Book Review -- Like Blind Men Feeling an Elephant: Scholars' Ongoing Attempts to Ascertain the Role of Non-State Actors in International Law

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Review of Rainer Hofmann (Ed.) and Nils Geissler (Ass. Ed.), *Non-State Actors as New Subjects of International Law: International Law – From the Traditional State Order Towards the Law of the Global Community, Proceedings of an International Symposium of the Kiel Walther-Schücking-Institute of International Law*, March 25-28, 1998, Berlin: Duncker & Humblot, 1999, 175 pp., Euro 44,- / SFr 44,-.

A. Introduction

[1] It is very difficult, noted one of the organisers at the end of the symposium on which this volume is based, to draw major conclusions on the issue of non-state actors (NSAs) in the international order. (p. 171, Kiel Prof. Dr. Jost Delbrück) Consensus among twenty-six leading international legal scholars after two days full of addresses, thought-provoking reports and lively discussion had been reached essentially on one idea alone. Participants agreed that the process of globalisation is challenging states' traditional dominance of international law due to the increasing role of NSAs. (p. 6)

[2] The modesty of this consensus should not detract from the richness of the debate at the symposium. The text of the symposium's proceedings should, as the same organiser predicted, spawn many dissertations. (p. 172, Delbrück) Furthermore, international legal science would only profit from similar attempts to grapple with the issue of NSAs in the international system. The issue is highly relevant and of fundamental importance, but the situation remains complicated and unsettled even four years after the symposium.

[3] I would like to facilitate such attempts by means of the following review. Somewhat like a rapporteur, I summarise the wide range of information and viewpoints presented at the symposium on the issue of NSAs in the international system. In the course of doing so, I identify the principal concerns in the debate, where the participants' arguments diverge and most importantly, at which points clarification is required. My hope is that further research and discussion on the issue may thereby better proceed and that more profound consensus may in future be reached.

B. A First Attempt: NGOs and Non-State Political Entities as Legal Persons

[4] The organisers began the proceedings by setting out the context for the 1998 symposium. Just as for the three biennial predecessor symposia, the aim was to explore the structural changes that the international system is undergoing with globalisation and the end of the Cold War. Their conviction that international law is "in a period of a very radical transformation" (p. 13) would strike few as novel. The organisers are correct in noting, however, that much of international legal science "has tended to pay random or no attention" to related developments (p. 14), possessing little understanding of them beyond buzzwords and cliches.

[5] In her thorough opening presentation, "Legal Personality and the Role of Non-Governmental Organizations and Non-State Political Entities in the United Nations System", Prof. Ruth Wedgwood goes a long way to remedying the lacunae in contemporary discourse. The Yale Law School scholar methodically provides the why, explains the how and shows the where non-governmental organisations (NGOs) and non-state political entities are exercising growing influence in the international system today. She concludes that though NGOs do not enjoy the legal accoutrements of states – i.e. standing before the International Court of Justice (ICJ), a vote in the UN General Assembly, the protection of territorial integrity and political sovereignty – and do not therefore possess full legal personality, NGOs are nonetheless "the real actors in international systems, affecting outcomes, mobilizing publics, and constraining states." (p. 28)

[6] Wedgwood's lucid exposition provides the raw material – in particular through her comprehensive citation of relevant primary international legal materials - for an intelligent debate. Unfortunately, she does little to advance such debate directly. Wedgwood promises but does not ultimately offer a judgement on whether giving voice to these new actors "will help or hinder the primary tasks of the United Nations system in resolving internal and international conflicts, and enforcing human rights". (p. 21) At most she offers a framework for thinking about the topic in her cautionary description of the "problems of NGOs", especially their legitimacy and accountability. (p. 28-32)

C. A Second Attempt: NGOs and TNEs as Helpers of the State

[7] The second presenter, Prof. Dr. Daniel Thürer of the University of Zürich, addresses the topic of the emergence of NGOs like Wedgwood but then that of transnational enterprises (TNEs) rather than non-state political entities. He considers these NSAs' emergence from the perspective of the changing role of the state rather than that of the reach of legal personality. "The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State" proves the more satisfying of the two presentations. Although Thürer's success is partly due to a more conceptually felicitous combination of topics and to his adoption of a broader perspective on them, it is mainly due to his effort to find a new frame of reference for an evolving international legal order. One feels in reading the text of the proceedings that it was with the Swiss scholar's plea for a "constitutional approach" to international law in order "to better reflect and to cope with the needs of modern international society" (p. 51) that debate at the symposium was well and truly engaged.

