discussion, A Thumbnail Sketch of the Landmines Campaign 2 (Feb. 27, 1998) (on file with authors).

100. Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT'L. ORG. 613, 624 (1998).

101. *Id.* at 625.

102. Anderson, *supra* note 99, at 3.

103. *See* Jim Wurst, *Closing in on a Landmine Ban: The Ottawa Process and U.S. Interests*, ARMS CONTROL TODAY, June/July 1997, at 14, 17.

> Some observers say that such a global campaign involving hundreds of grassroots groups would have been impossible as recently as five years ago, when most organizations would have lacked that technical capability. . . . [B]y using the Internet . . . organizations could stay in close contact with one another and with campaign organizers, whether based in Washington or in rural Vermont, which is where Ms. Williams spent much of her time. Electronic mail also enabled organizations to control costs.[104]

There was a flurry of activity in national capitals. The Canadian federal government was a prime mover and is credited with convincing states *not* to use the consensus approach so common in international treaty making.[105] Within Canada, the principal architect was Foreign Minister Lloyd Axworthy,[106] although in the early stages it can be assumed Axworthy had at least the tacit support of Prime Minister Jean Chrétian. Axworthy's approach, which sought to remove landmine issues from the usual secrecy of disarmament negotiations, has been termed "unconventional diplomacy."[107] As momentum built and public opinion—both in Canada and in most other countries—became very favorable, Chrétian was handed a dream issue for a Canadian prime minister. Canada legitimately could claim to be a world leader, staking out a position clearly different from the United States, but not a position likely to jeopardize the overall bilateral relationship between Ottawa and Washington.

Figure IV is quite complex but still illustrates only a fraction of activity that coalesced very quickly to build support for the treaty. The model attempts to use the same general elements from the earlier figures; however, the shoe is not a very good fit, which is probably indicative of the uniqueness of the landmines issue and the effect of new information technologies. NGOs are more prominent than in the UNCLOS III example, having a more substantial and direct influence on the treaty-making sequence. The group of conferences shown at the bottom of the figure illustrates the mingling of NGO and IGO meetings that characterized this process. Further, NGOs were far more impor-

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104. Stephen G. Greene, *A Campaign to Sweep Away Danger*, CHRON. PHILANTHROPY, Oct. 30, 1997, at 60.

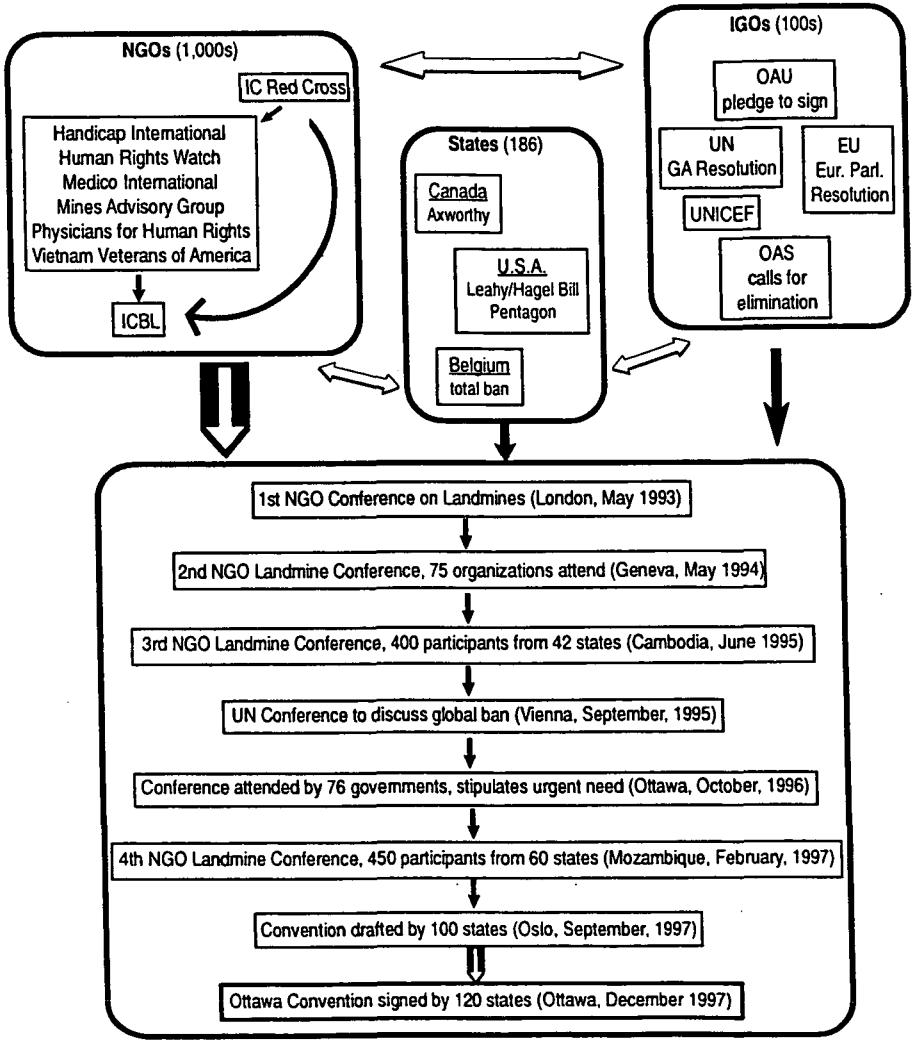
105. Anderson, *supra* note 99, at 4.

