

which explains the emerging consensus among third world peoples that IIs suffer from ‘democracy deficit’. The erosion of the autonomy of the neo-colonial state is, in other words, the reason why the issue of II legitimacy has acquired the salience it has. In sum, the neo-colonial third world states will continue to exist but essentially in the service of the TCC and the global state. The Northern/Western states, on the other hand, will continue to shape the form and content of the emerging global state to realize TCC interests.¹³

The constituent elements and features of the nascent global state and the negative implications of the emerging global state for the states and peoples of the Third World are elaborated in Sections II and III below. The aim is to offer a macro view of developments rather than a detailed analysis of individual regimes. Needless to add, the developments in the world of IIs are not entirely one-sided; in many ways IIs act as a shield for third world states and also empower third world peoples against their own states (for instance, human rights and environmental organizations). Indeed, it is only because IIs offer certain advantages that the collaborating ruling elite in the Third World is in a position to sell the idea of multilateralism to their people. However, the essence of contemporary developments in the field of IIs is the creation of conditions conducive to the spread and growth of global capitalism and not the improved welfare of third world peoples.¹⁴ Section IV deals with some possible objections to the thesis that a nascent global state with an imperial character has evolved. The concluding section explores the question whether things can be changed and advances certain proposals in this regard.

2 The Emergence of a Nascent Global State: Developments

A International Economic Institutions: Seceding Sovereign Economic Space

1 Prescription of Uniform Global Standards

A principal characteristic of the ongoing globalization process is that sovereign third world economic space is being seceded to IIs. With capitalism entering the phase of

¹³ We therefore tend to agree with Petras that ‘in the contemporary world, the national state, in both its imperial and neo-colonial form, has *expanded* its activity’. Petras, ‘A Rose by Any Other Name? The Fragrance of Imperialism’, 29 *The Journal of Peasant Studies* (2002) 139. But this expansion in their activity is the very basis of the emerging global state. For as Petras notes, ‘the activities of the state vary according to their class character and whether they are imperial or neo-colonial states’, *ibid.* Thus, as we shall suggest later, whereas the autonomy of the neo-colonial states is being eroded by seceding sovereign economic, social and political space to IIs, the Western imperial states are being strengthened by this very act of secession.

¹⁴ It would be readily recognized that our political referents and priorities, be it ‘the people’ or the ‘Third World’ or ‘women’ ‘are not there in some primordial, naturalistic sense’ or ‘reflect a unitary or homogeneous political object’. H. K. Bhabha, *The Location of Culture* (1994), at 26. These need to be specified and imaginatively worked into operational categories of international law.

globalization. IIs have been assigned a role which was played by the state in the early and middle stages of capitalism in removing local impediments to the process of capital accumulation. It may be recalled that since the 16th century the development of capitalism has called for the destruction of differences in laws, standards, currencies, weights and measures, taxes, customs duties at the level of the nation-state.¹⁵ Globalization, on the other hand, requires the *replacement of numerous national laws and jurisdictions by uniform global standards* in order to remove the barriers to capital accumulation at the global level. Therefore, in the last two decades the advanced capitalist world has pushed through a series of changes in international economic laws, which lay the legal foundation for capital accumulation in the era of globalization by prescribing uniform global standards.¹⁶ These changes, embodied in and enforced by IIs such as the WTO, IMF and World Bank, compel sovereign states to adopt the same laws irrespective of their stage of development. The usual lament that international laws lack enforcement mechanisms does not apply to these institutions. They do not merely bark, they also bite.

2 WTO and the Erosion of Sovereignty

The WTO is the key institution to which sovereign economic space is being seceded. In crucial areas such as agriculture, intellectual property rights (IPR), and regulation of foreign investment and services, sovereign powers have been relocated from third world states and peoples to WTO *inter alia* through the adoption of uniform global standards. Thus, for example, be it Nepal or the US or Rwanda and Japan, the same IPR laws are to be adopted by all under the Agreement on Trade Related Intellectual Property Rights (TRIPS).¹⁷ Likewise, WTO Member States cannot, *vis-à-vis* the Agreement on Trade Related Investment Measures (TRIM), impose local content or balancing requirements on foreign capital irrespective of their individual needs and concerns. The absence of local linkages can *inter alia* give rise to an 'ersatz capitalism' that faces considerable trouble with the relocation of foreign investment to other countries.¹⁸ The General Agreement on Trade in Services (GATS), a framework agreement, imposes a common set of standards to be applied to service industries with respect to which states undertake obligations. Progressive liberalization would see sectors ranging from banking and insurance to critical social sectors like education and health in the Third World invaded by transnational capital. Once obligations are undertaken in the service sector it is very difficult to withdraw them, as certain conditions, including making compensatory adjustments, have to be satisfied.¹⁹ On the other hand, third world countries are under pressure to liberalize, without fully

¹⁵ F. Braudel, *Civilization and Capitalism 15th–18th Century* (1979), at 513.

