

A World of Actors

A Question of Legal Standing

Never doubt that a small group of thoughtful, committed citizens can change the world. (Margaret Mead)

National interests aren't what they used to be. Our Survival requires global solutions. (Jeffrey D. Sachs)

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Traditionally, the study of international law focused on the state as the dominant actor and paid passing attention only to international organizations such as the UN. Today there is a general awareness of the multiple kinds of actors that populate the world and must be taken into account because their behaviors and resulting consequences are important. The state remains primary, but IGOs, NGOs, MNCs, insurgency groups, individuals, and churches, among others, may have a measure of legal standing in some circumstances. The organization of this chapter is a straightforward one. Each actor will be identified and its role and legal status elaborated.

Actors

All legal systems recognize specific actors that must comply with the rules of that system or face some form of sanction. For instance, US law not only holds individuals accountable but treats business corporations as if they were individuals. Usually, actors in a system possess both *rights* and *duties* in some manner. Actors so constituted are said to enjoy **legal personality**. Of course the only real, or natural, actor is the individual person, but individuals can organize into a variety of institutional arrangements as the international relations of today richly illustrate. The degree of legal personality these actors possess varies considerably, with the state alone possessing full legal personality. In fact, some actors are merely **objects** of international law rather than **subjects**. As objects, actors can receive the effects of international law including both benefits and sanctions. Subjects have duties and rights including the capacity to appear before a panel of arbiters or an international court. The state monopolies over legal personality lasted for several centuries, with only one significant exception. Pirates, known as the scourge of humankind, were subject to international law as individuals, and any state's navy could capture and try them.

The State

Law professors use the term "state" while many political scientists refer to the "nation-state." Since "nation" can have a sociological implication, referring to ethnic groups as in the case of the French-speaking minority in Canada, the choice of law professors will be applied here. The **state** is a sovereign actor with a central government that rules over a population and territory and protects and represents that population in international politics. Despite myriad differences among states in physical size, wealth, and military clout, as sovereign entities they are legal equals and, according to the positivist legal philosophy, states are independent of any vertical authority over their heads. This definition of the state is essentially the same as offered in the 1933 *Montevideo Convention on the Rights and Duties of States*.¹ This treaty is frequently cited for its definition of statehood even though it originated as a regional treaty set among Latin American countries.

The Montevideo Convention also called on states to enter into relations with other states, implying that states will normally carry on diplomatic intercourse with each other by offering **recognition** through the exchange of ambassadors. Unfortunately, state practice has never clarified whether recognition by other states is a firm requirement of statehood, and so the necessity of recognition remains controversial today. States have generally rejected the 1930 *Estrada Doctrine* of Mexico, which called for recognition to be automatic instead of a subjective decision of policy by other states. Mexican officials could remember when President Woodrow Wilson withheld recognition of the military dictatorship of Victoriano Huerta in 1913, a repressive regime that came to power through revolution instead of democratic elections.

The question of recognition has sometimes taken the form of **collective recognition** as by the European Union (EU), the UN, or, earlier the League of Nations. This type of

recognition can be understood as an action taken together by a sub-set of states usually belonging to an IGO. These governments voice an opinion about what behavior is acceptable and what is not, as criteria for recognition. The League recommended against recognition of the puppet-regime of Manchukuo, which Japan set up after seizing Manchuria from China in 1931. When Rhodesia, under the control of a minority white-regime, broke away from Great Britain in 1965, the UN Security Council, in 1970, ordered all member-states of the UN to withhold recognition of the Rhodesian government because it obviously had denied governing power to the large majority of black citizens. At the end of the Cold War, the EU held a meeting in 1991 to discuss a common recognition policy regarding the new states splintering off from the Soviet Union and Yugoslavia. The EU let it be known that the formation of democratic governments would weigh heavily in the decision to grant or withhold recognition of the new states.

Besides a formal definition of statehood, states also have duties and rights that guide their treatment of one another. These duties and rights provide a social lubricant for the mutual interactions of states that makes for a more convivial international society than otherwise would be the case. States, for example, are to act in good faith in their dealings with other states, and, very importantly, they must respect the principle of *pacta sunt servanda*. This hallowed legal principle requires that states respect and obey all treaty obligations. Additionally, states can expect to benefit from rights based on **state immunity**, which means that normal *acts of state* should be free from interference. Most importantly, a state's government cannot be taken to court in another country without that state's permission.

Among a world of diverse states, irresponsible behavior can and does happen, sometimes shaking the system of duties and rights, but there have been important efforts to strengthen the system of rights and duties with written understandings. The 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* calls on states to refrain from the use of force, intervention, or other harmful acts toward other states and to act in good faith according to the UN Charter.² This declaration is often cited in UN General Assembly resolutions, court decisions, and diplomatic communications. Also, the UN International Law Commission labored for decades on revisions before adopting the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*. In 2001, the General Assembly commended the Draft Articles to states for adoption as treaty law.³ States have been slow to warm to this proposed treaty.

The international law on **state responsibility** involves the circumstances under which a state is held responsible for a breach of an international obligation. Historically, this concept focused on the way a state dealt with *aliens*, or foreigners, on its territory. Fair and civilized treatment was expected at a minimum. Certainly an alien was not to encounter a lesser treatment than a citizen of the state in question. Under the UN International Law Commission's handling of the Draft Articles on the Responsibility of States, the concept now seems more open-ended. These articles could cover state obligations about very controversial subjects such as peace, human rights, and the environment. Conceivably, if the proposed treaty had been in force in 1986, the Soviet Union might have been held liable under treaty law, rather than a

Box 2.1 Selected Duties and Rights of States

- 1 *State Doctrine*, a court in one state will not sit in judgment on the act of another state carried out on its own territory.
 - 2 *Pacta Sunt Servanda*, states are obligated to obey treaties and international law in general.
 - 3 States must not intervene in the affairs of other states or attack them militarily.
 - 4 States must not allow their territory to be used to harm other states by counterfeiters, revolutionaries, terrorists, or even commercial operations that may cause pollution to reach the territory of another country.
 - 5 States have an obligation to compensate other states and their citizens in cases of material harms that include, for example, shipwrecks, the fall of space vehicle debris, and the nationalization of private property belonging to citizens of another country.
 - 6 States have a duty to protect foreign nationals and their property and to treat them as well as their own citizens with a few exceptions, mainly, regarding matters of voting and holding political office.
- 1 States have a right to self-preservation including self-defense.
 - 2 States enjoy a right to legal equality and sovereign independence including control over their domestic affairs.
 - 3 States have a right to recognize one another and to participate in diplomatic intercourse including joining international organizations.
 - 4 States can exercise the right to sue other states in the International Court of Justice and other courts if they have ratified the treaty creating these courts.
 - 5 States possess the right of immunity for acts of state, for their diplomats, and for vehicles of war including ships and planes.
 - 6 States expect other states to reciprocate acts of good faith and comity.

general principle, for the nuclear disaster in Chernobyl that cast radiation across northern Europe. The society of states has long embraced the principle that one state's territory and activities should not be allowed to harm another state. Under the concept of state responsibility, an offending state is expected take compensating steps ranging from an apology to reparation payments for damages depending on the nature and extent of damage (Brownlie 2002; Caron 2002: 857–73).

An area of legal obligation that remains ill-defined concerns **state succession**. When a state breaks up into two or more new countries, what becomes of the treaty obligations, national debts, and the original state's property and government archives? Occasionally states do fragment, and recent history bears witness to several prominent cases. The Soviet Union, in 1991, dissolved into 15 separate states, and Yugoslavia quickly divided into 5 and now 6 states with Kosovo. About the same time, Czechoslovakia, in "a velvet divorce," became the Czech Republic and

Republic of Slovakia. With the meltdown of communist suzerainty emanating from Moscow, these countries could pursue new political forms more to their liking. The troublesome fragmentation of states has been handled on a case-by-case basis and without enough consistency to establish clear rules, but two treaties are available to help despite a small number of ratifications. These are the 1978 *Vienna Convention on the Succession of States in Respect of Treaties* and the 1983 *Vienna Convention of States in Respect of State Property, Archives, and Debts*.⁴ Five states, emerging from the Yugoslavian federation, accepted the 2001 *Agreement on Succession Issues* to cover their specific situation.⁵ Succession remains highly political, with states insisting on leaving their options open. Ample political will must always precede successful law.