106. *See* Wurst, *supra* note 103, at 14.

107. Price, *supra* note 100, at 625.

FIGURE IV

The Case of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (The Ottawa Convention)



tant at IGO meetings—NGO fora had à more prominent role than ever and NGOs came much closer to getting seats at the negotiating table.

The state portion of the model (center) shows only a few examples from a massive amount of activity. Although Canada's lead role is acknowledged, Belgium was the first state to pass legislation compa-

rable to the provisions that would later be included in the Convention.[108] United States support was lukewarm. President Clinton tried to reconcile Pentagon pressure with his desire to stay on the comfortable side of public opinion. Senators Patrick Leahy and Chuck Hagel led an effort in the U.S. Senate to "ban new deployments of antipersonnel mines after January 2000."[109] While full U.S. support was unlikely, at least opposition was fragmented.

IGOs were active in myriad ways on many levels. One explanation for NGO success is that human interest issues made issue cohesion easier.[110] The contrast between the Ottawa Convention and UNCLOS III is clear. In the latter case, the UN was *the* driving force. In the instance of the Ottawa Convention support was more broadly manifest. The General Assembly and the European Parliament passed resolutions endorsing the treaty's provisions. In May 1997, the Organization of African Unity pledged their twenty-five members to sign the Ottawa Convention.[111] Austrian Chancellor (then Foreign Minister) Wolfgang Schussel described the process in the following terms: "Lessons learned from the Ottawa Process are that public opinion must be the driving force and NGOs form with states one team. Their synchronous action will row the boat. Together and amplified by the media we can do it."[112]

E. *The NGOs' Defeat of the Multilateral Agreement on Investment*

A recent example of the influence of information on treaty-making is the Multilateral Agreement on Investment.[113] This is a very complicated, lengthy "treaty" in some ways reminiscent of UNCLOS III. Professor Stephen Kobrin wrote an excellent, yet concise, summary of the substantive terms of the "treaty:"

> • A broad definition of investment to include investment in stocks and bonds, as well as foreign direct investment and

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108. *See id.* at 625.

109. *See id.* at 625.

110. *See* Kathryn Sikkink, *Transnational Politics, International Relations Theory, and Human Rights*, 31 PS: POL. SCI. & POL. 517, 520 (1998).

111. *See* Greene, *supra* note 104, at 60.

112. Wolfgang Schussel, *Editorial Report: Message from H.E. Mr. Wolfgang Schussel*, LANDMINES (Apr. 1998) <http://www.un.org/Depts/Landmine/NewsLetter/3_1/austria.htm>.

