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The Role of the United Nations in Dealing With Global Problems

JOST DELBRÜCK*

In this article, Professor Jost Delbrück maintains that the United Nations (U.N.) has evolved beyond its original conception as merely an international organization designed to facilitate cooperation between its various Member States. As evidence of this transformation, Delbrück offers examples of U.N. practice and its impact. In particular, U.N. regulation concerning global commons and human rights has encouraged globalization by confirming limitations on States’ rights and sovereignty. Further, the U.N. practice of involving non-governmental organizations has helped to expand (or globalize) the recognized subjects of international law.

According to Delbrück, the U.N. has become a global actor with a meaningful role to play in the process of globalization. It should serve as a forum for the determination of international public interest, promote the participation of nonstate actors, and work to expand and reshape the international legal framework. In this way, the U.N. will live up to its new role and provide for the emergence of a new global community.

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INTRODUCTION

The title of this article appears trendy and is likely to satisfy the so-called "realists" in that it seems to corroborate their perception of "non-realist" international lawyers and political scientists as hopeless idealists and day-dreamers. But even observers of the present-day international system with less strong preconceptions might be puzzled by the topic I address in this article. For, if one looks into the literature dealing with globalization and global problems, the issues discussed are generally related to topics like the globalization of markets, telecommunication, and global threats to the environment, which, in turn, are primarily related to economic causes, e.g., the unrestrained exploitation of natural resources and the pollution of the atmosphere in order to maximize profits.¹ Much less is said about the international and domestic legal implications of globalization,² and even less about the role and status of international organizations in the globalization process, particularly the United Nations (U.N.).

The reason for this neglect of the U.N. and other international organizations in the discussion regarding the implications of globalization may be seen in the fact that the U.N. and State practice in general are still preoccupied with coming to grips with the internationalization³ of politics or, put differently, with constructively understanding the role of international organizations in international relations. Furthermore, the recurrent failures of the United Nations concerning the maintenance of international peace and security have continuously clouded its reputation. Thus, there seems to be

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¹ For an instructive introduction to the ongoing "globalization" process within the international (economic) system, see Peter Dicken, Global Shift (1992).
² Such legal implications can, for instance, be clearly seen in international law where the number and kinds of subjects of international law are currently increased by nonstate actors such as nongovernmental organizations and multinational corporations; a very visible impact of globalization on domestic legal orders can be found in the area of domestic administrative law. See generally Alfred C. Aman, Jr., Administrative Law in a Global Era (1992); Alfred C. Aman, Jr., Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency, 73 Cornell L. Rev. 1101 (1988).
³ "Internationalization" is to be distinguished from "globalization." While the former is a form of institutionalized cooperation between States with the aim to complement their national efforts to promote national power and welfare, "globalization" denotes a process of "denationalization" of the production or provision of "public goods" (e.g., security and global climate protection), i.e., the fulfilment of public tasks—sometimes by a transfer of powers to supranational authorities—that by their very nature and dimension transcend national capabilities. See Jost Delbrück, Globalization of Law, Politics, and Markets—Implications for Domestic Law: A European Perspective, 1 Ind. J. of Global Legal Stud. 9, 10-11 (1993) (defining "globalization").
little promise in discussing the United Nations’ role in the ongoing process of globalization.

Only recently the global environmental challenges facing the international community have caught the public eye by figuring prominently in U.N.-sponsored fora, such as the 1992 Earth Summit in Rio. However, the progress made by the Earth Summit is perceived as minimal because of strong national interests hampering the adoption of more effective measures for the protection of the global environment. Thus, although globalization is a fact, it seems to be a process largely separated from the ongoing political interactions within and without international organizations, which are still widely dominated by the self-centered, national interest-driven nation-states.

Looked upon from a distance, the present-day international system, national policies, and the policies of international organizations appear to be determined by factors deeply rooted in and informed by the historical and cultural experiences and the political socialization of the nation-state era. This era is distinguished by its fixation on sovereignty, national interest, and self-preservation; and its focus on the “individual State” has been only marginally mitigated by the less than a century old process of internationalization. Nevertheless, political, economic, and social transactions are actually carried out today on at least three levels that have evolved out of the international system, in which the nation-state functioned as the exclusive international actor:

1. the level of the nation-states established after 1648—the year in which the concept of the sovereign nation-state was legally recognized by the Westphalian Peace Treaty;


6. The Emperor of the Holy Roman Empire of the German Nation accepted the territorial princes of the Empire as representatives of sovereign territorial entities and, as such, parties to the Westphalian Peace Treaties. It has to be added, though, that as members of the Holy Roman Empire, the territorial entities’ sovereignty was less complete than that of States in the nineteenth century. In other words, sovereignty as a legal characteristic of States was the product of a continuous process that does not allow for sharp
2. the level of international institutionalized and non-institutionalized cooperation (internationalization) as a means to make up for the increasing inability of nation-states to pursue their national interest and welfare as independent, self-sustaining entities; and

3. the level of globalization processes characterized by an increasing *denationalization* or transnationalization of economic, social, and ultimately political interactions and transactions that, by their very nature, transcend the once dominating paradigm of the international system, i.e., the sovereign nation-state.