[8] To be sure, Thürer's proposed reconception of international law is like most contemporary conceptions state-centric. States "are and remain the indispensable centers of authority and power" (p. 58) in international relations, being the units that hold the monopoly of force and that provide the basic infrastructure in the present world order. As is characteristic of innovative scholarship, however, Thürer insightfully recharacterises the problem at hand. He begins by defining state sovereignty not according to the traditional, formal concept of sovereignty as the highest authority under international law within a given territory. Instead, he adopts an alternative, substantive concept of sovereignty, namely "the capacity to realise human rights and other basic values recognised by the international community". (p. 39) The consequences of redefining sovereignty as a value-laden concept and states as the values' trustees are enlightening and wide-ranging. The crucial questions become a) how and to what degree do NSAs "enhance, strengthen and enable states to realise their proper function in the face of pressure from opposing forces, or the failing will of state authorities" (p. 40) and b) whether and to what degree the international community should "step into the vacuum of the ‘rule of law' and ‘public order'" (p. 41) created by the process of privatisation and the some states' inability to exercise public control.

[9] The Swiss scholar answers these questions with reference to NGOs and TNEs, the two types of NSAs that he holds to be the main forces leading to the changing nature of states. His evaluation of NGOs' impact on international life is essentially positive. Thürer finds their activities in transferring democratic principles from state constitutional law to international politics of fundamental importance. Moreover, as non-state entities, NGOs introduce "an independent stance" into the international arena. (p. 46) Lastly, by reminding states of their international legal obligations, NGOs often "express the juridical conscience of the international community." (p. 46) In contrast, TNEs tend not to support states as trustees of values under modern international law, since TNEs are "not principally designed to fulfil a public purpose, but rather aim at making a profit". (p. 46) Thürer queries whether rather than being generally encouraged like NGOs' activities, TNEs' activities should be controlled "in a fairer, more reliable and effective way". (p. 47) Strengthened or novel legal regulation might ensure that TNEs do not have long-term adverse consequences for the common interests of mankind.

[10] In view of the effects of NGOs and TNEs' activities, Thürer calls for a reconception of international law and the adoption of a constitutional approach. Constitutionalism would bring several advantages. First, in its identification of the basic components of the legal system, a constitutional approach would provide "an easier way of escaping from the rigidly defined circle of traditional subjects of international law" and incorporating NSAs. (p. 53) Second, as a main function of state constitutional law is to define the basic rules of legitimacy such as consent of the people, constitutionalism would further efforts at extending democracy and political freedoms to the global level, especially in connection with NGOs' activities. Third, constitutionalism means that no power should remain unchecked, a principle that when applied to movements such as Greenpeace conceives of them as a countervailing force safeguarding public interests internationally. Fourth, contemporary international relations, with its "total market" orientation and concomitant "dangers for social justice, solidarity and – ultimately – peace" (p.56), would benefit from economic efficiency being given a limited, instrumental place within the international order of ideas comparable to that within state constitutions. Last, a constitutional-federal perspective would help identify tasks to be regulated centrally or regionally. "Might not, under the finality of federal thinking, sovereign states also be conceived as middle parts, mediators or ‘bridges' between communities" (p. 57) on the local and global levels?

D. The Opening Debate

[11] The comments that immediately follow on Wedgwood and Thürer's presentations tend to be as divergent as they were convergent, as discordant as the pair's arguments were harmonious. The scholars at the symposium were at odds with one another on many aspects of the symposium's main theme, from the proper definition and phenomenological description of NSAs and new subjects, through their actual existence and their significance in

historical perspective, to how the international community would be best advised to react in conceiving a future international legal order. The scholars' disagreement made for a highly stimulating - if largely inconclusive - opening discussion.

[12] Several participants began by challenging conceptual assumptions made by Wedgwood and Thürer. For example, Wedgwood had not directly considered whether NGOs or TNEs have emerged as new subjects of international law. Thürer had likewise sought to avoid what he called an "intensely debated but largely sterile question". (p. 53) Both preferred to take a case-by-case approach and to "conclude what the law is from social forces". (p. 91, Thürer) Prof. Dr. Krzysztof Skubiszewski was, however, not satisfied with Wedgwood's allegedly confusing use of the terms "subjects of law", "actors" and more, of those "who participate in international conversation". A clear distinction must be drawn, argued the Iran-US Claims Tribunal President, between "the capacity to be a subject of international law, that is, to have international rights and duties," and "the capacity to act in international law so as to produce legal effects". (p. 83)

[13] Likewise, use of the term "decline" to describe the effects on states of the changing structures of the international system gave rise to several exchanges. Where Thürer had spoken of states having "gained in weight and profile as ‘trustees'" in modern international law (p. 37), others such as Berkeley Prof. David D. Caron spoke of a decline. To Caron, the decline or strengthening of the state's role should be gauged according to the discretion possessed by the state in its external relations, that is according to its "capacity to move contrary to expectations of others, to decide in a moment unfettered by institutional and normative constraints." (p. 80) The actual change in discretion experienced by states varies per substantive area, but even in the area of security, where states have traditionally enjoyed considerable freedom to manoeuvre, a decline in state discretion could be seen. Prof. Christine Chinkin of the London School of Economics cautioned that NGOs' participation in international consultative, advisory and expert bodies can have the paradoxical consequence of legitimising state action and thereby strengthening the state's role. (p. 90) With an eye to saving time "on the decline issue," Delbrück proposed that participants agree that in absolute terms, states are maintaining their status but that in relative terms, they are becoming less influential as new actors moved in. (p. 68) His proposal failed to end the debate. In summing up the discussions the next day, Delbrück was reduced to the formula: "'We all agree that there is a change or a difference in the role of the state.' I want to leave it at that." (p. 172)