113. The Multilateral Agreement on Investment (MAI Negotiating Text) (April 24, 1998) <http://www.oecd.org//daf/investment/fdi/mai/maitext.pdf>.

contract rights, intellectual property, real estate, and "claims to money."
- Very strict limits on "performance requirements"—laws governing such matters as the obligation to have a certain level of local content . . . and domestic equity participation. . . .
- Limits on expropriation subject to the "usual" justifications and conditions: a public purpose; nondiscriminatory application; due process; and prompt, adequate and effective compensation. The phrasing, however, is quite broad, including . . . "measures having equivalent effect."
- Free transfer or repatriation of capital, profits, interest payments, expropriation settlements, and the like.
- Dispute settlement provisions that establish an international tribunal to arbitrate between countries and give private investors standing to sue a country in its courts for breach of the agreement or to bring action in an international tribunal.
- Provisions that require countries to "roll back" existing laws or regulations that are not in accordance with the MAI and refrain from passing new laws that contradict it.
- Specific application of nondiscrimination or national treatment to privatization, monopoly regulation, and access to minerals and raw materials.[114]

Jumping ahead to the climax (or, more accurately, the anticlimax), in April 1998, after three years of negotiations, the MAI was stopped dead in its tracks. The Organization for Economic Cooperation and Development (OECD), under whose auspices the MAI was negotiated, tried to put a positive face on developments by asking for a six-month delay.[115] OECD Secretary-General Donald Johnston, finally realizing that his organization had been outmaneuvered, remarked, "It's clear we needed a strategy on information, communication, and explication."[116] Some held out hope the negotiation would be revived. However, on December 3, 1998, the OECD announced that after "[a]n informal consultation among senior officials . . . . [n]egotiations on the

114. Stephen J. Kobrin, *The MAI and the Clash of Globalizations*, FOREIGN POL'Y, Fall 1998, at 97, 101.

115. *See id.* at 98.

116. Madelaine Drohan, *How the Net Killed the MAI: Grassroots Groups Used Their Own Globalization to Derail Deal*, GLOBE & MAIL (Toronto), Apr. 29, 1998, at A1 (quoting Johnston's statement at a press conference).

MAI are no longer taking place."[117] This experience represents one of the fastest, most resounding defeats for a treaty—a defeat attributable to the efforts of NGOs. The history of the MAI under the OECD was only about three years.

> The life of the MAI can be benchmarked between the Halifax G7 Summit of 1995 and the Birmingham G7 Summit of 1998. At Halifax, in June 1995, the final communique endorsed the negotiation of a set of multilateral rules for investment (the MAI) at the Paris-based [OECD]. Almost concurrently, ministers and delegates at the OECD launched technical and substantive discussions, hoping to conclude the MAI within two years, in April 1997. Failure to conclude the agenda at that date led to a one year extension, but by April 1998, it was clear that final agreement on the MAI was still far off.[118]

The desirability of negotiating the MAI under OECD auspices was controversial. The OECD, based in Paris, represents twenty-nine major economic powers: all of Western Europe plus Japan, the United States, Canada, Korea, Australia, and New Zealand. Reasons for using the OECD include the fact that its membership accounts for about ninety percent of the world's direct foreign investment.[119] Further, the OECD has broad experience in drafting investment treaties.[120] However, many developing countries are suspicious of the OECD, believing it to be a club of rich countries that would give priority to the interests of multinational enterprises headquartered in member countries.[121] Eventually, the negotiations may be taken over by the WTO, but consensus seems to be that with its membership of 132—five times that of OECD—it would be even harder to reach agreement.

It is understandable how many "outsiders" might view this process as

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117. Press Release by Organisation for Economic Co-opertation and Development, *Informal Consultations on International Investment*, ¶¶ 1,3 (Dec. 3, 1998) <http://www.oecd.org/news_and_events/release/nw98-114a.htm.>.

118. Alan M. Rugman, *The Political Economy of the Multilateral Agreement on Investment* ¶ 4 (last modified Aug. 23, 1999) <http://www.library.utoronto.ca/g7/annual/rugman1998/index.html>.

119. *See id.* ¶ 5.