Some states have moved in the opposite direction by forming voluntary mergers. With the retreat of British colonialism, Tanganyika and Zanzibar became Tanzania in 1964. More recently in 1990, East and West Germany, having been divided into two states by the Cold War, began a merger when the citizens of both Germanys, acting with dramatic spontaneity, tore down the infamous Berlin Wall. In 1975, North Vietnam, never having accepted South Vietnam as a legal state, conquered the south and simply ignored all the international obligations of South Vietnam. A state completely absorbed in this manner is regarded as *extinct* (Papenfuss 1988: 469–88). Mergers generally are much easier to complete than a division of a country into two or more states. German diplomat Dieter Papenfuss insightfully offers the metaphor that mergers are like marriages and are easy to enter into, while breaking up a country is similar to divorce, with the experience painful and expensive (1998: 488).

Offering a legal definition of the state as an actor with duties and rights is relatively easy. States as actors, however, are caught up in forces of change that can create a new environment for state interaction and potentially even the meaning and importance of statehood itself. In the last decade, a veritable cottage-industry of scholarship has raised questions about the viability of the state and its future as the primary actor. So far, the state has held on for several centuries, while rivals, such as city-states, empires, and tribes, among others, have dwindled in importance and landed in the dustbin of history (Finnemore 1996: 332). The gist of concern is that forces below and above the state are whittling away at its importance. Ethnic groups in many countries wish to break away and form their own states. Cities and provinces of different countries ignore their national governments and use "telephone diplomacy" to iron out transborder problems on their own. States appear more vulnerable as illegal immigrants, illicit drugs, terrorists, cultural forces, and, above all, the tightening grip of a globalizing economy, demonstrate convincingly the permeability of national borders. Not all writers have joined this cottage-industry, however. Anne-Marie Slaughter refers to the state as not *disappearing*, after being battered by various forces, but *adjusting*. Slaughter rightly points out that the state is fine-tuning itself, not to create a "hermetically sealed sphere," but to intensify state power for more effective participation in the world (Slaughter 1997: 83ff.; 2000: 177–205). Despite country name changes and shifting borders over time, the population of states in the world is at the healthy number of about two hundred, the largest count in history.

While all states share the same legal characteristics of statehood, the reality of the state appears in myriad variety. It is important to be aware of the kinds of differences that exist among states because these differences often shape the policy choices of internal states including their position in a legal dispute. Traditionally, professors of international relations have given much attention to the *military power* of states. The range is from the United States, widely acknowledged as the world's unrivaled military titan, to numerous small states that simply cannot defend themselves at all. An example would be Comoros consisting of three impoverished islands with a half million population located off the southeastern coast of Africa. In 1995, this tiny country was seized by mercenaries until French soldiers charitably came to the rescue. Charles de Gaulle once called these scattered island states "the dust of empires" (Watson 1992: 300).

The states of the world can be divided at times by *political ideology* and always by *culture*. Differences among fascists, communists, and democratic states led to the Second World War. Now the world copes with radical terrorists, many of whom are from fundamentalist Muslim sects. When deep political and cultural fissures divide states, the chances of peacefully guiding relations by rules of law are bound to decline markedly. *Economic differences* among states are huge, and the disparity between rich and poor states is also a source of one the world's great simmering conflicts.

The *physical differences* among states are so great that it is hard to imagine that they can all be fitted into a common category, even if it is based on a legal definition. There is gigantic Russia covering the Eurasian heartland, which contrasts sharply with the minuscule Pacific island countries of Kiribati, Nauru, and Palau, and with every imaginable size existing in between. Disparities in *population size* are even more striking, with China and India leading the way at over a billion people each out of the world's total of 6.6 billion people. Numerous countries have fewer than a million people, and some of the tiny states, such as Liechtenstein, Monaco, and San Marino, have only 30,000 to 50,000 people. Countries also vary tremendously over the extent of their *ethnic heterogeneity* and the problems that arise from these cultural differences. Religious, racial, language, tribal, and other cultural differences can cause serious difficulties. Many states face disintegration by ethnic secessionist movements or turn to political repression to hold their minorities in line (Groarke 2004; Beck & Ambrosio 2002).

Two special types of states that have bedeviled international society in recent years are *failed states* and *rogue states*. As Stanley Hoffman pointed out several years ago, the chief problem facing the world today is not finding a way to establish a world government or fending off an ambitious strong state wanting to dominate the others, but finding a way to deal with the many weak states that are wracked by ethnic conflict and poverty until they just seem to fall apart creating "nobody-in-charge" states (Hoffman 1995: xi). Somalia, for instance, has been in turmoil since the 1980s and now plagues international shipping in the Red Sea with a serious outbreak of piracy that has drawn the attention of the UN Security Council.

The other type of bedeviling state is that of the rogue state. The US State Department maintains a list of states that it perceives as harmful to the peace and security of international society. This list of the notorious has included Cuba, Iran, Iraq, Libya, North Korea, Serbia, Somalia, Syria, and the Sudan. Robert Harvey offers

three criteria of rogues: (1) the act of unprovoked aggression, (2) the sponsorship and direction of terrorism toward other state, and (3) a refusal to respect international law (2003: 188–97). In addition to the United States, other actors of international society often regard the same states as problems, although they may not apply the pejorative term of "rogue state." These rogues have scoffed at international law and fervently resisted an international order that they are unable to overturn.

International Government Organizations

It is states that create IGOs, but IGOs frequently take on an independent life of their own and rebound on states with suggested policy changes that states sometimes accept. IGOs can become teachers of norms in policy areas such as human rights, science, culture, and much else (Finnemore 1993: 565–97). IGOs have a history reaching back to the river commissions and international conferences of nineteenth-century Europe, but their numbers rose sharply in the twentieth century, especially after the Second World War. Following this war, Western democracies pressed for a new world order friendly to free trade and human rights and one that would banish war as a legitimate policy option, an order pursued mainly through the panoply of IGOs making up the UN system. Above all else, IGOs exist to help states deal with problems that they cannot handle alone. Performing this role, IGOs have become indispensable as they spin webs of cooperation among states (Coicaud & Heiskanen 2001).

IGO exist at the global level, examples being the *World Trade Organization* (WTO) and the *World Health Organization* (WHO), but five-fold more IGOs operate at the regional level, to name a few, the *Organization of American States* (OAS), the *African Union* (AU), the *Commonwealth of States*, the *Council of Europe* (COE), and the *League of Arab States* (AL). Most IGOs focus on one major purpose and are referred to as *unifunctional*. Of these, economically focused IGOs have the most pronounced growth rate. These include, for example, the European Union (EU), the *North American Free Trade Agreement* (NAFTA), and the *Association of South East Asian Nations* (ASEAN), all designed to increase the economic prosperity of their member-states. Some IGOs are *multifunctional* as is the case of the UN and some of the major regional organizations, such as the OAS and the AU, which busy themselves with maintaining peace, promoting human rights, and raising living standards, among other worthwhile objectives.

Approximately 400 IGOs exist in the world and have a measure of legal personality which is determined by the exact set of duties and rights assigned to each organization by its member-states through the treaties that create these organizations. IGOs can send and receive ambassadors, who enjoy immunity, as well as make treaties with states and with other IGOs. IGOs and treaties have gone together for a long time, but this kind of cooperation became more formally managed by the 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations*.⁶

A typical treaty between IGOs and states concerns *host agreements* that lay out the privileges and immunities of the IGOs while they conduct international business on

the soil of a sovereign state. IGOs have to have headquarters on one state or another's territory, and they require protection for their properties and personnel. The principal headquarters of the UN, for example, is in New York City, although major activities of the UN are also carried out in Geneva, Switzerland. The UN took over the old facilities of the defunct League of Nations. The UN has a goodly number of its specialized programs spread out in other cities and countries as well, for instance, the *UN Environmental Program* in Nairobi, Kenya and the *UN High Commissioner for Refugees* in Vienna, Austria. Each requires a headquarters agreement with its host country. Good examples of IGO-to-IGO treaties can be found in the UN System. *The International Labor Organization* (ILO), the *Universal Postal Union* (UPU), and the *International Atomic Energy Agency* (IAEA), among many others, are specialized, autonomous organizations melded into the UN system by treaty arrangements.

Among the many IGOs, the UN is paramount. The UN is the inheritor of the League of the Nations, carrying on the traditions of the sovereign equality of states and respect for diplomacy and international law. The UN continues today as the best chance for replacing violent conflict in the world with the peaceful settlement of disputes (Buzan 1991: 170). UN membership is now at 192, almost the entire population of states. A few tiny states cannot afford to maintain a diplomatic delegation at the UN. Although these states are the legal parents of the UN, the UN symbolically represents humankind as well as the states. The Preamble of the UN Charter begins with, "We the peoples of the United Nations," and then offers a grand litany of worthy goals ranging from promoting human rights to establishing world peace and security. The Secretary-General, as the chief executive, is commonly viewed as a world spokesperson, able to take an enlightened view about all interests involving the global good.