From a historical perspective, the United Nations would clearly have to be seen as a central structure on the second level, the level of international cooperation. In order to answer the question as to what role the U.N. could play in dealing with global problems, it is therefore necessary to establish whether and to what extent the United Nations, a creature of the era of international institutionalized cooperation, is structurally capable of playing a meaningful role on the third level within the process of globalization. For, if the United Nations is structurally or inherently bound to the international level (and thereby indirectly to the nation-state level), a negative answer to the overall question implied by the title of this article would be a foregone conclusion. If, however, the United Nations does have the potential to be a constructive actor on the global level, then I may be able to sketch out, at least tentatively, the U.N.'s future role in dealing with global problems; or to put it in even more optimistic terms, the role it is already fulfilling.

I. THE UNITED NATIONS' POTENTIAL TO TRANSCEND ITS ROLE AS A TRADITIONAL INTERNATIONAL ORGANIZATION

The examination of the U.N.'s potential to transcend its current role will be developed in three steps. In the first section, I will look at the original

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7. See supra note 3 and accompanying text.
THE U.N. AND GLOBAL PROBLEMS

concept of the U.N. in the historical context. Next, I will analyze U.N. practice with regard to the national versus public interest debate, or, put differently, the debate over the limits of State sovereignty. And, third, I will examine the U.N.'s structural potential to transcend the traditional international organization paradigm.

A. The Original Concept of the U.N. as an International Organization

The full story of the development of international institutionalized cooperation or of international organization cannot be told within the narrow confines of this article. Suffice it to say, international organizations as a structural element, and thereby as actors in the international system, came about in the nineteenth century in an era marked by both the culmination and the turning point of the concept of the independent, sovereign nation-state. Profound changes in economic and technological development caused States to realize that they could no longer accomplish, on their own, the tasks of providing for their nations’ welfare and keeping their economies competitive in universalizing markets. In other words, they came to realize their growing interdependence. The technological revolution in communications (e.g., railway, telegraph) was a telling example of this new interdependence. Investing in these technologies only made sense within a framework of international cooperation. For instance, it was necessary to develop common technical standards and networking. In short, the nineteenth century saw the beginning of the internationalization of certain areas that until then were considered inherently domestic or national responsibilities. International and


9. One could actually say that—in a dialectical process—the sovereign nation-state, which Georg Wilhelm Friedrich Hegel had just described as the reality of the moral idea and as reason as such, produced economic and social conditions that required a reorganization of the forms of State interaction, which undermined the very characteristics of the Hegelian State concept: sovereignty, independence, and self-sufficiency. See GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT §§ 257, 321-29 (T.M. Knox trans., Oxford University Press 1967) (1821).

10. On these technological changes, see Jost Delbrück, International Communications (Sea, Land and Air Traffic, Telecommunications), in XV THESAURUS ACROASIUM OF THE INSTITUTE OF PUBLIC INTERNATIONAL LAW AND INTERNATIONAL RELATIONS OF THESSALONIKI 77, 84 (Dimitrios S. Constantopoulos ed., 1987).
institutionalized cooperation in other economic and related fields followed suit.\textsuperscript{11}

The next decisive stage in the process of internationalization, as a means to compensate for increasing deficits in the State's capacity to "go it alone," was taken when the European security system established by the Vienna Congress, i.e., the Concert of Europe, collapsed around the end of the nineteenth century.\textsuperscript{12} The call for institutionalized cooperation of States for the maintenance of peace and security became louder and was heard by the international community after the disastrous destruction caused by World War I. The League of Nations was the first, albeit unsuccessful, attempt at internationalizing the responsibility of States for the maintenance of peace and security.\textsuperscript{13} The failure of the League was due to political factors—most prominently the lack of universality (e.g., absence of the United States and the Soviet Union).\textsuperscript{14} However, it also suffered from a major structural and highly political defect: the League Covenant was strongly based on the respect for the Member States' sovereignty, which, \textit{inter alia}, incapacitated the organization's decisionmaking ability. While conceptually committed to the internationalization of the responsibility for international peace and security, the League remained well within the perceptions and value sets of the nineteenth century's international system.\textsuperscript{15}