[14] Beyond these terminological differences, Thürer's assumption that there has been a transformation in the international legal order due to the recent emergence of NSAs was also challenged. Prof. Dr. Peter Malanczuk, Erasmus University Rotterdam, provided the most thoroughgoing analysis of this topic. (p. 156-158) Malanczuk began by dismissing the term subject of international law as too abstract to be informative as to its legal consequences. "It is more fruitful to think in terms of legal personality, which is related [...] to specific rights and duties." (p. 71) Malanczuk also stated that it was necessary to distinguish between NSAs' current status *de lege lata* and their possible future status *de lege ferenda*. He then reviewed the legal significance of NSAs under three aspects. Malanczuk concluded that NSAs' law-making capacity is, as far as treaties and custom are concerned, very slight, consisting solely in the limited participatory and advisory role granted to certain NGOs in multilateral treaty making. A distinct source of international law related to the law-making activities of NSAs would have to be conceived *de lege ferenda*. Second, as regards NSAs' legal standing before international dispute settlement bodies, Malanczuk explained that the special area of human rights aside, individuals, TNEs and NGOs lack direct access and therefore personality *de lege lata*. Whether NSAs should be given standing was a matter of *de lege ferenda*, which at the ICJ he considered unrealistic. Third, NSAs' lack of responsibility under international law for harmful acts (see Brent Spar below) mitigates again against conferring personality upon them. Malanczuk proposed extending the existing international law - and in particular the diligence rule - to attribute state responsibility for NSAs' harmful activities rather than imputing direct responsibility onto NSAs. For his part, Dr. Michael Byers thought it more interesting to consider how non-state actors are penetrating the state-centric international legal system and exercising their power within it. The Oxford University scholar argued that NSAs do not exercise influence as international legal persons as such; instead, they interact on the sub-state level with states, "which then act out the influence of the non-state actors upon them" internationally. (p. 75) The most – and it is ultimately not much - that can be characterised as a consensus on this topic is that in analysing the contemporary role of NSAs, "we can grasp some of these scenarios in terms of old-fashioned classical public international law, whilst others may call for a more dynamic approach." (p. 63, Prof. Dr. Matthias Herdegen, Bonn University)

[15] Although it was agreed as an empirical fact that "the actors in the international system have multiplied" (p. 66, Delbrück), it was then demonstrated that their characterisation is "considerably more complex than it might appear at first glance." (p. 76, Byers) Some scholars took objection to the presenters' distinction between international non-governmental and governmental organisations, arguing that such a distinction is difficult to maintain in many cases. Others challenged the notion that most states are as benign as described and that they actually protect human rights. The notion that NGOs are by definition good and TNEs bad was also questioned. Lastly, Prof. Dr. Albrecht Randelzhofer of the Free University of Berlin pointed out that it is neither the phenomenon of international NGOs as

such nor all international NGOs but rather "some" of them that are of sufficient importance to "really influence, to a high degree, public international law." (p. 77)

[16] Despite the conceptual challenges to Thürer's argument, his characterisation of the problem at hand and more, his plea for a constitutional solution resonated positively among the participants. Particular concern was expressed about the power wielded by NGOs and TNEs in light of their ‘access' to the global level and their ‘escape' from control on the national level. Prof. Dr. Jochen Abr. Frowein, co-director of the Max-Planck-Institute for International Law in Heidelberg, put these concerns most dramatically: "on one hand there is the fact that the NGOs are buying states. That is of course something which happens in the UN all the time [...]. The other problem that you have: states behind not NGOs, but behind transnational companies. That, I think, is again very important to realize, and it is certainly true for some European countries." (p. 60-61) The problematic topic of NGOs' international responsibility was raised again in conjunction with the Brent Spar incident, where Greenpeace caused enormous, uncompensated damage to Shell by making a factually unfounded call for a boycott of Shell products. Prof. Dr. Torsten Stein of the University of the Saarland argued that "it would be helpful if states could agree to parallel the growing influence and global acting possibilities of NGOs by agreeing upon parallel and internationally applicable rules of responsibility." (p. 63) Prof. Dr. Wolfgang Benedek of the University of Graz found Thürer's constitutional solution attractive because "it is very important also to have a value basis for this new system in the making" (p. 79) by which citizens, politicians and business can direct their activities.