Although the various treaties and agreements between the UN and states suffice to create a legal personality for this IGO, the defining historical moment of UN legal personality is the well-known 1949 *Reparations for Injuries Suffered in the Services of the United Nations* case, an **advisory opinion** of the International Court of Justice (ICJ), one of the six principal organs of the UN. The ICJ, unlike many national or municipal courts, can and does render some of its most important decisions as advisory opinions. Without litigants bringing a case before the court, the ICJ offers an opinion on what the legal outcome would have been if an actual case were being decided. In this case, fighting erupted between Jewish settlers, struggling to create the state of Israel, and the Palestinians in the UN Trust territory of Palestine. The UN sent into the dispute its diplomatic agent, Swedish Count Folke Bernadotte, to mediate a settlement. Jewish militants assassinated Count Bernadotte in 1948, as they had earlier assassinated British Army officers when they tried to supervise the Palestinian Trust territory. Did the UN have the legal standing to bring a case that would hold Israel responsible? In the 1949 Reparation Case, the ICJ answered in the affirmative, even though the UN lacked the full set of duties and rights of states. Israel paid damages to the UN all the while denying that it had a legal obligation to do so. The UN's considerable legal personality would not again be in question.⁷

Another important problem the UN has had regarding its legal personality has been raised by the United States, its major host and the country that provides the largest single amount of membership dues, close to one-fourth of the total. Amidst an

anti-communist crusade in the early 1950s, the US government pressured the first UN Secretary-General, Trygve Lie of Norway, into dismissing 18 UN employees of US citizenship who could not pass US security clearances. The central question concerned the competence of an international body to determine its own requirements for civil service personnel. The next Secretary-General, Dag Hammarskjöld of Sweden, acted quickly to retrieve lost ground by asserting it would finally rest with him and not with any state, to determine who was a suitable employee of the UN, no matter how important that particular member-state was. Articles 100 and 101 of the UN Charter clearly intend that the UN is to have an independent and loyal civil service.

A more severe form of disrespect for the UN's rights and role has come from terrorists. The UN suffered a terrible blow in 2003 when a truck, laden with a large bomb, was driven into the UN Headquarters in Baghdad, killing several top UN diplomats and wounding others. The Security Council called for Secretary-General Kofi Annan to alert host states of any UN bodies, in this case the ruling council of Iraq operating under the US occupation authority, to pay attention to key provisions of the 1994 *Convention on the Safety of UN and Associated Personnel*. These provisions call for those harming UN personnel to be considered war criminals and required that they either be prosecuted or extradited to a country that is willing to prosecute them. The hackles of the US government were immediately raised when Secretary-General Annan asserted that the United States was responsible for UN Headquarters security. The United States responded that it had offered protection but was turned down by UN officials who were trying to protect the UN's image of neutrality. Still early in Secretary-General Ban Ki-moon's tenure, another terrorist suicide mission using a bomb-laden truck caused the destruction of UN offices in Algiers, Algeria, in 2007.

Another prominent IGO is the *North Atlantic Treaty Organization* (NATO) created in 1949 by Canada, Iceland, the United States, and Western European states to defend themselves against the rising specter of the Soviet Union and its communist allies. NATO was billed as a regional collective security organization, meaning that if any member were attacked by an outside source, the other states would come to the attacked member's aid and defense. It was implicitly understood that the aggression would almost certainly come from the Soviet Union and its *Warsaw Pact* allies, after this pact was formed in 1955. Since no war occurred between the two Cold War camps, the NATO alliance has been called a success story in terms of deterrence. As ex-Warsaw Pact member-states have joined NATO, its membership has risen to 26 states.

Although never tangling with the Warsaw Pact in a significant military way, NATO did step up to serve in the mid-1990s as the muscle of a grateful UN since the global body had struggled without success to halt the bloody ethnic fighting in Bosnia, a former province of Yugoslavia. Then, in 1999, without UN approval, NATO planes attacked Serbia, another part of fragmented Yugoslavia, forcing Serbian leaders to retreat from their depredations against their Albanian minority living in the province of Kosovo.

Article 5 of the NATO treaty, providing for the collective defense of any member-state, was never invoked until after the infamous terrorist attack on the United States in 2001, now known as the "9/11" crisis, a full decade after the collapse of the Soviet

Union and the Warsaw Pact. This devastating terrorist attack aroused unmatched sympathy for the United States and was widely perceived as an attack on the West in general. The terrorists that carried out 9/11 were linked to al-Qaida, the terrorist organization based in Afghanistan under the protection of the radical Islamist Taliban regime. NATO members activated Article Five by cooperating to track terrorist networks and set up the *International Security Assistance Force* (ISAF). NATO Forces were still operating in Afghanistan in 2009 but with some strain on the alliance. Over half the forces there are from the United States, and US Defense Secretary Robert Gates, in early 2008, complained that only a few NATO members will risk troops in combat, preferring to occupy relatively safe areas.

The most developed IGO in the world is the EU. After facing the massive destruction of the Second World War, a handful of European states began a cooperative venture on free trade in coal and steel that eventually grew into an impressive **supranational** body of 27 states. These states pool their respective sovereignties creating a quasi-authority above the state level to make more effective policy decisions for the common good. The institutional structure of the EU includes a European parliament, court, and executive bodies. The EU also has its own flag and anthem as well as the Euro currency shared by 16 of the member-states. Some of the most impressive cooperative ventures of these states include *Europol* for tracking terrorists and criminals, *Eurojust* that helps with extradition and cross-border prosecutions, and the *Schengen Agreement* that monitors outsiders entering the EU states to watch for terrorists and criminals.

By 2003, the EU began to process of adopting a constitution providing for more consolidation that ultimately failed when several states, including the important leader of France, rejected it. The 2001 *Treaty of Nice* had already proven inadequate for the complexities of an expanding organization. The EU leadership next tried to accomplish the goal of consolidation with the 2007 *Treaty of Lisbon*, which would add more transparency and democracy as well as consolidating power.⁸ The aim was to have this treaty in force by the summer of 2009, but an Irish referendum has turned the treaty down. Its future is now in jeopardy since all 27 EU members must to approve.

If the EU can create a more elaborate governance structure and draw more authority to its center, it will generate a more evolved legal personality. The EU is not of course a *super state*. The IGO has not forged the sovereignty of its member-states into an allowed regional government, reducing its national governments to mere minions. Despite an impressive record of integration, the EU still has a long way to go before it can become the "United States of Europe," as envisioned by some European intellectuals several decades ago.

Non-government Organizations

Because of the combined forces of democracy, advanced communication systems, and strong moral awareness by a world citizenry, a veritable global civil society has emerged into place, ready to tackle a wide range of issues. Individuals and private groups that once only lobbied national governments at home now also lobby IGOs,

attend annual conferences at the regional and global levels, and hold demonstrations at summit conferences attended by executives of the leading states. A sense of global awareness appears through activists from around the world networking together as their NGOs form alliances with like-thinking IGOs and states friendly to a given cause.

A prime example of the effectiveness of an NGO is that of the *International Campaign to Ban Landmines* (ICBL). This organization formed in 1992 as a coalition of 1,000 national and international NGOs operating from a base of 55 countries. The movement was helmed by Jody Williams, an American housewife. The ICBL received the support of a few countries, mainly Canada, and, in 1997, the Canadian government hosted a conference in Ottawa that resulted in 120 state signatures approving the *Treaty to Ban Anti-Personnel Landmines*. In 1999, after 40 states completed the ratification process, this ban on landmines became part of international law. Today, over 100 countries have ratified this treaty prohibiting the millions of landmines now seeded in the soil of many countries or stacked on the shelves of national armories awaiting use. In place of the usual famous statesmen and IGOs, Jody Williams and the ICBL were chosen to receive the 1997 Nobel Peace Prize. Unfortunately, China, Russia, and the United States, the top military powers, have not accepted this treaty.

NGOs are now commonly seen as playing a role in global governance because they feed ideas and norms into global policy contributing to the rules of international law. Since NGOs frequently speak for people at the grassroots level, the policy-making process, once dominated by states and later influenced by their IGOs, has made global governance more democratic (Keck & Sikkink 1998; Slaughter 2000; 193; Brown, Khagram, Moore, & Frumkin 2003: 271–96). Obviously, NGOs cannot participate directly in law-making in the sense of signing and ratifying treaties, but they do sometimes voice an original idea that becomes widely accepted as seen in the example of the ICBL. Two other good examples of NGO input on treaty formation are the roles of the *World Wildlife Fund* (WWF), promoting the 1973 *International Convention on Trade in Endangered Species*, and *Amnesty International*, proposing the 1980 *Declaration Against Torture*, which later was converted into the 1984 *Convention Against Torture*.