120. *See id.*

121. *See* Global Policy Forum, *OECD Multilateral Agreement on Investment, Fact Sheet, Friends of the Earth-US* (Feb. 19, 1997) <http:www.igc.org/globalpolicy/socecon/bwi-wto/oecd-mai.htm>.

secretive and unresponsive to the needs of developing countries.[122] OECD carried on the negotiations largely oblivious to mounting opposition. A notable example occurred in October 1997. The negotiations were nearly completed when OECD Secretary-General Donald Johnston presided over an "informal" consultation with NGOs.[123] Mr. Johnston's remarks clearly show that he believed matters were moving along well. He began by enumerating NGO concerns, including national sovereignty, treatment of foreign personnel, labor practices, and accommodating the interests of countries not participating in the negotiations.[124] Although not totally oblivious to opposition, Johnston grossly underestimated that opposition. He commented that the "OECD has always taken a balanced approach to foreign direct investment."[125] At the end of his remarks, Johnston announced that "a broad framework is now in place" *and* that he was ready to review the MAI with NGO representatives in attendance.[126] Poor communications, a process perceived to be secretive, and this *fait accompli* attitude set the stage for opposition to rise up and overwhelm the MAI.[127]

Lawrence Herman, apparently unaware of the Ottawa Convention, wrote: The MAI was the first real Internet negotiation. Never before was so much information on an international negotiation available from so many different sources to so many different people. Interest groups and average citizens came armed with massive amounts of cyberspace information about the MAI.[128]

In this instance, a coalition of groups used the Internet to stop the treaty cold. Hundreds of advocacy groups, attempting to galvanize opposition to the MAI, used terms and examples that brought their message home to the public. Their sites on the World Wide Web were colorful and easy to use, offering primers on the MAI that anyone could understand.[129] The range of NGOs working against the MAI and the variety and hyperbole of their claims are amazing. The following

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122. *See* Madeline Drohan, *MAI Talks Shunted as Trade Ministers Assess Options*, GLOBE AND MAIL (Toronto), Apr. 29, 1998, at B6.

123. *See* Donald J. Johnston, Opening Remarks at the Informal Consultation with NGOs on the MAI (Oct. 27, 1997) <http://www.oecd.org/daf/cmis/mai/sgngo.htm>.

124. *See id.* ¶ 3.

125. *Id.* ¶ 16.

126. *Id.* ¶ 19.

127. *See* Drohan, *supra* note 122.

128. Lawrence Herman, *Internet Flexed Muscles in MAI Negotiations*, FIN. POST, Apr. 30, 1998, at 21.

129. *See id.*

examples provided by Professor Kobrin are illustrative:

> "The MAI . . . will serve as a Charter of Rights and Freedoms for transnational corporations against citizens and the earth, and represents a grave threat to democracy in Canada."
>
> —[Canadian activists] Maude Barlow and Tony Clarke
>
> "[The MAI is] one of the gravest threats ever to the economic development and national sovereignty of countries of the South."
>
> —Dr. Chandra Muzaffar, director, Just World Trust
>
> "If the OECD gets its way, the British government will never again be permitted to restrain the rapacity of the private sector."
>
> —Environmental advocate George Monbiot, letter to the London *Guardian*, April 15, 1997
>
> "Under [the] MAI, local, regional and federal governments could no longer make low-interest loans to local businesses, cut taxes for businesses that hire members of local communities, or give minority-owned or environmentally conscious companies preference in the awarding of public-works contracts."
>
> —Gabriel Roth, *San Francisco Bay Guardian*, October 15, 1997[130]

The unprecedented influence of a large group of disparate NGOs was due to more than flashy, state-of-the art web sites. Some estimates place the number of opposition NGOs at more than 600.[131] Professor Rugman argued convincingly that the United States' failure to pass trade legislation and to give President Clinton fast-track negotiating authority created a "vacuum the NGOs were able to step [into] and steal the agenda."[132]

The case of the MAI may presage a new era where justification to a wider audience—certainly a democratic principle—will be an essential part of treaty making. But it would be simplistic and premature to proclaim global grassroots democracy. Are some issues too complex to explain to a mass audience? Canada spawned one of the most active anti-MAI NGO efforts lead by Maude Barlow, head of the Council of Canadians, a major global influence against the MAI. But Ms. Barlow did *not* have broad popular support in Canada. In 1993, she cam-

130. Kobrin, *supra* note 114, at 103.

131. *See id.* at 97.