[17] Underlying the discussion about extending international law's reach was a belief that though they are increasingly being by-passed in international transactions, states possess the ability to maintain their influence and counter that tendency. Kiel Prof. Dr. Dr. Hofmann spoke of states having "voluntarily" lost their previous position as the sole actors and subjects of public international law. (p. 144) States could, if they wished, co-operate with each other, "by concluding agreements that strengthen the relevant international institutions [...] or by changing their rules and policies." (p. 71, Malanczuk) Stein predicted that states would eventually agree to do so. "We might have to go through a phase during which a number of states see advantages that prevent them from participating in combined efforts to control the adverse effects of new technologies and globalization. But the time will come when they realize that they all are vulnerable and that cooperation is the only way to regain the necessary control." (p. 145)

[18] The essential question became how best to extend the reach of international law to control NSAs. The European Union (EU) was proposed by Thürer as "the most promising way of creating some structure capable of checking the abuse of economic and social power, and of directing social activities towards overriding common ends." (p. 92) Fred Aman, Dean of Indiana University, was sceptical about the EU's ability to solve the "mismatch problem between creative demands for global law and traditional state-centric solutions" (p. 88), since the EU is very state-centric, and the state has proven itself either indifferent to, unable to recognise, or unable to aggregate NGOs' demands. Aman called instead for "a broadening of the system by providing greater recognition to NGOs and allowing their transnational demands to help create a supply of transnational solutions." (p. 88) The UN was later described as the "relatively best equipped" to play a promoting role in the transformation of the structure of international law, as it has variously demonstrated itself willing and able to integrate the diversified range of emerging NSAs. (p. 134, Cologne University Prof. Dr. Stephan Hobe) Caron disagreed, arguing that while the UN may be the obvious candidate, it is unlikely to prove an effective means of controlling TNEs. Caron observed that business has in some respects (e.g. its arbitration mechanism) "a much more developed effective transnational legal order than the interstate order" and that "[i]f business can avoid states, they most certainly can avoid the UN." (p. 148)

[19] By way of ending my summary of the opening debate, reference may be made to comments addressing the nature of change in and the future of international law. The participants' considerations here led them - with one notable exception - to advocate a cautious approach to reforming the legal order, stating in effect that "it is not necessary yet to deal with the question whether [NSAs] are legal entities under international law or not." (p. 66, Delbrück) For example, Prof. Dr. Luigi Ferrari Bravo of the University of Rome stressed that the "time factor is very important in international law". (p. 68) While he agreed that new norms are currently being created in international law, Ferrari Bravo felt that to recognise new NSAs as subjects of international law "would create a complete disequilibrium in the real world. I on my part remain linked to the past." (p. 69) Randelzhofer also emphasised the time factor, characterising the situations in Abkhasia, Bosnia, Rwanda and Sierra Leone that Wedgwood had described as "peculiar, pathological situations, which possibly are only transitional in character," and as unlikely "to give rise to re-evaluate the structure of public international law." (p. 77) Frowein repeated his long-standing realist outlook on such developments: "wherever power is being exercised, […] states will in fact treat these power holders as something of importance in international law and will under certain circumstances also take up international legal relations with them without recognizing them as states." (p. 59) Lastly, Wedgwood spoke of slow but practical innovations elsewhere in the UN system (e.g. *amicus curiae* briefs before the ICJ and loans from the international financial institutions to sub-state actors) that might follow from the Security Council's giving cognisance to various non-state political entities. "It is very hard to confine the effects of innovation in one area of the public international law system from another." (p. 93) In contrast to the other speakers on this topic, University of Minnesota Prof. Dr.

Fred Morrison predicted that change to the international legal order would come soon. (p. 85) Morrison saw international law as replete with an growing number of "fig leafs" covering the peculiar contemporary status of NSAs and "designed to fit the present reality into the forms of the past." (p. 85) He argued that "when legal fictions begin to multiply, you are approaching a point at which the substance of law will change". (p. 85)

E. A Third Attempt: Individuals and Groups of Individuals as Subjects of International Law

[20] The symposium was well conceived in its coverage of the issue and in its division of responsibility among presenters, with the presentations complementing one another in handling the principal topics. Like Wedgwood and Thürer, the second pair of presenters addressed essentially the same NSAs from different perspectives. New York University Prof. Dr. Thomas M. Franck and Cologne University Prof. Dr. Stephan Hobe both addressed individuals and groups (or groups of individuals), the former as regards subjects of international law and the latter as regards the denationalisation of international transactions. In style, the two presentations were also well-matched. As one participant observed afterwards, "Professor Franck's crystal-clear, somehow merciless view and Professor Hobe's softer, more velvet-like vision complement each other very nicely." (p. 150, Herdegen)

[21] In the context of the symposium, Franck's focus on the international protection of human rights was particularly apt. It is in this area of international law that individuals and groups have made the most progress in acquiring legal status, that the development of an enforcement machinery is most advanced and that the challenge to the state-centric nature of the international legal order is most acute. Moreover, the international rules concerning the protection of human rights remain in flux, manifesting at turns a fundamental conditionality, indecision and unclearness.