NGOs are not always puny organizations hoping they may get lucky and spark a moral response from the more powerful entities of states and IGOs. They can be very influential at times because of considerable resources, including millions of dues-paying members who may be divided among fifty or more national chapters. Any given NGO typically links to other like-thinking NGOs, as a force-multiplier, allowing their combined organizations to quickly rally for a cause. NGO campaigns involve lobbyists visiting government offices, pressuring corporations with publicized campaigns, their lawyers filing legal briefs in national and even international courts, and attending international conferences on matters such as human rights, the environment, trade, urbanization, and population issues, among many others. NGO representatives at international conferences usually outnumber state representatives by far and push their views at every opportunity. For instance, at the 1992 Earth Summit on environmental problems, 1,400 NGO representatives were present

to influence 150 state delegations, which included nearly 100 heads of state.⁹ Estimates on the number of NGOs vary widely. One source claims there are about 100,000 NGOs of every imaginable kind, counting both national and international NGOs. Of these, perhaps 5,000 are fundamentally international in nature and organizational structure (Dierks 2001: 135).

NGOs contribute importantly to democratizing today's global governance by bringing the interests of ordinary citizens to the fore when world agendas are set and by insisting persistently that policy-making reflect *transparency*. NGO activists want a full disclosure of accurate information from governments, corporations, international banks, IGOs, and by NGOs themselves, for that matter. The transparency movement in today's global governance is illustrated by the role of the widely respected German NGO, *Transparency International*, making assessments of national government's corruption; *One World Trust* for evaluating the accountability of NGOs, IGOs, and business corporations; and *Corporate Watch* specializing in tracking business corporations.¹⁰

The legal personality of NGOs is limited and probably lags behind their mounting importance in international affairs as doers of good deeds and inspirers of new rules. NGOs commonly have some sort of legal standing in the country where they are based. Municipal, or domestic, laws usually classify them as non-profit organizations for tax purposes and allow them to sue and be sued in civil court actions. At the international level, many NGOs receive *consultative status* with the Economic and Social Council of the UN under Article 71 of the UN Charter. This status enables an NGO to submit information relevant to an issue and even offer expert testimony. Being granted consultation status in the UN Charter, perhaps the world's most important treaty, demonstrates that NGOs can have appreciable legal standing. Early in the twenty-first century, 1,700 NGOs have UN consultative status.¹¹

A few prominent NGOs have advanced consultative status such as the *American Society of International Law* (ASIL), and the *International Committee of the Red Cross* (ICRC). Of special interest is the *Palestinian Liberation Organization* (PLO). The PLO status is referred to as the "Permanent Observer Mission of Palestine." The PLO status was upgraded in 1998 to include speech-making before the UN General Assembly, the capacity to raise new issues, and the ability to co-sponsor resolutions. Undoubtedly, this improvement in status represents overwhelming world opinion that the PLO should be allowed to govern an independent state of Palestine. The UN treats the PLO as if it were the government of a state-in-waiting.

The regional IGO of the *Council of Europe* (COE) goes even further than the UN by covering the role of NGOs in a special treaty. The COE created the *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations*, which assigns duties and rights to NGOs. This convention entered into force in 1991, and about one-fourth of the COE has ratified this convention.¹²

Other strong evidence that NGOs enjoy a degree of legal personality is the arbitration case of 1987 between the French government and *Greenpeace*, the prominent environmental NGO. In 1985, French agents blew up the *Rainbow Warrior* in the harbor of Auckland, New Zealand, sinking the ship that Greenpeace had used to

protest and block the testing of atomic bombs in French Polynesia. A crewman died in the bombing. The Secretary-General of the UN and an arbitration tribunal reached a decision punitive to France. The very fact that Greenpeace, as an NGO, was a party in an arbitration proceeding with a state suggests Greenpeace benefited from a worthy legal personality.

The outstanding case of a relatively strong legal personality afforded an NGO belongs to the ICRC. Not only does Swiss civil law recognize the famous Red Cross, but internationally the ICRC holds a unique status because the 1949 *Geneva Conventions* recognize the ICRC and provides for its important role during wartime. Actually, the ICRC's role in taking care of civilians, the wounded, and POWs goes back to the latter part of the nineteenth century. The 1949 Geneva Conventions, and their 1977 Protocol, are updates on a treaty process that began in 1864 and included a role for the ICRC (Finnemore 1999: 149–65; Forsyth & Rieffer-Flanagan 2007).

Multinational Corporations

Multinational corporations (MNCs) are a special case of the NGO actor, one that has risen to a height of power and influence beyond that of other NGOs in general. MNCs are economic actors in pursuit of profits, and they operate at the heart of the economic globalization process. They are business enterprises with ownership, management, production, and sales activities located in several or more countries. As in the case of BMW, the headquarters is in Bavaria, Germany, manufacturing takes place in Austria, Germany, and the United States, and sales occur in 100 other countries. Hundreds of MNCs, such as GMC, Coca Cola, Nestle, Michelin, Sony, Pfizer, McDonald's, Toys-R-Us, Boeing, and Citicorp, relentlessly pursue efficiency by acquiring material resources, cheaper labor, and bigger yields on investments in as many national markets as possible.

There are an estimated 38,000 MNCs along with their 250,000 affiliates, or subsidiaries spread out in numerous host countries, helping to knit together the complex, interdependent world economy.¹³ Through their exponential growth, MNCs now hold in their hands the bulk of world trade in goods and services, technology transfers, patent ownership, and capital investment.

The economic clout of the MNCs, and the political influence that extends from it, are incontestable. Writers interested in the role of MNCs in the global economy are fond of ranking the top 50 or 100 economic entities of the world so they can show that MNCs occupy some of the higher slots in the ranking, well ahead of many small states (e.g. Love & Love 2003: 95–118, esp. 98). MNCs often have more money, expertise, personnel, technology, and access to world leaders, including the Secretary-General of the UN, than do the governments of many states.

The facts about MNCs invite widely different interpretations about their role in the world economy and their impact on national economies, especially their effects on weaker states. The Western, or capitalist view, is that MNCs are helping build a burgeoning world economy that will advantage all states and peoples.

The other interpretation, one associated with socialism and many Third World leaders and economists, is that MNCs are further enriching the already rich states at the expense of the poor states and are even causing human rights and environmental harms along the way. Many interested NGOs and Third World governments would like to see MNCs regulated in a way that would protect human rights, preserve the physical environment of a country, and produce economic benefits for the general population. International law that can offer such guarantees does not exist. The powerful MNCs have kept regulation restricted to *Codes of Conduct*, which are ethical guidelines. Corporations essentially remain free to concentrate on profits that will reward their shareholders (Artz & Lukashuk 1995: 70–1).

The most important effort to rein in corporate power is probably the *UN Center on Transnational Corporations* (or TNCs – a synonym for MNCs). This Center tried to create an effective, comprehensive *UN Code of Conduct on TNCs*. Unfortunately for the critics of MNCs, this effort faltered in 1993, leaving a mish-mash of organizations and NGOs to carry on the cause in specialized industrial sectors. By 1999, the UN could only produce an ethical code for MNCs known as the *Global Compact*. MNCs have never objected completely to international regulation, especially if those regulations would harmonize multiple national laws and thereby reduce transactional costs across borders (1995: 78). What MNCs have objected to are rules that would require corporations to share their wealth to pay for peoples' wants and needs, since corporations generally believe it is the states' responsibility to do so (Love & Love 2003: 212).