132. Rugman, *supra* note 118, ¶ 15.

paigned actively for a number of candidates in the federal election—those whom she supported receiving less than one percent of the votes cast.[133] The situation in Canada confirms the observation of reporter Reginald Dale: "NGOs often display none of the transparency they seek in others, hide the sources of their funding and represent only narrow special interests, not the wider public."[134] The negotiating process for treaties often needs a degree of secrecy to facilitate delicate political bargains. Will Internet diplomacy make this impossible?

We believe these three examples—the MAI, the Ottawa Convention, and UNCLOS III—illustrate important aspects of contemporary NGO influence. It may be premature to generalize from only three cases, but the reasons for NGO influence are telling. In the case of the Law of the Sea Convention, the duration of the conference, the complexity of the issues, including the need for technical expertise, created a rare opportunity for NGO influence because states needed information often available only from NGOs. In the case of the Ottawa Convention, the issue was concrete, the human dimension palpable, and states had an existing legal and institutional platform on which to place the issue as soon as popular momentum began to build—the speed and scope of mobilizing political support through technology was evident. Finally, in the case of the MAI, political opposition came from a host of issues ranging from human rights to environmental protection. Again, technology permitted fast and broad mobilization of an unprecedented nature.

IV. CONCLUSIONS AND PROSPECTS FOR A SHIFT IN GOVERNANCE

We have argued that an expanded place for NGOs is inevitable and can be constructive—even decisive—in the development of international law. Prosaic as it may seem, an enormous amount of analytical work on NGOs remains to be done. Our review of existing analyses and concepts of international law-making suggests areas particularly ripe for study. For example, Professor Dinah Shelton sees an important function for NGOs before courts, providing another access point to international law:

> Nongovernmental organizations are playing an increasingly important role in international litigation. . . . International pub-

133. *See id.* ¶ 11.

134. Reginald Dale, *The NGO Specter Stalks Trade Talks*, INT'L HERALD TRIB., Mar. 5, 1999, at 11.

> lic interest organizations . . . may institute cases or intervene as parties, serve as court- or party-appointed experts for fact finding or legal analysis, testify as witnesses, or participate in proceedings as amici curiae. . . . The role of amicus . . . is generally less costly and time-consuming than mounting a full case.[135]

A critical look at the accepted definition of NGOs suggests some radical possibilities. For example, important institutions usually assumed to fall into the IGO category might arguably be NGOs. Gordenker and Weiss speculate about quasi-governmental organizations and donor-organized nongovernmental organizations.[136] What about the International Court of Justice, the most important court of international law? The virtually unchallenged assumption is that the ICJ is an IGO, part of *the* global IGO, the UN. But can an IGO create an NGO? Because the ICJ "shall be the principal judicial organ of the United Nations"[137] and "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice,"[138] is it inconceivable that the ICJ could be an NGO? States do not belong to the ICJ in the way they belong to the FAO. Further, the dictates of judicial impartiality forced the ICJ to distance itself from states, adding to this impression of quasi-NGO status.[139] The point, of course, is not to argue literally that the ICJ is an NGO. However, a functional approach emphasizing what NGOs do, not just how they are created, shows how porous the traditional categories have become.

Recent efforts creating international tribunals and courts to enforce international standards and norms in areas where national judicial institutions are found to be inadequate, e.g., the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia and Rwanda, suggest that a new era is dawning. This new era is characterized by expanded roles for NGOs contemporaneous with international law focusing more on human rights. The notion—virtually unassailable a century ago—that the state is the only subject of

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

136. Gordenker, *supra* note 27.

137. U.N. CHARTER art. 92.

138. U.N. CHARTER art. 93, para. 1.

139. *See, e.g.*, ICJ Statute, Art. 2 (requiring that the court be composed of independent judges); ICJ Statute, art. 18(1) (requiring unanimous opinion of other judges for dismissal from the court).

international law is giving way. NGOs have contributed to this systemic shift.