[22] The majority of Franck's presentation, "Individuals and Groups of Individuals as Subjects of International Law", is repetitive of standard accounts of the evolution of international human rights protection. He traces the gradual empowerment of the self beginning with the shift away from the impermeable state sovereignty of the early modern Vattelian system, through the turn to group rights under the purely associational League of Nations, to the present-day UN, which defines the individual in terms of personal, political and civil rights enforceable against the state. Along the way, particular attention is paid to the differential ability of individuals to seek redress for alleged injuries under the various regimes. It is in Franck's concluding call for the further consolidation and extension of individual empowerment that his signature analytical force comes to the fore and that his long and deep reflection on the topic is clearly demonstrated. The spirited exchanges that Franck's argument subsequently gave rise to evidence its provocative and innovative nature.

[23] According to Franck, the evolution of individual human rights protection has led to a certain tension in contemporary rights discourse. The claims of the historic sovereign state, the formerly-prioritised groups and the newly-emancipated individual are being staked simultaneously, having been merged into a single claims-triad. (p. 110) International law is thereby being challenged to think about the appropriate balance between the claims and the possible means of accommodating them. "What sort of future do we want, what sort of governance, and what are to be its empowered constituents: International Institutions? States? Groups? Individuals? Or a mixture of some or all of these?", Franck asks provocatively. "If a matrix of all or some, then how, and in accordance with the discursive processes of what sort of polis, are the various claims to rights and benefits to be apportioned and reconciled?" (p. 110-111)

[24] Franck recognises that black-letter law and social convention usually favour specific claimants in case of conflicting claims. Where a conflict in the triad is not socially pre-determined, Franck favours according priority to the individual as rights claimant on the basis of a structural and functional analysis. Only the rights of the individual can be said to be "natural", rather than a historical-social construct, as they alone are not derived from any higher principle but are implicit in the fact of personal being. Put otherwise, individuals, unlike states or groups, can hold "inherent" rights, rights that are not transferable and pertain to the bearer unconditionally. (p. 111) Franck concedes in deference to advocates of group or state rights that individuals develop and act in association and community and that if individual rights always trumped, "we might revert to a law of the jungle". (p. 113) Nonetheless, he argues that "lexically, it is the individual who constitutes society. The group, nation and state do not constitute the individual". (p. 112) Franck envisions the future international legal order as a systemic architecture whose overriding purpose is not to promote "some absolute, automatic preeminence for personal rights but to promote the struggle and discourse that ensure perpetual – not peace - but equilibrium." (p. 113) Like a "well-constructed Alexander Calder mobile", the parts of the triad would be kept in "a continuous interaction within the constraints of equilibrium." (p. 113)

F. A Fourth Attempt: Individuals and Groups as Global Actors

[25] Hobe's concluding presentation addresses practically all of the previous presenters' major concerns. Although to be welcomed for its comprehensive and syncretic nature, "Individuals and Groups as Global Actors: The Denationalization of International Transactions" suffers from being overly ambitious. Its thesis is too sweeping, its ideas too often unclear and its style of argumentation ultimately too rhetorical.

[26] The fundamental flaw in the Cologne University Professor's presentation lies in its reference to the process of globalisation as the catalyst for the recent development of individual and group legal personality and for the further development of international law. Although it is his argument's starting point, Hobe offers only "a rough description" of globalisation, confessing that "no firm notion of the term globalization has yet been established." (p. 116) Moreover, the rough definition of this buzzword that Hobe does offer - "the development of the world as one economic marketplace based on telecommunication and information systems that are easily accessible for everybody" (p. 116) - relates to economic forces, when the challenges that Hobe describes as prompting change in the international system and legal order relate primarily to individual and group rights. Even judged on its own terms, Hobe's definition is wanting. It fails to consider that "globalization is not an entirely new phenomenon" (p. 69, Malanczuk): several pre-WWI economic indicators are similar to those Hobe associates with globalisation. This incomplete historical perspective blunts his claim of an epochal change in international relations being underway. Lastly, Hobe's attempt to avoid terminological debate by pursuing "an inductive approach" – i.e. describing "certain trends which actually characterize the international system as the factual framework and as the real basis for the different international actors" (p. 116) - provides inadequate support for an argument that attempts to provide a holistic understanding of the development of international law.