From this description, the economic power of MNCs cannot be in doubt, but can MNCs be said to have an appreciable legal personality? Most regulation of MNCs has come from their home countries where they are headquartered and are usually treated under law as legal persons, or "citizens." Efforts at international regulation, described earlier, were attempts to treat the MNC as an "object" of ethically based codes of conduct. Most discussion of MNCs' international legal status has had to do with corporate nationality that involves deciding which state speaks for a corporation when it has problems in another country. Is it the state where the MNC is registered as a corporation, or is a corporation's nationality reflective of its stockholders' nationality? The often cited *Barcelona Traction* case of 1970 helps answer these questions. *Barcelona Traction* was identified by the ICJ as a Canadian company since it was registered in Toronto. The fact that the primary stockholders were Belgium citizens did not make *Barcelona Traction* a Belgium enterprise. For *Barcelona Traction*'s stockholders to receive help dealing with Spain as the host country, they would have to turn to Canada, and not Belgium.¹⁴

Noted legal scholar Louis Henkin is sanguine about the chances of MNCs moving beyond their status as entities holding economic power and possessing the nationality of their home state. With the capitalist market economy in full ascendancy over the old communist sphere of the world, he believes the MNC is poised for a momentous change. In time, the MNC may no longer have to operate in the shadow of the state, where it must be registered, but may act on its own as a new actor with duties and rights before international tribunals (Henkin 1995: 24; see also Zerk 2006: ch. 2). Opposition to this change would no doubt include Third World states which

Box 2.2 The Barcelona Traction Case

Barcelona Traction, Light and Power Company, Ltd, formed as a registered corporation in Toronto, Canada in 1911. *Barcelona Traction* then set up a number of subsidiary companies, which supplied the major part of the electricity used in the Catalan Province of Spain with its operations directed from the city of Barcelona. Shortly after the First World War, *Barcelona Traction*'s capital shares came to be held by Belgium nationals. Following the Spanish Civil War in the mid-1930s, *Barcelona Traction*'s sterling bonds were suspended because the Spanish exchange-control authorities refused to authorize the transfer of the foreign currency necessary to resume servicing the bonds. In 1948, a Spanish court declared *Barcelona Traction* bankrupt, which was followed by the executive branch of the Spanish government expropriating the company.

This case bounced around in the Spanish court system for years until Canada finally dropped all *espousal* efforts on behalf of *Barcelona Traction* in 1955. The Belgian government grasped the baton for another run at the Spanish court system but to no avail.

The Spanish government viewed Belgium as lacking *jus standi*, or legal standing, despite the fact that Belgian citizens owned the lion's share of *Barcelona Traction*'s stock. Once Belgium and Spain agreed to have this case placed before the International Court of Justice, this court's justices rejected Belgium's right to espouse for *Barcelona Traction* by a vote of 15 to 1 in 1970. Although it was in vogue between the world wars to determine the nationality of a corporation by a majority of its stockholders, the *Barcelona Traction* case confirmed the clear shift to assigning nationality to the country where the corporation was originally registered.

Sources: Refer to: <http://www.lawschool.cornell.edu/library/> > Int Ct of Justice > Decisions of the ICJ > Second Phase-Judgment of 5 Feb 1970.

would not care to see MNCs acquire legal personality on top of their considerable economic power (Artz & Lukashuk 1995: 82).

Europe, always a leader in international law and institutional development, has provided MNCs some basis for legal personality. The EU's *Corporate Social Responsibility* requirements appear to be so clear and firm that compliance by corporations is generally expected, as if they were "subjects" of law.¹⁵ Also, the 2003 *Criminal Law Convention on Corruption*, sponsored by the COE, aims to harmonize multiple states' regulation of corruption and bribery. Subject to the 2003 Convention would be individuals in their own right and individuals acting as corporate agents, making MNCs directly liable. Apparently, corporations in Europe are subjects with an appreciable legal personality.¹⁶ Finally, the *European Court of Justice* of the EU, arguably the most developed international court in existence, has been settling legal

disputes since 1952 among member-states, EU institutions, and individuals living under the EU arrangement, but has also been hearing cases involving corporations. MNCs, in this instance, have legal personality because they are subjects of the Court of Justice's jurisdiction.¹⁷

In another important case, the legal personality of the MNC was particularly pronounced. After the egregious seizure of the American embassy in Tehran, Iran, in 1979, coupled with Iran's holding of US State Department employees for 444 days, Algeria mediated an agreement between Iran and the United States, known as the *Algeria Declaration*. By this agreement, the United States would get its people back and Iran would regain control over its \$5 billion in gold in American banks. As part of the settlement, citizens of both countries could bring claims before the *1981 Iran-US Claims Tribunal* that had been set up for this purpose. Moreover, the Claims Tribunal went well beyond the old *espousal doctrine* that requires the government of a state to speak for individual or corporate citizens in international matters, as happened in the *Barcelona Traction* case. Both individuals and corporations were allowed to act in their own capacity as legal persons before an international tribunal with binding outcomes (Artz & Lukashuk 1995: 75–6).

Incidentally, the *Algeria Declaration* defined a company as a US corporation if 50 percent or more of its capital stock was owned by American citizens.¹⁸ This definition of the nationality of a corporation flies in the face of the major precedent recorded with the *Barcelona Traction* case, which bases nationality on where the corporation is registered as a business enterprise. Only time will tell if the Claims Tribunal's definition will challenge the *Barcelona Traction* precedent, or have meaning just for the Claims Tribunal's limited purposes.

Individuals

Since the individual human being is the only natural person, one would think the legal personality of individuals might have a long, impressive history. A distinguished record of this kind does not exist, however. Only during the early history of the Westphalian system, in the seventeenth century, when the natural law tradition prevailed, was it assumed that the individual had a legal personality of duties and rights. By the nineteenth century, the positive philosophy clearly won out over natural law, a development that placed the state at the center of international law and left the individual mostly out of consideration (O'Brien 2001: 153; Melanczuk 1997: 100). With the exception of pirates, who have long been regarded as the enemy of humankind, international law for centuries was almost hidebound as a legal system of states. States were the *subjects* of international law, and individuals figured in only as *objects* of states. Individuals received either benefits or restrictions, as the case might be.

This traditional view of the individual as object was sustained in the 1928 Danzig Railway case that occurred between Germany and Poland. The *Permanent Court of Justice* of the League of Nations (the precursor to the ICJ of the UN) offered the advisory opinion that the treaty between the two countries could not create duties and rights for individuals but only benefits (Cassese 2000: 78–9; Higgins 1985: 476–94).

Box 2.3 The Danzig Railway Officials Case

One of the outcomes of the First World War was the creation of the Free City of Danzig (now the city of Gdansk, Poland) as an entity separate from Germany and Poland and administered by a High Commissioner answerable to the League of Nations. Article 104 of the 1919 Treaty of Versailles, which ended the First World War, called for a treaty between Danzig and Poland that would transfer the railway system serving Danzig to the Polish Railway Administration. The 1921 Danzig–Polish Agreement left the Danzig railway officials unhappy with their new employers over the issues of pay and pensions and they sued in Danzig civil courts. Poland's government objected to the use of Danzig courts to the High Commissioner who finally ruled in 1927 in Poland's favor. The Free City of Danzig appealed over the head of the High Commissioner to the Council of the League, which in turn asked for an advisory opinion from the Permanent Court of Justice (PCJ).

In its 1928 advisory opinion, the PCJ viewed the 1921 Danzig–Polish Agreement as an international treaty and, in keeping with legal views of the day, observed that there was a well-established principle of international law which precluded *international agreements from creating duties and rights for individuals*. However, the justices of the PCJ found that an international agreement can create rules enforceable in national courts that involve duties and rights for individuals, as in “contracts of service.” This advisory opinion overruled the High Commissioner. Danzig and Poland had previously agreed to abide by the advisory opinion.

Source: Advisory opinion 15, March 3, 1928 found in Manley O. Hudson (ed.), *World Court Reports* vol. II, 1927–32 (Dobbs Ferry, NY: Oceana Publications, Inc., 1969), pp. 236–67. See especially pp. 246–7.

Immediately following the Second World War, the Nuremberg Military Tribunal probably changed the status of the individual's role in international law forever. This terrible war took well over 40 million combat deaths, with millions more dying in concentration camps simply because they were Jews, Roma (Gypsies), or members of some other ethnic group the Nazi leaders of Germany wanted eradicated. The Nuremberg trials handed down long sentences and even the death penalty to German civilian and military leaders, whose charges included waging a “war of aggression,” and “crimes against humanity.” The “badge of state,” that is, acting in the name of the state, could no longer protect individual violators. The claim that an individual was “only obeying a superior's orders” would at most a mitigating circumstance. At the Nuremberg Tribunal, the American Chief Prosecutor, Justice Robert Jackson, in his opening statement, declared “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹⁹ A parallel tribunal in Tokyo brought charges against Japanese leaders for similar crimes.

Individual responsibility before the bar of international justice continues today with the UN tribunals for Cambodia, Rwanda, Sierra Leone, and Yugoslavia. In 1998, many states took the bold step of creating a permanent *International Criminal Court* at The Hague in the Netherlands that can try individuals for a range of serious crimes, a significant institutional improvement over *ad hoc*, or temporary, tribunals.