This Article began with a focus on technology's effect on NGOs, particularly as their work related to the development of international law. The sources of international law helped to demonstrate the workings of the law-making process. The complexity of an issue, as is the case with the ten-year negotiation of UNCLOS III, with its 320 articles and 9 annexes, plus the number of negotiating parties (160 in this instance), created a political dynamic more open to influence by private parties including NGOs. This influence was wielded through government representatives, officials of sponsoring organizations, and conference secretariats. NGOs served as sources of information, channels of communication, and purveyors of solutions for the negotiation of stalemates or logjams. The Ottawa Convention illustrates the "acceleration of history" made possible when NGOs use information-age technologies in an international system freed from the constraints of Cold War bipolarity and where states' interests have not fully ripened in a particular issue area.

Technology appears to have made a qualitative difference for NGOs in two primary ways. First, it enhanced their power as information purveyors in a complex and information-rich environment. Second, technology has greatly expanded the ability of NGOs to mobilize and to organize a critical mass of support so that they cannot be ignored the way they were in the MAI negotiations.

The nature and frequency of contacts and interactions across borders have increased drastically, requiring both more complicated as well as more open-ended international legal obligations and frameworks to support them. This more intense process of making and developing law has moved international law away from a rule orientation towards one that considers values, frameworks, and processes. In this context, private actors—corporations, individuals, and NGOs—have an opportunity to help determine which questions should engage the attention of governments.

Whether NGOs will contribute to better global governance and more civil society depends on how they are used and how they relate to the interests and functions of national and international institutions. Recent scholarship and practice demonstrate that NGOs are an important factor for a full understanding of contemporary international legal and political processes and have the potential to advance human rights and develop international law in myriad ways. The instantaneous

global reach of the information age provides the means to do so. Professors Thakur and Maley have optimistically stated that, "NGOs have for many years acted as systemic modifiers of state behavior. The case of the Ottawa Convention shows that the role of NGOs has changed from constraining state behavior to setting and driving the international agenda."[140]

We began this inquiry by speculating about whether information-age forces that affect individuals will necessarily influence international law. It seems appropriate to conclude by trying to fit international law into the new social fabric being woven by the information age. Canadian academic David Johnston has written eloquently about a "triangle of success" consisting of "wealth creation, social cohesiveness and political liberty."[141] In 1500, Islam and China both led Western Europe in technology, but since then Western Europe has moved far ahead as a result of a better balance among these three elements.[142] Professor Johnston described the present situation in this way: "Today, we are faced with a parallel challenge: can we use the new tools of information technology to enhance and strengthen the synergy across the three corners of the same triangle?"[143]

The heightened role of NGOs is pertinent to Johnston's conceptualization. NGOs have helped to bolster each side of the triangle. The Ottawa Convention certainly is an attempt to advance human liberty. Some might argue that the MAI was a noble effort at global wealth creation, an attempt thwarted by NGOs. The social cohesiveness side of the triangle can be even more problematic. The information age permits seamless, instant communication across borders, which certainly has the potential to undermine social cohesion. The answer to this apparent contradiction lies in realizing that, while each side of the triangle represents a positive value, advancing any one of the three *may* come at the expense of the others. This is precisely what law is all about, balancing social values when they conflict with one another.

For more than 350 years, states have been the principal actors applying law to adjust among competing values. NGOs are now emerging as an additional force in the application of law to adjust among these values. The values themselves can be as varied as prohibiting the

140. Thakur & Maley, *supra* note 97, at 297.

141. Johnston, *supra* note 4, at 59–60.

142. *See id.* at 59

143. *Id.* at 60.

shouting of "fire" in a crowded theater and outlawing torture previously hidden behind the veil of territorial sovereignty. NGOs have heightened status and efficacy as part of international law's effort to balance and advance human values. We live in interesting—cyberspacial—times.