The United Nations was founded on a different, yet still ambiguous design. The U.N. Charter states that the organization shall be based on the sovereign equality of its Member States—\textsuperscript{16} a clear deferential reference to the traditional supreme paradigm of State sovereignty. But having experienced the ineffectiveness and ultimate demise of the League, and shocked by the second

\begin{enumerate}
\item See \textit{JACOB TER MEULEN, 1 DER GEDANKE DER INTERNATIONALEN ORGANISATION IN SEINER ENTWICKLUNG} (1917). For a concise overview of the development of international organizations during the second half of the nineteenth and early twentieth century, see Hans-Ulrich Scupin, \textit{History of the Law of Nations 1815 to World War I}, in 2 \textit{ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW} 767, 779 (Rudolf Bernhardt et al. eds., 1995) [hereinafter EPIL]. See also Delbrück, \textit{ supra} note 8.
\item See \textit{DAHM ET AL., supra} note 6, at 13.
\item See \textit{WINFRIED BAUMGART, VOM EUROPAISCHEN KONZERT ZUM VOLKERBUND [FROM THE CONCERT OF EUROPE TO THE LEAGUE OF NATIONS]} 142 (1974). For a somewhat skeptical commentary about the thesis that it was the lack of universality that let the League falter, but which also emphasizes the unfortunate effect of the United States' absence from the League, see Clive Parry, \textit{League of Nations}, in 5 \textit{EPIL} 192, 200 (Rudolf Bernhardt et al. eds., 1983).
\item See \textit{DAHM ET AL., supra} note 6, at 13.
\item U.N. \textit{CHARTER} art. 2(1) (stating "[t]he Organization is based on the principle of the sovereign equality of all its Members.").
\end{enumerate}
total World War, the founders also introduced provisions into the Charter that heralded a new, progressive approach to internationalization. These four fundamentally important principles are the following: (1) the prohibition of the use or threat to use force;\(^7\) (2) the power of the Security Council to issue binding decisions and to see to their enforcement;\(^8\) (3) the protection of human rights as a cornerstone of peace;\(^9\) and (4) the exemption of all matters determined by the Security Council to constitute at least a threat to international peace under Chapter VII of the Charter from the non-intervention principle (Art. 2(7)).\(^{20}\) On all counts, these principles and provisions created a definitive inroad into the once sacred principle of sovereignty. Taking away from States the essential signum of sovereignty—the right to go freely to war (liberum jus ad bellum)—and subjecting the governments’ treatment of their citizens to the scrutiny of the members of the United Nations was truly revolutionary. In addition, the philosophy underlying the U.N. Charter, at least potentially, transcended that of traditional international organizations. It was not only to serve as a complementary instrument to amend for deficits in the State’s capacity to deal with certain tasks hitherto considered its exclusive responsibility. Rather, the philosophy of the U.N. Charter aimed at restricting a State’s sphere of exclusive competence in favor of international authority moderated only by the veto power of the five permanent members of the Security Council\(^{21}\)—a privilege which in itself was a clear deviation from the principle of the equality of States.\(^{22}\)

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17. U.N. Charter art. 2(4) (stating “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

18. U.N. Charter arts. 24, 25, and chap. VII.


20. U.N. Charter art. 2(7). Article 2(7) provides that

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\text{[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.}
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U.N. Charter art. 2(7) (emphasis added). This section has to be read in conjunction with art. 39 of the U.N. Charter, which empowers the Security Council to determine that at least a “threat to the peace” exists, which in turn means that the principle of non-intervention does not apply.

21. U.N. Charter art. 27(3) (providing that “[d]ecisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . .” (emphasis added).

22. For details, see Dahm et al., supra note 6, at 236, 238.
The revolutionary meaning of the Charter was not fully understood at the time because of the deteriorating political climate in the wake of the unfolding Cold War. It is interesting to note, however, that some leaders of the medium and small countries, like General Smuts of South Africa, did realize the potential of the United Nations to exercise authority over the Member States, particularly those not belonging to the "club of the great powers."

Their concern, of course, was not to enhance this potential but rather to warn against it. These leaders feared that if internationalization went too far, they would lose their sovereignty.

From a doctrinal point of view, then, the United Nations and the other organizations of the U.N. family represented a big step toward genuinely internationalizing matters hitherto perceived as essentially belonging to the realm of a State’s domestic jurisdiction. Moreover, the United Nations Charter particularly lent itself to further transcending the traditional confines of the nation-state and the national interest-oriented international system. Of course, this potential of transcending the traditional international system was neither used by the U.N. during the first four decades, nor realized by the general public, because of the ideologically motivated gridlock between the superpowers. This gridlock was particularly visible in the veto-stricken Security Council and in its declining role as the organ that, according to the original concept, was vested with the primary responsibility for the maintenance of international peace and security.