¹⁶ Chimni, 'Marxism and International Law: A Contemporary Analysis', *Economic and Political Weekly* (6 Feb. 1999) 337.

¹⁷ For the TRIPS and other agreements see WTO: *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1995). These are also available on the WTO web site at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

¹⁸ P. Burkett and M. Hart-Landsberg, *Development, Crisis, and Class Struggle: Learning from Japan and East Asia* (2000), at 169.

¹⁹ See Article XXI entitled 'Modification of Schedules' of the GATS text.

knowing the consequences of doing so. The WTO agreements, it may be added, are enforced through a *compulsory* dispute settlement mechanism backed by an effective system of sanctions.

The prescription of uniform global standards is essentially meant to accommodate the interests of transnational corporations 'who are capital exporters, technology leaders and service providers in the world economy. For them, these new issues represent the final frontier in their global reach to organize production and trade on a world scale without fetters'.²⁰ The WTO also hopes to bring within its regulatory ambit, through the ongoing Doha round of trade negotiations, other aspects of the relationship between trade and investment, government procurement policy, competition policy, and so on.²¹ In areas such as the interface between trade and environment, also an issue at the Doha round of trade negotiations, the interpretive route has been used by the WTO dispute settlement bodies to establish environment regulation.²² It needs to be emphasized that while WTO agreements do take into account developing country concerns in a number of areas, 'the tendency has not been to grant developing countries broad exceptions to compliance with GATT rules'.²³ While in some instances third world countries have been given a little more time to bring their domestic regimes into compliance with WTO rules, there is no substantial special and differential treatment for them.²⁴

3 *International Financial Institution Conditionalities and Third World Sovereignty*

In addition to the loss of economic sovereignty to WTO, third world countries have to contend with the international financial institutions (IFI) which encroach on other sovereign areas of national economic life through the prescription of conditionalities to be complied with if a state is to receive loans. These conditionalities more or less impose the goals of liberalization, privatization and deregulation on third world states (its only users) in a bid to pry open markets, help transnational capital take over public sector assets at throwaway prices, and avoid regulation of its activities in public interest.²⁵ Further, IFIs are currently subjecting the national currencies in third world states to growing pressure by insisting on deterritorialization. The advantages of monetary sovereignty are well known. It is, among other things, 'a possible instrument to manage macroeconomic performance of the economy; and ... a

²⁰ Nayyar, 'International Trade and Factor Mobility: Economic Theory and Political Reality', in D. Nayyar (ed.), *Economics as Ideology and Experience: Essays in Honour of Ashok Mitra* (1998) 93.

²¹ WTO, Ministerial Declaration, Fourth Session, Doha, 14 November 2001. UN Doc. WT/MIN(01)/DEC/W/1.

²² Chimni, 'WTO and Environment: Shrimp-Turtle and EC Hormone Cases', *Economic and Political Weekly* (2000) 1752; and Chimni, 'WTO and Environment: Legitimization of Unilateral Trade Sanctions', *Economic and Political Weekly* (2002) 133.

²³ M. J. Trebilcock and R. Howse, *The Regulation of International Trade* (1995) 324.

²⁴ *Ibid.* For the negative position of the US on the special and differential treatment demand of the developing countries in the ongoing Doha negotiations see Raghavan, 'US Caveats on S&D, Wants "Full integration" of Developing Countries' (2002), <http://www.twinside.org.sg/title/5247a.htm>.

²⁵ J. E Stiglitz, *Globalization and Its Discontents* (2002), at 53 *et seq.* A new statement on conditionalities was adopted by the Executive Board of the IMF on 22 September 2002. It remains to be seen whether this will mean any serious change on the ground.

practical means to insulate the nation from foreign influence or constraint'.²⁶ But the IMF, and its masters, actively encourage states to accept capital account convertibility, an act that considerably erodes the autonomy of states as it cannot effectively regulate marauding and hyper-mobile global finance capital.²⁷ This can have severe negative consequences for third world economies.²⁸ The loss of monetary sovereignty, as the East Asian crisis showed, also has serious fall-outs for the ordinary people in the Third World. The nightmare of unemployment can hit suddenly and their standards of living can substantially erode overnight.²⁹