In addition to punishing individuals for war and humanitarian crimes, the status of the individual in international law took a strong, positive turn when the UN produced the 1948 *Universal Declaration of Human Rights*. This litany of rights, morally powerful and broad in scope, became the progenitor of numerous human rights treaties that greatly benefit individuals. The 1976 *Covenant on Civil and Political Rights*, for instance, offers an optional protocol that allows individuals to petition a *Human Rights Committee* concerning their treatment at the hands of their government. The *European Court of Human Rights* cannot only receive an individual's appeal from the highest court of a state, but can also overrule the decision of that state court. Today, human rights are no longer viewed as the good fortune of the few, those lucky enough to be born in say England or Switzerland, as was the case only a century or two ago. Rather, rights belong to everyone as a matter of birth and are inalienable. That is, rights can be violated but cannot be taken away legally. Universal rights are the main vestige remaining of the natural law tradition in international law.

In some instances, individuals also have been able to advance material claims in their own right without the espousal of a state. Individuals, like MNCs, were able to present claims before the Iran-US Claims Tribunal. Also, when the *UN Compensation Commission* was set up after the 1990-1 Persian Gulf War, individual claims were actually given priority (O'Brien 2001: 155).

Insurgents

Insurgents are groups of citizens waging revolution against the central government of their state. They usually have *de facto* control over part of the territory of the state and may enjoy popular support among the people under their rule. Insurgents are either fighting to create a breakaway state of their own or, more ambitiously, to take complete control of the country. The large majority of wars today involve internal warfare. Insurgents are involved in an action much more prolonged than a riot or a brief rebellion that can be quickly quashed by the central government's police or army. Because the insurgents are able to persist over time, they take on the character of a *quasi-international person*, that is, they can enjoy a provisional legal personality. Insurgents possess both duties and rights involving diplomatic intercourse with states, although their status as a state-in-waiting does not give them a full legal personality comparable to that of a central government.

The fate of insurgents, however, does not depend so much on a temporary legal standing as it does on the outcome of military engagement. If the insurgents are militarily successful, they can form a new state, as happened in Bangladesh in 1971,

when it broke away from Pakistan with India's help. Or, if the military effort fails, as was the case for insurgents in the western Sahara in 1991, then they must submit to the government of an unwanted state, in this case, Morocco. If the insurgency should show a promise of success, some states may decide to offer **belligerent recognition** conferring some duties and rights on the insurgents for the time being. To be given belligerent status, there must be a general state of war between the central government and the insurgents, and the interests of the recognizing states must be involved. A state granting belligerent recognition, for instance, may be worried about its citizens and property located on the territory held by the insurgents. The leadership of the insurgency bears responsibility for aliens and their property wherever the insurgent forces exercise *de facto* control; in fact, the insurgent forces, once so recognized, must operate under the laws of war.

The recognition of an insurgency by another state almost certainly will be viewed as an *unfriendly act* by the central government as it tries to avoid territorial dismemberment, or even its own extinction. When the Ibo people tried to secede from Nigeria in 1968 and form a new state called Biafra, the premature recognition by several African states caused hard feelings between these countries and the Nigerian government, a diplomatic problem that lingered well after the Ibo rebellion was crushed. This case was especially sensitive since African states have borders mostly set by European colonial powers in a by-gone era, with boundaries both enclosing old enemies within the same territorial state and dividing tribal peoples in two or more countries. The potential for serious political mischief over the territorial bases of states was enormous. For this reason, the OAU, early in its history, established the strong norm of leaving boundary issues alone.

Antonio Cassese identifies a **National Liberation Movement (NLM)** as a special case of insurgency. NLMs are implicitly interested in gaining territory, but are mostly interested in pursuing international acceptance and legitimacy based on what they see as a rightful claim to **self-determination**. Legally, self-determination applies to a people wanting to be free of (1) colonial rule, (2) a racist regime, or (3) an alien occupation (2001: 75-7). A NLM will likely oppose one of these three kinds of rule. The *National Liberation Front (FLN)* wished to end French colonial rule in Algeria in the 1950s. South Africa's white regime faced a relentless demand by the *African National Congress (ANC)* to turn government over to the Black majority. And, for decades, the *Palestinian Liberation Organization (PLO)* has wanted the occupation forces of Israel out of the Palestinian territories. The most strident Palestinians want Israelis completely out of all of Palestine, which, before 1948, reached from the borders of Jordan to the Mediterranean Sea to the west. The FLN and the ANC have succeeded in taking control of their own states while the PLO remains a state-in-waiting.

Besides the actors possessing varying measures of legal personality, covered so far, there are several others that can complicate international relations without holding appreciable legal personality, if any at all. It is a daunting task in international relations studies to keep up with the growing cast of actors that can play a meaningful role in international politics and, in some way, relate to international law as either a subject or object of law. Deserving special attention are ethnic groups, terrorists, and private military companies.

Box 2.4 Belligerent Recognition: Great Britain and the South

With the outbreak of the American Civil War (1861–5), the government of Great Britain faced a quandary: a humanitarian option versus a power opportunity. Great Britain could ignore the new Confederate States of America (CSA) yearning for recognition as a new state and, thus, preserve a good relationship with Abraham Lincoln's government with its anti-slavery cause. Or, the British government could militarily intervene, permanently dividing and weakening the growing rivalry of a young United States. Britain opted for a middle choice by offering the South *belligerent recognition* while continuing full recognition with the US government in Washington, DC. Although feigning neutrality, Britain sold armed ships, including the storied cruiser the *Alabama*, to the South and supplied most of the South's infantry with the Enfield musket-rifle. Any temptation by the British to intervene further, say by extending full recognition to the CSA government in Richmond or landing troops, to assist Southern independence was stifled by the 1863 Emancipation Proclamation of President Lincoln, which freed all slaves and firmed British public opinion's support of the Union cause. The stalemate at the 1862 Battle of Antietam and the decisive defeat of the South at the 1863 Battle of Gettysburg doomed any chance that the South might receive Britain's full recognition as a permanent state. Great Britain also had to worry about its power calculations in Europe, involving especially the rise to great-power status by Prussia.

The conditional belligerent recognition of the South, as a state-in-waiting, allowed the British government to back out of a policy that was hurting their relationship with the Lincoln government, increasingly victorious and certain to reunite the country. Full recognition of the South would very likely have led to war between the United States and Great Britain.

Ethnic Groups

Sometimes scholars speak prematurely of the demise of the state, but one actor that does, on occasion, tear at the fabric of the state is the **ethnic group**. This group is a collective of people who share a special and enduring sense of identity based on a common history and shared culture. Cultural identification with the group may depend on language, religion, tribal status, and racial characteristics such as skin color and facial markers, or any combination of these. Equally important is the group's self-perception that its members are different from other peoples around them. The group may, in fact, feel that it is at risk from one or more other ethnic groups sharing the same country. The world of states has been hectorated by the nearly complete lack of congruence between states and ethnic groups. The large majority of states are ethnically heterogeneous, forced to deal with some stress caused by

persistent ethnic animosities that involve disputes ranging from how to spend government budgets to outright civil war. Ethnic minorities often pursue secessionist causes to form their own country, or at least insist on a degree of autonomy to protect their culture.

Tragically, conflict between ethnic groups can even reach genocidal proportions as happened in Rwanda in 1994, when the Hutu people went on a rampage and killed hundreds of thousands of Tutsi, among them women and children. It is ethnic group discontent that is frequently behind insurgencies and secessionist efforts, rioting, and acts of terrorism. Even if none of these dramatic events occur, central governments often view their ethnic minorities as troublemakers and target them with political repression that may involve torture and political murder. Before the defeat of Saddam Hussein's Sunni-controlled government in Iraq in 2003, being a Marsh Arab or a Kurd meant second-class citizenship status in Iraq at best.

Lucky are the multi-ethnic states that can live by what French historian and sociologist Ernest Renan (1823–1892) called the “spiritual principle.” He reviewed geography, religion, language, race, and other potential common denominators but found none sufficient to meld a diverse people together. Renan decided that an ethnically varied state can only achieve an appreciable solidarity if its members have a strong sense of a shared past and expect to share a future, whether it is one of glory or of grief (1971: 82–90). Australia, Canada, the United States, and many European countries enjoy a sense of nationalism, or “spiritual principle,” that bonds their peoples together with a strong sense of national identity despite their ethnic diversity. For these states, nationalism is a psychological sense of belonging that bridges over ethnic fissures. During the Second World War, for example, African-Americans, Italian-Americans, Japanese-Americans, and other American ethnic communities fought bravely for the United States despite the fact that these minorities had experienced long histories of discrimination.