However, a closer look into U.N. practice shows that over the years the organization succeeded in unfolding not only the concept of genuine internationalization, but also in opening up what today is conceived of as globalization, i.e., that certain problems need to be solved because they are matters of an international public or international community interest, rather than matters that should be cooperatively addressed in support of national interests.

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24. For a detailed account of the decline of the role of the Security Council in the 1950s and 1960s, see JOST DELBRÜCK, DIE ENTWICKLUNG DES VERHÄLTNISSES VON SICHERHEITSRAT UND VOLLVERSAMMLUNG DER VEREINTE NATIONEN (1964). The primary role of the Security Council is expressed in art. 24(1) of the U.N. Charter which states, "[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." U.N. CHARTER art. 24(1) (emphasis added).

25. For this distinction between “internationalization” and “globalization” and the related distinction
can be extrapolated from an analysis of what is here called the battle over national interest versus international public interest in the main organs of the United Nations, the Security Council and the General Assembly.

B. National versus International Public Interest

Because of the precarious voting situation in the Security Council, the General Assembly’s practice is of primary interest in the present context. As a comprehensive analysis of the rich practice of the General Assembly is not possible within the framework of this article, two particularly interesting areas of the General Assembly’s activities will be taken up: the first relates to the development of the concepts of the Common Heritage of Humankind and the Global Commons; the second relates to the unfolding of the conceptual framework and the substance of the international protection of human rights.

1. The Development of the Common Heritage of Humankind and the Global Commons

In the course of the United Nations’ efforts to promote worldwide disarmament, the General Assembly, exercising its responsibility to contribute to the progressive development of international law and to general and complete disarmament, took up the problem of preventing the use, or rather abuse, of areas outside national jurisdiction for military purposes. These areas, which included outer space, the high seas, and the seabed, came to be known as Global Commons; and the efforts of the General Assembly resulted in the elaboration and finally the adoption of several important treaties enunciating the principle of the Common Heritage of Humankind. In 1967, the Treaty on Principles Governing the Activities of States in the Exploration and Use of

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between national and international public interest, see Delbrück, supra note 3, at 10-11.


Outer Space, Including the Moon and Other Celestial Bodies, was adopted and opened for signature and ratification. This treaty was followed in 1971 by the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof. The essence of these treaties was that the spaces covered by them were declared the common heritage of humankind and therefore were not subject to national appropriation. An earlier treaty must be mentioned in this context as well, although not concluded under the auspices of the United Nations: the Antarctic Treaty of 1959. This treaty is particularly interesting since it established an international regime for Antarctica and its protection (followed by a series of specific conventions intended to protect the sensitive ecology of this unique geographical area). In later years, the General Assembly endorsed the Antarctic Treaty’s underlying concept of serving the interests of the international community, although a number of States held claims to exercising national sovereignty over large segments of the continent. Clearly, what is at stake here is a confrontation of national interests with an interest of the international community at large. But also in the later conventions mentioned above, the notion of a common interest to be protected over national interests is quite apparent. Once on the agenda of the General Assembly, the concept of the

32. Out of the host of literature on the special ecological character of Antarctica, see Boleslaw A. Bocek, Specially Protected Areas as an Instrument for the Conservation of the Antarctic Nature, in ANTARCTIC CHALLENGE II at 65 (Rüdiger Wolfrum ed., 1986).
34. For details, see Wolfrum, supra note 31, at 173.
Common Heritage of Humankind and that of the Global Commons was ever more clearly emphasized in the work of the U.N. General Assembly and other organizations such as the United Nations Economic, Social, and Cultural Organization (UNESCO).

In resolution 2749 (XXV) of 1970,\textsuperscript{35} initiated by Ambassador Pardo of Malta, the General Assembly declared that "[t]he sea-bed and ocean floor, and the subsoil thereof... and the natural resources of the Seabed and the Subsoil are the common heritage of mankind"—a notion that has been iterated over and over again and was ultimately introduced into the Law of the Sea Convention of 1982, entered into force in 1994.\textsuperscript{36} Although the underlying idea of these nonbinding declarations and the ensuing treaties, now binding, did not meet with great enthusiasm on the part of the industrialized nations technologically capable of making use of these marine areas, these areas were now declared the common heritage of humankind and closed to unilateral exploitation in the national interest of individual States. But in the course of time and the force of an increasingly interested world public opinion, consensus was reached on the documents mentioned, clearly evidencing a commitment of States to what may legitimately be called a public interest of the international community.