[27] That having been said, the shortcomings of Hobe's argument as a whole should not be taken to detract unduly from its parts. There remains much of value in his presentation. Hobe's dating of the conferral of (partial) legal personality on individuals is, for example, of interest. Unlike Franck and others, the German scholar implies that this momentous shift in the law of nations occurred at last century's end rather than at its midpoint. Despite the UN Charter's pledge that the protection of human dignity is to be an international concern, Hobe contends that the subsequent codifications do not justify talk of a changing paradigm in international law. "The decisive test of the effectiveness of an international protection of human rights is always whether it can effectively meet and react to the challenge of state sovereignty. [...] Until very recently, the implementation part of the human rights protection has been somewhat fragmented." (p. 120) Three modern developments have to his mind contributed to the individual's status as a legal subject and thus justify talk of a changing paradigm: the Security Council's recognition of grave human rights violations as threats to international peace (i.e. in the humanitarian interventions in Somalia, Rwanda and Haiti between 1992-94), the strengthening of traditional human rights enforcement mechanisms (e.g. through protocols 9 and 11 of the European Convention of Human Rights of 1990 and 1995, respectively) and the revitalisation of the concept of individual criminal responsibility (e.g. in the establishment of the international criminal tribunals for the Former Yugoslavia in 1993 and for Rwanda in 1994).

[28] Hobe's description of international law's differential treatment of group and individual rights is also of worthy of consideration. Unlike individuals, Hobe finds that groups – or rather the test entity minorities – have yet to attain unequivocally the status of partial subject. They are currently "legal subjects *in statu nascendi*." (p. 129) Certain rights have been granted to minorities, but these rights are still predominantly channelled through the states. As regards their future legal status, Hobe perceives a growing need to accommodate minorities arising out of migratory processes and the establishment of new, multi-ethnic states. The dominating concept of the nation state, with which the concept of minority as a group collides, may be soon relativised. Based on other current tendencies (e.g. the active involvement of NGOs in UN global conferences and the ongoing work on codes of conduct for TNEs), Hobe concludes that "it seems therefore to be likely that both [groups and individuals] may eventually generally be accepted as – partial – subjects of international law." (p. 133)

[29] Finally, Hobe's predictions for the development of international law due to its growing number of subjects should be mentioned. He states that international law as a whole looks to gain in importance, "as this seems to be the only body of law which may actually be designed to meet the challenges of the era of globalization." (p. 134) Further, the international law-making process will most likely change to articulate and accommodate the very diverse interests coming to the fore. (Specifically, the importance of conventional law and general principles of law as sources may well rise, while customary international law will probably adapt itself to the recent changes of the international system.) Last, Hobe expects that the means of central law enforcement will have to be strengthened even more "in order to prevent a fragmentation of the international system and of international law." (p. 134)

G. The Closing Debate

[30] The comments following Franck and Hobe's presentations have much in common with the comments following Wedgwood and Thürer's. In addition to handling many of the same topics, the former tend to be divergent and

discordant like the latter. The scholars remained fundamentally at odds on several aspects of the issue of NSAs as new subjects of international law, from conceptual assumptions to points of fact. Again, participants were obviously stimulated by the presentations, with two offering comments nearly as elaborate as the presentations themselves. The result is that the closing discussion makes for a thought-provoking - if demanding - read.

[31] It would have been naive in this context to expect Franck and Hobe's theses to go unchallenged. Participants lined up to take sides in particular over Franck's. Herdegen described Franck's thesis as emphasising "a strictly personalist, individual-oriented vision" with "a very strong warning against group-oriented perspectives, a kind of philippic for the non-liberal, sectarian, tribal implications." (p. 150) For his part, Delbrück agreed with Franck that there is no natural law answer to the question of which rights to prioritise. "It is the on-going international discourse that can lead us to reasonable conclusions about the ultimate basis". (p. 154) He added that Franck's triadic approach could also help answer the difficult question of the source of *erga omnes* and *jus cogens* human rights norms. Franck's application of his approach to the protection of minorities also found favour. Participants generally agreed that "individual rights are a safer and better starting point for regulating the protection of minorities." (p. 149, Skubiszewski) Some cautioned, however, that group rights should not be equated with the collective exercise of individual rights. Individuals may have rights claims arising out of their membership in groups, and for these to be effectively protected, groups must be accorded specific rights. (p. 143, Hofmann)

[32] Other participants came down on the opposite side of Franck's thesis. Wedgwood, for example, took exception to Franck's reasoning in favour of a superior moral claim for individual rights, arguing that Franck had confused ontology and epistemology. "Even if we believe that [...] the nature of being is such that humans have a natural endowment of dignity and claim to resources and regard, [...] this is not conceded by many." (p. 165) Ferrari Bravo rejected Franck's deductive approach to group rights in favour of an inductive approach. The Italian scholar cited several states where local groups have or have not been recognised as minorities to illustrate that a clear concept of minority is lacking world-wide. Examples should be kept in historical perspective, "because otherwise we run the risk of creating a big structure and big theories on something which can be solved [...] on that particular basis on which the problems were created." (p. 165)