Since time immemorial, ethnic groups have had to share a territory and government with peoples unlike themselves and perhaps with inimical feelings shared by all. Salvation seemed at hand, however, when President Woodrow Wilson announced his famous Fourteen Points, which were America's war aims for the First World War. Especially important was the principle of *self-determination*, mentioned earlier, that later would be stretched in meaning to suit different goals and situations. President Wilson wanted to break up the German, Austro-Hungarian, and Ottoman-Turkish Empires and create democratic states in their stead, a major step that Wilson thought would contribute to lasting peace. Wilson's approach seemed modest and reasonable at first glance but, unfortunately, the ambition for statehood held by many groups, some of them quite small, soared (O'Brien 2001: ch. 5). Wilson's Secretary of State, Robert Lansing, wrote insightfully about the new principle of self-determination when he said, “The phrase is simply loaded with dynamite...what misery it will cause.”²⁹ Since the end of the First World War, the problem of deciding which territories and peoples should have the coveted status of “sovereign state” remains an issue today.

The concept of self-determination entered the UN Charter in 1945, in Article 1 (2) and Article 55, in a moderately expressed form, when read in context. Several

The dynamic force of self-determination barreled across the twentieth century mostly knocking the props of legitimacy out from under colonial empires. This force still rambles about unspent in the twenty-first century, with numerous minorities taking on strong governments in a bid for independence, whether they can lay claim to an argument of international law or not. Probably most disgruntled ethnic groups, set on creating their own country, will pay little heed to legal niceties. The break-up of states is certainly not encouraged by international society, but human rights concerns may still be at stake. When the Russians attempted to crush the Chechens near the Caspian Sea, China its Muslim minority, or Turkey its Kurdish population, the world accepts the prerogative of these states to remain whole, yet some states and human rights NGOs do not hesitate to aim human rights criticisms at the central governments because of their ruthlessness.

When an ethnic group succeeds with secession to form its own country, the success often involves outside intervention by an IGO or a powerful state. NATO's military strike on Serbia in 1999 set the stage of Kosovo to become independent. Russia's defeat of the Georgian Army in 2008 gave hope to South Ossetia and Abkhazia that these areas could permanently break away from Georgia. If all the restive ethnic minorities of the world managed statehood status, there would be a complexity of unmanageable numbers of states. A state society of two hundred states would transform into two or three thousand states very quickly.

Terrorists

Terrorists are private actors that use or threaten violence calculated to create an atmosphere of fear and alarm. This atmosphere is designed to break down the will-power and morale of a target, usually one or more governments and their citizens, so the agents of violence can push forward some sort of political agenda. Kidnapping, assassination, hijacking aircraft, sabotage, and, above all, setting off bombs are the typical actions of terrorists. Terrorists have a strong sense of injustice but an equally strong sense of military weakness, hence the need for them to resort to hit and run tactics. Today's terrorists seek modern weapons so they can escalate death and mayhem on an unprecedented scale. The 9/11 incident involving the hijacking of commercial airliners and flying them into the Pentagon and the World Trade Towers in 2001 constitutes the worst case of terrorism in history.

Often dedicated "true-believers," terrorists kill a few to frighten the many and frequently suffer the fate of death themselves.²¹ While most terrorists focus on one country and its government, terrorist groups may operate internationally in the sense that they recruit supporters, weapons and money across borders and use several countries as places to train, hide, and rest. The infamous al-Qaida is international in every way. Its recruits come from several dozen countries, mostly Islamic states, and usually target the Western world, whether the object of attack is the World Trade Towers in New York City or American military personnel serving in Iraq.

International law concedes to states a monopoly on violence, although in modern times, under the UN Charter, that monopoly is restricted to self-defense and

years later, in 1948, the writers of the *Universal Declaration of Human Rights* (UDHR) saw no urgency to include references to minority rights or self-determination. This situation changed dramatically, however, when anti-colonial forces in the UN made self-determination a sacrosanct principle. In 1960, the *Declaration on the Granting of Independence to Colonial Countries and Territories* expressed a strong moral demand that peoples in Africa and Asia be allowed to rule themselves instead of continuing to bear the rule of Europeans. Then, in 1966, self-determination appeared as a right in the very first articles, respectively, of the twin *Covenants on Civil and Political Rights* and *Economic, Social and Cultural Rights*. It is ethnic groups that usually express a demand for self-determination, sometimes expressed through a NLM. Ethnic groups may not confine themselves to the legitimate rationales for expressing self-determination, namely, objection to colonial rule, racist government, and military occupation (Cassese 1995: 319). These groups may simply want to secede and from their own country, even when they are governed by democracies willing to grant a significant measure of democracy. The Basque people in Spain and, in the 1960s, the French-speakers in Canada are prime examples.

Box 2.5 The Special Case of Kosovo

Kosovo was legally a province of Serbia (aka Yugoslavia) but had a *de facto* independence from Serbian rule that became permanent. The attempts by Slobodan Milošević to create a "Greater Serbia," as the old Federal Republic of Yugoslavia broke up, included not only ethnic cleansing in Bosnia and Croatia but in Kosovo as well. In 1999, the Serbian army attacked the Albanian ethnic community, who made up the large majority of the citizens of Kosovo, driving them toward the country of Albania or into the mountains to live a meager existence. As news of depredations, that included the rape of Albanian women and the shooting of men of military age, reached Western Europe, NATO organized a form of humanitarian intervention that consisted mainly of aerial bombardment directed at the Serbian military and political infrastructure, all without UN authorization. Serbia finally capitulated.

Following NATO and Russian occupation of Kosovo, the UN set up the Interim Administration Mission to Kosovo in June 1999. The UN, the EU, and other international organizations shared nation-building duties to improve social, economic, and political conditions in Kosovo. The United States and European states mulled over whether Kosovo was to remain a province of Serbia or become an independent country. Kosovar leaders declared the country's independence in February 2008. The United States and the EU states quickly recognized the new country. While the Kosovo case does not meet the legal criteria for self-determination based on either colonial status, racist rule, or foreign occupation, Kosovar leaders could at least make the moral claim that they were ruled badly and undemocratically by the Serbs.

multinational operations to stop aggression and restore peace approved by the UN Security Council. The laws of war currently cover states but can drop down to the level of an insurgency, a revolutionary group that might possibly become a state.²² Terrorists generally fall beneath this level and hence do not have international legal personality. For increasing numbers of people, there may be little hesitation to call terrorists "outlaws" and to regard them as the enemy of humankind, along with pirates, slavers, war criminals, and those guilty of genocide. A consensus is not present, and one can still hear the refrain, "one person's terrorist is another's freedom fighter."²³ At least there is a tightening noose of UN-sponsored treaties to criminalize various aspects of terrorism.

Mercenaries and Private Military Companies

The status of the **mercenary** appears to be in a state of flux. A mercenary is an economically motivated volunteer participating in military engagements in service to a government or some other entity. Usually a mercenary is an individual from a state that is uninvolved in a given conflict. Mercenaries have a storied history, but their various names of "soldiers of fortune," "dogs of war," or "sword-sellers" reveal a generally negative image of their activities.

Mercenaries have often appeared in the wars of Europe and received the same treatment as any other combatants so long as they obeyed the laws of war. Their legal status was verified by the 1949 *Geneva Conventions* covering the laws of war. A fundamental change occurred, however, with the 1977 Protocol I, an add-on to the Geneva Conventions. Protocol I declared that mercenaries no longer enjoyed the right to be a combatant and were not entitled to POW status. After 1977, mercenaries could be treated as objects of international law and prosecuted for criminality. This reversal of fortune came about mostly at the insistence of Third World states, particularly the African countries.

Some of the blame for the bloody internal conflicts in Africa has been attributed to the interfering role of white mercenaries. One of the first steps taken by the UN Peacekeeping force in the Congo, in the early 1960s, was to arrest Dutch and South African mercenaries. Also, in 1977, the Organization of African Unity (OAU) – now the African Union (AU) – drafted the *Convention for the Elimination of Mercenaries in Africa*. Later, responding to the many Third World states, the UN General Assembly adopted the 1989 *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, which still needs additional ratifications to enter into effect (Morton & Jones 2002: 638).

The matter of the legality of mercenaries would appear settled were it not for the regular appearance in the 1990s, often much ballyhooed by the media, of **Private Military Companies** (PMCs). These military companies are usually led by retired military officers from various countries, including especially Great Britain and the United States. Legally, PMCs are registered in a given country as corporations and operate under the contract law of that state. Operating from Great Britain, Sandline International tried to involve itself in Papua New Guinea in 1997. Apparently,

Sandline International was under contract to protect a private corporation's interests in a copper mine by preventing its takeover by a rebel force. And in 1998, this same PMC gave advisory and logistical support to Nigerian troops when they ousted the oppressive government of Sierra Leone. In doing so, Sandline International violated a UN embargo on arms shipments to the area just to protect corporate interests in the area's diamond trade.