2. The Framework and Substance of the International Protection of Human Rights

The road to accepting the international protection of human rights, as a matter of international public interest, was more prolonged and arduous. Although the motivation of the original members of the United Nations and the early accessors to the Charter for the idea of an international protection of human rights was great in view of the outrageous atrocities committed by fascist Germany and the sufferings of displaced persons and refugees after World Wars I and II, the beginnings were modest, albeit not without appealing pathos.\textsuperscript{37} The developmental stages of the codification of an impressive body of universal human rights law can be summarized in a few sentences. In

\textsuperscript{37} The most impressive document in this respect is the Universal Declaration of Human Rights, adopted by the U.N. General Assembly on December 10, 1948. Technically speaking, the Declaration is simply a recommendation adopted by the U.N. General Assembly and as such it is without binding force. See G.A. Res. 217/III, U.N. GAOR, 3rd Sess., Supp. No. 1, at 71.
concretizing the rather vague human rights language of the Charter, the General Assembly adopted the Universal Declaration of Human Rights on December 10, 1948. A nonbinding, but solemn declaration, the Universal Declaration, according to the prevailing view in international legal doctrine, has become part of customary international law.\(^\text{38}\) After intense and bitter debates over the meaning and scope of particular human rights and the question as to whether economic, social, and cultural rights should be included, the General Assembly adopted two human rights treaties: the U.N. Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights in 1966. Both of these treaties entered into force in 1976, and have presently been ratified by 136 and 135 States respectively.\(^\text{39}\) In the same year, the General Assembly adopted the Convention on the Elimination of All Forms of Racial Discrimination, entered into force in 1969 and presently ratified by 148 States.\(^\text{40}\) Other important human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child followed in 1979 and 1989 respectively.\(^\text{41}\) Admittedly, the impressive but still incomplete enumeration of important binding human rights instruments remains in rather sad contrast to the present state of international human rights enforcement. However, the most important developments relevant to the present context occurred in the area of human rights enforcement.

First of all, from the very beginning of the General Assembly's work in the field of human rights protection, the Assembly rejected the objections of culpable States, which claimed that issues of human rights violations were "domestic matters." The General Assembly's interpretation of Art. 2(7) of the U.N. Charter—which prohibits the intervention of U.N. organs into matters essentially within the domestic jurisdiction of States—asserts that human rights, having become part of binding international law, are no longer domestic matters. Today, this interpretation has become accepted legal doctrine.\(^\text{42}\) State
sovereignty is no longer accepted as the overriding international interest in the protection of human rights. But with regard to the present context, i.e., the globalization aspect of the U.N.'s role in human rights development, two other aspects are of even greater interest than the clear inroads made into the domestic realm of States. The General Assembly, in its quest to overcome the apartheid regime in South Africa, adopted the Convention Against Apartheid in 1973,\(^4\) which declared apartheid not only to be illegal but also to constitute a crime against humanity. The Convention obliges States which are parties to the Convention to apply criminal sanctions against any person found guilty of this crime, thus establishing for this crime universal jurisdiction, i.e., States everywhere possess jurisdiction over any such crime irrespective of whether they, or rather their citizens, are directly affected by such criminal acts.\(^5\) This contention is again a clear deviation from the traditional sovereignty-oriented principle that only the injured State—through the injury inflicted upon one of its nationals—could apply sanctions.\(^4\) Second, the most dramatic step was taken by the International Court of Justice, the fifth of the main organs of the U.N. Building on the body of human rights law initiated and developed by the U.N., the Court in the Barcelona Traction Case\(^4\) declared most fundamental rights, such as the prohibition of racial discrimination and apartheid, to be rights *erga omnes*, i.e., to be enforceable by all States bound to observe these rights—irrespective of whether they are directly affected by the violation. According to a wider and more convincing reading of this decision of the Court, the *erga omnes* concept even means that States not having participated in the creation of such rights

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45. An early forerunner of this approach is the crime of piracy, which since ancient times has been subject to criminal sanctions based on the principle of universal jurisdiction. Today, art. 100 of the United Nations Convention on the Law of the Sea (UNCLOS) of Dec. 10, 1982, entered into force Nov. 16, 1994, obliges States parties to "cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State"—a provision clearly based on the notion that any State's apprehension of a pirate is legitimized by universal jurisdiction. For a concise summary of the history of the crime of piracy and a critical appraisal of the "universal jurisdiction" approach, see Alfred P. Rubin, *Piracy*, in 11 *EPIL* 259 (Rudolf Bernhardt et al. eds., 1989). Another forerunner of this approach is the prosecution of the crime of genocide. See Genocide Convention of 1948, Dec. 9, 1948, 78 U.N.T.S. 277.
46. Barcelona Traction (Belgium v. Spain), 1970 I.C.J. 4 (Feb. 5). According to a narrow reading of the case, the *erga omnes* effect of the fundamental human rights norms cited by the Court only relates to the enforcement of norms binding upon the States involved, not vis-à-vis third States; a wider reading is more convincing. See infra note 47.
under international law are bound by these most fundamental human rights. Such understanding amounts to accepting a right of States to enforce these fundamental human rights against States that did not consent to or take part in the creation of the respective norms of international law. As traditional international law would not recognize any norm of international law as binding on States not having consented to it (be it only by acquiescence), the wide erga omnes concept can only be interpreted in the way that it is based on the “international public interest” character of the fundamental human rights norms.