[33] Franck's thesis also sparked an unexpected methodological debate. Prof. Berta Esperanza Hernandez-Truyol fundamentally objected to Franck's – and previous presenters' – use of dichotomies "because [dichotomies] tend to create oppositional and adversarial stances rather than cooperative and relational ones." (p. 140) The St. John's University scholar preferred to analyse the notions of sovereignty, the role of the state and NSAs in a holistic manner. "Only such an approach facilitates finding the coherence, connections, and interdependence of these concepts and permits a cohesive review of the development, expansion, and transformation of law based, in large part, upon changes in real life." (p. 140) Specifically, Hernandez-Truyol objected to Franck's depiction of individuals, groups and the state as discreetly identifiable categories, since the categories risk being excessively rigid and eliding natural and positive legal rights. She also objected to his depiction of rights as either individual or communitarian and as opposing forces. Hernandez-Truyol favoured seeking "the promise of both" types of rights and forces by recognising "issues of power, domination and subordination." (p. 141) It is only through such recognition, Hernandez-Truyol argued, that the dignity of the human spirit that "we all believe ought to be at the center of our concerns" can be furthered. (p. 141) Caron defended Franck's use of dichotomies. Although there is much to be said for going beyond dichotomies "if the objective is policy prescription so as to achieve the most good for the most people" (p. 147), the explanatory power of the triad is undeniable and not to be forsaken. The demands of three constituencies are always present and are separate in the respective constituency that espouses them the strongest. When two of the constituencies take the same position on doctrinal reform, "it is more likely that there will be action". (p. 147)

[34] Beyond the arguments put forward in his presentation, Franck stimulated a further discussion about NGOs' role in the international law-making process. Franck described criticism of NGOs' single-issue orientation and doubtful democratic credentials as moot. Whatever their character, their motives and their membership, "NGOs in no way solve the problem of the legitimacy deficit of the growing international power of institutions." (p. 151-152) This legitimacy deficit arises from the fact that decisions in intergovernmental organisations (IGOs), being mainly ministerial, exclude large sections of domestic public opinion. Franck predicted the eventual collapse of this unrepresentative but increasingly important decision-making system. (p. 152) Wedgwood moderated the force of Franck's argument, pointing out that in undemocratic states, where legitimate elements of society cannot contribute to the state's international voice, "NGOs can provide a corrective." (p. 165) Wedgwood preferred what she called a "subsidiarity of theory": "there are many different organs that function in international politics and in international law." (p. 165)

[35] In an elaborate, sweeping argument, Prof. David Fidler considered the emergence of NSAs in terms of a larger, historical tension between power and norms in international law. International law, the Indiana University scholar said, is required to reflect "power and power structures in international relations" and to serve as "the mechanism for the pursuit of equity, the pursuit of moral principles and concepts of justice." (p. 158) Fidler perceived ongoing shifts in

both power and norms in international relations. Power is shifting from states to TNEs, and notions of power are shifting from a state-centric point of view epitomised by *realpolitik* to the profit-seeking point of view of private corporations. These shifts, he argued, should be welcomed as a positive development. The shift in power has lessened the dangers of traditional forms of state power by diffusing power to NSAs, and the shift in notions of power echoes the teachings of liberal political theory in "reducing the power of government and increasing the power in the hands of individuals and private entities." (p. 159) For its part, the shift in norms relates to their source: international norms are being developed by NGOs and not so much by states or IGOs. The very powerful norm expression by NGOs has in turn led to an important shift in the role of norms in international relations, which again echoes the teachings of liberal political theory. "Private freedom of expression and private voicing of opinions about the way we want to see life organized is part of the liberal democratic theory." (p. 159)

[36] Fidler considered whether NSAs should have an enhanced status in the international legal order. Is the major purpose behind changing international law into "world law" or "cosmopolitan law" to constrain power or to improve norm-making? (p. 160) Fidler contended that "[i]f we learn anything from history, it has to be a combination of both". (p. 160) Recognising NGOs as subjects of international law will not rebalance power and norms in favour of the latter in contemporary international relations. The projection of liberal models of domestic law onto international relations as was, for example, attempted in the organisation of the UN and League of Nations has not been very successful because "international relations is a radically different political environment". (p. 160) Although a power shift has occurred, the structure of law-making is still dominated directly - or indirectly through IGOs - by states. Elevating NGOs' status under international law will fail to alter this dynamic and instead risks creating new problems of legitimacy. Legitimating filters are needed for NGOs' participation in norm-making, and "those filters are going to be the states and IGOs of the existing structure." (p. 160) "What we need to be doing" argued Fidler, "is getting better at politics rather than building international legal castles in the air." (p. 160-161) Accordingly, Fidler viewed TNEs rather than NGOs as having had and having in future a very beneficial impact on politics.