Better known among PMCs is Dynacorp, which is registered as a US corporation in Reston, Virginia. This PMC has a history reaching back to 1946. Contracting with the US government, Dynacorp has supplied police officers for Bosnian and Iraqi nation-building missions and bodyguards for the president of Afghanistan, and has flown defoliation missions over Colombia to thwart the illicit cocaine trade. Dynacorp is the 13th largest military contractor in the United States and has annual revenue of \$2.3 billion.²⁴ Another PMC, Blackwater USA, employed armed guards that fired on a crowd in Baghdad in 2007. These employees were placed on trial for murder under US *extraterritoriality laws*. These laws govern a state's citizens while they are away from the territory of the state.

The actual legal standing of PMCs is murky, except for the guidance national contract and extraterritorial law offers. International law developments appear to run against PMCs, if they are counted as mercenaries, but states, including the United States, employ them to supplement overstretched militaries. A special concern about PMCs has to be the treatment of their employees if captured during a conflict. In Colombia, Marxist insurgents have on occasion shot Dynacorp employees and other times held them for ransom. It is unclear whether the Colombian insurgents gave any particular attention to these persons. Did they treat them merely as corporate employees, or more ominously, as mercenaries? PMCs probably have a better chance of being seen in a positive light if they are taking part in a multinational effort at nation-building, working as police officers or protecting humanitarian workers. As for taking part in an open conflict, PMC employees are probably at greater risk if captured than the uniformed military personnel of a state. In their careful study of mercenaries, Jeffrey S. Morton and Presley Jones, in the spirit of transparency, conclude that international law should recognize mercenaries as legal combatants, as in the 1949 Geneva Conventions, so their role in conflicts can be properly regulated (2004: 625, 630).

Domestic Actors

Besides ethnic groups, terrorists, and mercenaries, there are other actors, essentially domestically situated, but sometimes extend themselves into the international arena and may, at some point, require the attention of international law. Religious organizations increasingly want a transnational presence. The Roman Catholic Church already has a long history that predates the Westphalian state system and, in some respects, is treated as a state. In recent decades, Protestant churches, through the World Council of Churches and evangelical missionary work, are having a large impact on Third World countries. Islamic groups have helped each other across

national boundaries in efforts ranging from economic development to supporting terrorism. Mafias, or internationally organized criminal associations, have become commonplace, whether they are smuggling people, cars, arms, or drugs from country to country and continent to continent. All too easily, they operate along the edges of national law enforcement jurisdictions. Then, there are the activities of cities, states, and the provinces of some countries. Often local governments have practiced "foreign policy" by passing resolutions on such matters as human rights and environmental practices in other countries. On occasion, local governments of two or more countries work out transborder agreements for their mutual advantage while by-passing their foreign ministries.²⁵

Especially notable are twenty or so prominent cities, such as Frankfurt, London, New York City, Paris, and Tokyo, which are frequently called "global cities." These cities have developed a pronounced international outlook as they have burgeoned into centers of international transportation, communication, finance and banking, and serve as the headquarters of MNCs and the loci of cultural centers and world-class universities and research centers. A super-stratum of cosmopolitan leaders and world-wise citizens populate these global cities (Sassen 2002; Neyer 2000: 179–97).

Chapter Summary

- Traditionally, international law has focused on the state as an actor but gradually other actors have taken the international stage with a degree of legal personality.
- The international society of today would be unimaginable without IGOs such as the UN or NGOs like Amnesty International or Greenpeace.
- The MNC is a special case of the NGO and together hundreds of these account for most of the world's trade and investment.
- Mercenaries' status is highly controversial, and today's PMCs may or may not be mercenaries depending on the choice of definitions.
- The only real persons are individuals but surprisingly it has taken several centuries before the individual person developed a significant legal personality based on duties and rights.

Discussion Questions

- 1 The state has the clearest legal personality. Why is this so?
- 2 What is the difference between *subjects* and *objects* of international law?
- 3 Should private military companies be regarded as mercenaries?
- 4 What is the status of terrorists as an actor under international law?
- 5 Why have MNCs become so important in international relations and law?

Useful Weblinks

<http://www.corpwatch.org/>

A website aimed at holding corporations accountable. This site offers an internal search engine and additional research tools. Reports on current corporate misdeeds and is regularly updated.

<http://www.transparency.org/>

Formed in 1993 and headquartered in Germany, Transparency International has gained respect for its carefully done corruption surveys of many countries around the world.

<http://www.uia.org/>

The website of the Union of International Associations offers numerous publications online including *Who's Who in International Organizations* and provides links to thousands of IGOs organized alphabetically, statistics on IGOs, and the *Yearbook of International Organizations*.

<http://www.gdrc.org/ngo/index.html>

The website of The Global Development Research Center offers the NGO Café which lead to thousands of NGOs organized by subject-matter.

<http://www.mitpress.mit.edu/journals/INOR/deibert-guide/TOC.html>

Among many other useful options, Professor Ronald J. Deibert of the University of Toronto offers "Countries, Regions, Governments." This option lead to government sites as well as academic studies of countries and regions.

<http://www.globalpolicy.org/nations/index.htm>

This website offers articles on states and their future. One special set of articles deal with the forces challenging the state and which threaten to usurp this actor as the primary actor.

Further Reading

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Notes

- 1 The 1933 Montevideo Convention can be accessed at <http://avalon.law.yale.edu/enter> "1933 Montevideo Convention" in the website search engine.
- 2 The 1970 Declaration can be found at <http://www.un.org/documents/ga/res/25/ares25.htm> > Resolution 2625 (xxv) 24 October 1970.
- 3 The 2001 Draft Articles on Responsibility of States, with commentary, can be located at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.
- 4 The 1978 Vienna Convention can be found at <http://treaties.un.org/Pages/ParticipationStatus.aspx>, see Chapter XXIII; and the 1983 Vienna Convention is available in Chapter III.
- 5 The Agreement on Succession Issues is at <http://treaties.un.org/Pages/ParticipationStatus.aspx>, Chapter XXIX.
- 6 The 1986 Vienna Convention can be located at <http://treaties.un.org/Pages/ParticipationStatus.aspx>, Chapter XXIII.
- 7 This 1949 advisory opinion can be accessed at <http://www.icj-cij.org/> > Cases > Advisory Proceedings > 1948 reparation for injuries (note: proceedings began in 1948 but it is usually referred to as a 1949 case).
- 8 These treaties can be viewed at http://europa.eu/abc/treaties/index_en.htm.
- 9 For an estimate of attendance numbers at world conferences, see Kegley and Raymond 2001: 166.
- 10 See the following websites: <http://www.transparency.org/>; <http://www.oneworldtrust.org/>; and <http://www.corpwatch.org/>.
- 11 This paragraph draws in part from Malanczuk 1997: 98; Chinkin 2001: 135–40.
- 12 http://www.coe.int/T/E/NGO/public/consultative_status/_summary.asp/.
- 13 Although some sources cite much larger estimates, the number of MNCs given here are an estimate from Kegley and Raymond 2001: 174.

- 14 Abi-Saab 1987: 549–76; <http://www.icj-cij.org/> > cases > Contentions cases > 1962 Barcelona Traction. (Note: The case began in 1962 and was decided in 1970.)
- 15 http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0366en01.pdf/.
- 16 <http://conventions.coe.int/> > Search > Criminal Law Convention on Corruption.
- 17 <http://europa.eu.int/> > institutions > Court of Justice.
- 18 <http://www.iustct.org/background-english.html/>.
- 19 Quoted from Artz and Lukashuk 1995: 67.
- 20 Quoted in Grant 1999: 85.
- 21 A brief but excellent description of current terrorism is in Laqueur 2002: 1–13.
- 22 Frederic L. Kirgis, "Terrorist Attacks on the World Trade Center and the Pentagon," (September 2001), <http://www.asil.org/> > Publications > ASIL Insights > 2001.
- 23 An interesting discussion about moral subjectivism and terrorism is found in Graham 1997: 115–31.
- 24 Pratap Chatterjee, "Dynacorp Rent-a-Cops May Head to Post-Saddam Iraq," found at <http://www.corpwatch.org/> pp. 1–3.
- 25 Interesting accounts of domestic actors are found in Fry 1998.