Finally, the notion that it is the international public interest that forms the basis of innovative human rights developments also holds true with regard to the Security Council’s practice in the field of human rights enforcement. In a step-by-step approach, the Council interpreted the notion of a “threat to the peace” in Art. 39 of the U.N. Charter to include grave human rights violations with the consequence that the Council could apply sanctions against the culprit State under Chapter VII of the Charter. In the earlier decisions, starting with resolution 688/1991, imposing sanctions on Iraq for oppressing the Kurd and Shiite minorities, and on unraveling Yugoslavia, the Council qualified the determination of grave human rights violations as a threat to international peace by requiring that this violation be carried out by organized (military or paramilitary) State forces and that it must have at least potential international implications. But later on, in the cases of Somalia and Rwanda, the Council let it suffice that international humanitarian disasters or genocidal activities could be established. Again, this shows that the Council became increasingly involved in the internal matters of States because it sensed an international public interest in stopping the massacres and other humanitarian disasters.

51. GADING, supra note 48, at 91.
52. Id. at 116.
C. Institutional and/or Structural Potential of the U.N. to Transcend the Internationalization Paradigm

The U.N. Charter, as the constitution of an international organization founded on the equal sovereignty of its members, contains a rather inconspicuous provision (Art. 71) that authorizes the Economic and Social Council (ECOSOC) to make available to itself the expertise of non-governmental organizations. This provision came to be very important in the present context. Using this provision, ECOSOC set up an elaborate legal framework by way of its organizational power to legislate its own rules of procedure under which non-governmental organizations (NGOs) were invited to, and were able to participate in, the work of ECOSOC's subsidiary organs and that of the Council itself. In order to make efficient use of the expertise of a wide range of NGOs, on the one hand, and not to be overwhelmed by the sheer numbers of NGOs eager to have access to the Council, on the other hand, they were categorized as A, B, and C or "Roster," now renamed categories I, II, and "Roster"—according to certain criteria, such as size, organizational maturity, and relevance of the NGOs' contribution to the work of the Council and its subsidiary organs. The legal status of NGOs in categories I to Roster varies in accordance with their meeting these criteria. Category I NGOs have the right to participate in the sessions of Committees and to present written and even oral statements, sometimes containing full-fledged draft resolutions or draft conventions. Category II NGOs have, in substance, similar rights but to a more limited degree. The lowest status is accorded to Roster NGOs. While the "rights" conferred on the NGOs do not amount to guarantees under the primary rules of international law, it has correctly been observed that conferring rights upon NGOs through the bylaws

53. U.N. CHARTER art. 71 (stating "The Economic and Social Council may make suitable arrangements for consultation with non-governmental 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 of the United Nations concerned"). On the role of non-governmental organizations, see Stephan Hobe, Global Challenges to Statehood—the Increasingly Important Role of Non-Governmental Organizations, 5 IND. J. GLOBAL LEGAL STUD. (forthcoming Fall, 1997).

54. For an in-depth discussion of the practice of the ECOSOC and its subsidiary organs, see Prof. Dr. Rainer Lagoni, Art. 71, in CHARTER OF THE UNITED NATIONS, supra note 42, at 902.

55. The total number of NGOs between 1976 to 1991 rose from 688 to 928. As compared with 1949, the number increased more than tenfold. See Klaus Hübner, Non-Governmental Organizations, in 2 UNITED NATIONS LAW ch. 98 (Rüdiger Wolfrum ed., 1995).