[37] To end my summary of the closing debate, reference may be appropriately made to comments regarding the transformation of international law from the traditional state order. Participants asked themselves whether a ‘law of the global community' could now be properly spoken of following on the earlier movement from the classic ‘law of co-ordination' to the ‘law of co-operation.' Hobe believed that such an understanding of international law is now theoretically possible, but that the transformation has not yet actually occurred. In the contemporary post sovereign state period of international law, it will be crucial, he argued, for international law to be flexible enough to incorporate all the basic values embraced by states and non-state entities capable of unifying humankind. (p. 135) Judge Prof. Dr. Vereshchetin stated that inasmuch as it is beginning to comprehend itself as a single whole and is trying to become master of its own fate, humankind is in the process of constructing such an order. Several developments were particularly significant in the movement of international law towards ‘the common law of mankind': the emergence of mankind as a whole as an international actor (Dr. Mahulena Hoskova of the Max-Planck-Institute in Heidelberg cited the Outer Space Treaty of 1967, under which mankind possesses property rights to the natural resources on the celestial bodies); the "colossal and ever-growing" influence of the public on the international law-creating process (p. 137); the addressing of international legal norms to TNEs, NGOs and individuals as well as to states and IGOs; and the "legal affirmation of such concepts as the common heritage of mankind [...], as applied to the areas beyond the territorial sovereignty of states." (p. 138) Nonetheless, the ICJ Justice felt it premature to speak of another paradigm shift in the legal order. As the law governing relations among states, international law has "far from exhausted its potential and will perform its important social function for a long time to come." (p. 139) Randelzhofer also took a cautious stance to interpreting developments towards privatisation in public international law. These may be significant, but they are "not yet results. Perhaps one day they will become results, and then is the time to give a new definition of public international law." (p. 162)

H. Conclusion

[38] "‘The times'", as one of the organisers less than originally put it in introducing the proceedings, "‘they are a-changing'". (p. 16, Hofmann) The symposium's aim was to understand what effects these changes were having on international law. More precisely, the organiser noted, appending a question mark to the title of the symposium might be appropriate: are there in fact NSAs who are new subjects of international law? (p. 16, Hofmann) The symposium's sub-title was likewise intended to encourage participants to consider whether the international legal order was developing into a law of the global community. Was another paradigm shift in international law afoot?

[39] An elite group of international legal scholars from the United States and Europe took up the invitation of the Kiel Walther-Schücking-Institute of International Law with perceptible zest, actively and intricately grappling with these matters. After what transcribes to 175 pages of highly stimulating text, however, the participants were essentially unable to agree on how the legal norms governing the interaction between international actors, old and new, are being renegotiated in light of globalisation. As regards the titular theme of the symposium, participants could find

consensus on little more than the notion that the process of granting NSAs such as individuals certain qualities of the international legal personality "has clear potential for further development." (p. 138, Vereshchetin) Similarly, at discussions' end, the presenter who addressed the sub-titular theme most directly was only prepared to make "the very modest and cautious forecast that the structure of international law will change to some extent in the future." (p. 167, Hobe)

[40] Considered in a broader, historical context, these conclusions represent slight progress in international legal scholarship. First, the ‘phenomenon' of NSAs has many antecedents. The great trading companies of the early modern era, the principalities of the Holy Roman Empire, the Catholic Church and the International Committee of the Red Cross have each been an important part of the international legal order and have each had a significant influence on international law. For their part, foreign anti-slavery societies and world peace conferences have like modern-day NGOs "long competed with governments in seeking to claim legitimacy and to mobilize support." (p. 21, Wedgwood) Second, in its advisory opinion in the *Reparation for Injuries* case of 1949, the ICJ had already made it clear that the catalogue of subjects of international law was not closed, but that the international community could add such subjects and determine their legal personality according to its needs. Lastly, an understanding of international society as a legal community is far from new, popularised as it was by the great international lawyer Hermann Mosler from the 1970s.

[41] The real contribution of the proceedings to scholarship lies accordingly not in the conclusions reached but in the exchanges themselves. The symposium should be seen as a workshop, a meeting for intensive discussions, and not as a conference convened to settle a particular matter of interest. Seen in the former terms, the symposium more than met its aim of exploring ‘international law at the frontiers'. The host of information presented, the breadth of the subject matter covered and the spectrum of the viewpoints expressed all offer legal science "a pretty rich goldmine for further research". (p. 172, Delbrück)

[42] It is to be regretted that the Walther-Schücking-Institute decided to end this series after one successor symposium. The modesty of the conclusions from 1998 suggests a worthy theme for another symposium. Why is it that an elite group of international legal scholars after intensive discussions could agree on little more than the rather banal idea that the process of globalisation and the increasing role of NSAs is challenging states' traditional dominance of the international legal order? Put otherwise, given that the issue long ago existed, was then identified and was similarly appraised, what does the publicists' relative failure say about the nature of international law or more, about contemporary international legal scholarship?