56. See id. at 929.
of the ECOSOC makes the NGOs concerned secondary subjects of international law or subjects of international law in a wider sense.\(^{57}\)

Furthermore, many other U.N. organs, including the General Assembly, the Security Council, and the subsidiary organs created under treaty law drawn up under the auspices of the U.N., allow NGO participation. Thus, NGOs may have standing before human rights monitoring bodies.\(^ {58}\) In addition, the main political organs of the U.N. have also given international significance to other nonstate entities by granting them observer status or the right to be heard \textit{ad hoc} \textit{like} PLO leader Yasser Arafat in 1974 and the Jewish Agency in 1948. Indeed, the observer status of the PLO became a permanent one in 1974.\(^ {59}\)

What this amounts to is nothing less than that these U.N. bodies have greatly contributed to opening up the hitherto "closed shop" of subjects of international law. In other words, they have transcended the confines of a State-oriented international law and opened up to a globalizing trend, i.e., promoting the direct participation of nonstate entities in the international (global) decisionmaking process. On the basis of these paradigmatic examples of the potential of the U.N. to transcend the traditional sovereignty-oriented international legal order, I now turn to sketching out the role that the United Nations may have in dealing with global problems.

III. THE UNITED NATIONS AS A GLOBAL ACTOR

As has become clear from the foregoing analysis, globalization has much to do with transcending the paradigm of the sovereign nation-state as the dominant actor in international relations. Likewise, global problems are those that by their very nature transcend the capacity of the nation-state to deal with them effectively as an independent entity. For instance, global threats to the environment; massive, persistent gross violation of human rights; and the protection and use of natural resources in the global commons are problems

\(^{57}\) This view was taken by Hermann Mosler as early as 1962. See Herman Mosler, \textit{die Erweiterung des Kreises der Völkerrechtssubjekte [The Increasement of the Number of Subjects of International Law]}, \textit{22 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT} 1 (1962).

\(^{58}\) See, for instance, art. 34 of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby of May 11, 1994, \textit{opened for signature} May 11, 1994 (providing for complaints to be addressed to the Court of Human Rights by non-governmental organizations). For text, see \textit{33 I.L.M.} 960, 962 (1994).

that are far beyond the capabilities of even the strongest nation-states. What role may the U.N. play in dealing with such global challenges? Roughly speaking, one may distinguish three areas where the U.N. may have a constructive role to play.

A. The U.N. as a Forum for the Determination of the Public Interest of the Globalizing International Community

As pointed out above, the main U.N. organs have directly contributed to promoting what has been referred to here as the international “public interest”-a notion that is, on the one hand, well-known in domestic public law, but, on the other hand, quite new on the international level and admittedly a somewhat hazy concept. It has experienced many attempts at general or abstract definition and has consistently withstood such attempts. Therefore, a considerable number of constitutional lawyers and political theorists have rejected the concept. However, State practice, particularly in democratic, rule-of-law political systems, shows that the notion of the “public interest” has played an important role and still does. Mainly, the legislatures and the courts have articulated the meaning of the notion of “public interest” not in abstracto, but in a concrete sociopolitical setting. It has proved to be an almost indispensable criterion in balancing individual rights versus other law-based values held in a given society.

The U.N. organs have increasingly taken the same approach. Balancing the right of States to be free from external intervention and the need to protect individual human rights, the General Assembly and the Security Council have in concreto taken decisions that give priority to the latter principle—and more often than not—out of a commonly felt concern, not because of some traditional national interest. These decisions have been taken after due public (and

60. Synonyms are the “general” or “public welfare,” the “bonum commune” or “salus publica.” These notions have already been introduced into public law by social philosophy and political theory centuries ago. See Christoph Link, Gemeinwohl, in 1 EVANGELISCHES STAATSLEXIKON co. 1062 (Roman Herzog et al. eds., 2d ed. 1987).

61. Id (emphasizing the difficulty in defining “public interest”).

62. An example in constitutional law is the application of a balancing test in cases involving the constitutionality of government regulation of free speech. See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 580 (1988). A similar approach is taken by the German Constitutional Court, although with a stronger emphasis on the “public interest.” See KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND (10 ed. 1977). On limitations on freedom of speech, see id. at § 12(ee)-(ff).
sometimes not so public) debates of the issues involved leading to the determination of what “the common concern,” i.e., the “public interest,” required to be done.\(^6\)

The upshot is the “international public interest”—though a potentially elusive concept in abstracto—can become a meaningful criterion in concreto upon which action can be taken. International fora, like the U.N. General Assembly and other U.N.-sponsored organizations, have a role in hammering out the concrete meaning of an international public interest in particular situations. With this background, these fora, particularly the U.N. General Assembly, which represents the vast majority of the States, can serve as the platform where international discourse can take place in determining what is “the international public interest” in matters like “global environmental protection” and “human rights protection.” Success, of course, depends on the development of an international political culture, especially on the part of the media and specific interest groups. These groups must educate people that the process of determining the international public interest is not a matter to be produced as flowers in a “hot house” or that can be “pressure cooked.” The international discourse must be given time and should not be preemptively devalued as “just talk” before it has had a chance to become meaningful.

B. The U.N.’s Role in Promoting Participation of Nonstate Actors in International Lawmaking, Dispute Resolution, and Forming a Network of Global Governance

Just as the U.N.’s role in determining the public interest of the globalizing community has a strong procedural dimension, so does the U.N.’s role in promoting the participation of nonstate actors. The global nature of the problems and challenges facing the international community requires the development of a regulatory regime beyond the nation-state. This regime should interconnect States, international organizations, and other nonstate actors in a network of global governance. The main feature of this new format of regulatory authority is that it still relies—to a certain degree—on the States, but also increasingly on other actors who have de facto played an important

\(^6\) While it was argued, at the time, that the action taken by the U.N. Security Council against Iraq was predominantly—if not exclusively—out of material interests in the oil of the region (“blood for oil,” as the slogan went), such insinuation is clearly out of place in the cases of Security Council interventions in former Yugoslavia, Somalia, or Rwanda. On these cases, see generally GADING, supra note 48.
role in the international system but who are now coming to the fore as legal entities. Also, it must be added that the States, as players in the supraterritorial governance, are not the same as they used to be in the pre-global era. The role of the State has been and is being transformed by the process of globalization.64

The example set by the United Nations in recognizing NGOs as valuable partners in the international decisionmaking and lawmaking process can serve as a model for what the U.N. can do in the future in furthering the role of nonstate actors, particularly strengthening their participatory rights with a view to enhancing the legitimacy of the envisaged global regulatory regime. But there is not only a need for widening the scope of nonstate actors’ participation in global governance. There is also a need to develop a global legal framework in order to curb the power and influence of such global actors as multinational corporations (MNCs) and powerful interest groups like Greenpeace. The U.N.-initiated code of conduct for MNCs65 is an early example for what is advocated here as the U.N.’s legislative role in dealing with a certain global problem.

C. The Role of the U.N. in Promoting the Progressive Development of Interactions in the Field of Global Concerns: Promoting the Understanding of Public Interest Norms as Erga Omnes and/or Jus Cogens Norms

The U.N. General Assembly has the mandate and the competence to promote the progressive development of international law. It is evident from the foregoing that tradition-based international law is not adequate for dealing with global problems. Starting from its hitherto narrowly defined notion of international legal personality—reserved predominantly for the sovereign nation-state with a gradual opening for State-based international organizations and a marginal opening for individuals—to the still overwhelmingly held notion that international law is binding because of the consent of States, international law more or less is conceptually still on the first and second levels, i.e., the nation-state and traditional international organization levels.66 Building on the groundwork laid by the U.N. in perceiving at least the most

64. On this also, see Hobe, supra note 53.
65. For details, see Dietmar W. Bachmann, Transnational Corporations, in 2 UNITED NATIONS LAW, supra note 55, at ch. 129.
66. See supra p. 280, with particular reference to items 2 and 3.
fundamental human rights to be binding upon and/or enforceable by all States, their role could be to further the understanding of the international legal order as one that is binding as a matter of necessity, not because of an individual State’s consent.\textsuperscript{67} If humankind is to survive, the global challenges such as effective global environmental protection, prevention of gross violations of human rights, and the many other important issues (e.g., worldwide migration, desertification, starvation) must be addressed. The ability of individual States, particularly the larger ones, to choose freely to opt out of a global governance for survival, cannot be viewed as compatible with the notion of a legal order. Given the record of the U.N. General Assembly in promoting the notion of international public interest as a legitimizing factor in the pursuance of vital interests of the international community, it could also play an important role in reconsidering and reshaping the very basis of the international legal order itself and making it fit to be the normative framework, not only of a system of self-interested States, but of that of an emerging global society.\textsuperscript{68}

\textbf{CONCLUSION}

Many critics may accuse my proposal for a network of global governance as being too idealistic. But looking at the facts of ongoing globalization without prejudice, namely at the political starting points for a role that the U.N. can play in dealing with global problems, the foregoing is not without basis in the real world. Has there not been much complaint about the lack of not only a political, but also a normative, vision for the future? It is suggested that there is one, if we look closely and without negative preconceptions.

\textsuperscript{67} For a detailed discussion of the problem of where the binding force of international law can be derived, see DAHM ET AL., \textit{supra} note 6, at 41. For an illuminating and cutting critique of the present state of international law and its binding force, see Philip Allott, \textit{The International Court of Justice and the Voice of Justice, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE} 17. (Vaughan Lowe \& Malgosia Fitzmaurice eds., 1996).

\textsuperscript{68} Similar to the notion of a global public interest oriented law envisioned here, Philip Allcott discusses the need for developing a “true” international law that is the “voice of justice” for the human race. Allott, \textit{supra} note 67, at 39.