But the ability to prescribe strict conditions is not enough. The IFIs, in particular the World Bank, also seek to assure transnational capital the general technical preconditions for the process of production. The need to create a *functional unified global economic space* for the operation of transnational capital requires that IIs create appropriate economic and social conditions. Given the inability of third world states to provide the material conditions in which transnational firms can enter productive activity, IFIs intervene, as we shall see presently, to help establish necessary infrastructure and institutional conditions for its operations. Finally, the IFIs also actively support the cause of transnational capital through setting up other IIs when necessary. Thus, for instance, the Multilateral Investment Guarantee Agency (MIGA) was established in 1988 under the auspices of the World Bank. It insures foreign capital against non-commercial risks.³⁰

B International Social Institutions: Creating Social Conditions for Globalized Capitalism

A whole range of social IIs, in particular in the field of human rights and environment, have also been established that limit the autonomy of third world states and peoples to adopt social policies that suit their individual cultures and stages of development.³¹ Social IIs are a crucial element in the emerging nascent global state as they facilitate

²⁶ Cohen, 'Money in a Globalized World', in N. Woods (ed.), *The Political Economy of Globalization* (2000) 84.

²⁷ Soedderberg, 'On the Contradictions of the New International Financial Architecture: Another Procrustean Bed for Emerging Markets?', 23 *Third World Quarterly* (2002) 607; Stiglitz, *supra* note 25, at 15–17.

²⁸ *Ibid.*; Bhagwati, 'The Capital Myth', 77 *Foreign Affairs* (1998) 7.

²⁹ Burkett and Hart-Landsberg, *supra* note 18, at 189–190; T. Van Hoa, *The Social Impact of the Asia Crisis* (2000).

³⁰ Article 11 of the 1985 Convention establishing the Multilateral Investment Guarantee Agency (MIGA) defines the non-commercial risks against which it ensures private investment. These are loss resulting from risks relating to 'currency transfer', 'expropriation and similar measures', 'breach of contract', and 'war and civil disturbance'. MIGA came into force in 1988 and has 157 members at present. For the text of the convention see <http://www.miga.org/screens/about/convent/convent.htm>.

³¹ More generally, 'the upshot of the activities of IIs is that today most citizens greatly underestimate the extent to which most nations' shipping laws are written at the IMO in London, air safety laws at the ICAO in Montreal, food standards at the FAO in Rome, intellectual property laws in Geneva at the WTO/WIPO, banking laws by the G-10 in Basle, chemical regulations by the OECD in Paris, nuclear safety standards by IAEA in Vienna, telecommunication laws by the ITU in Geneva and motor vehicle standards by the ECE in Geneva', Braithwaite and Drahos, *supra* note 4, at 488.

the creation of social and political conditions that are suited to the operation of transnational capital. To the extent that social IIs harbour potential for a progressive transformation of global social space, their limited mandate, authority and resources act as important constraints. Indeed, both the human rights and environment agendas are being increasingly drawn up to serve a neo-liberal agenda. IFIs even play an important role in this context, i.e., in creating social conditions that assist the functioning of transnational capital.

1 *IFIs and Good Governance*

This objective is being pursued through a concern with ‘good governance’ in the third world. The constitutional prohibition of political activities on the part of IFIs has been overcome with the ingenuous interpretation that its scope covers ‘governance as a question of “good order” in the management of a country’s resources through rules and institutions, rather than the exercise of political power to manage its affairs generally’.³² Thus, the World Bank has come to be concerned with civil service reform, corruption, legal reform (or law and development issues), budget discipline, observance of human rights, and so on:

Activities such as civil service reform, legal reform and judicial reform have been found to be relevant to the maintenance of ‘good order’ in the management of a country’s resources through the introduction and implementation of appropriate rules and institutions, and were therefore found to fall within the Bank’s mandate.³³

The central motivation is of course to create conditions that facilitate the operation of transnational capital. As Shihata notes:

the establishment of the rule of law attracts private investment, to the extent that it creates a climate of stability and predictability, where business risks may be rationally assessed, property rights protected and contractual obligations honored.³⁴

In this context it should be noted that IFIs have now established ‘field’ offices in member countries: ‘the World Bank has over one hundred field offices now, whereas the IMF has around seventy resident representatives in sixty-four countries. Until the end of the Cold War, they had very little field presence’.³⁵ Needless to add, these field

³² I. Shihata, *The World Bank in a Changing World: Selected Essays* (1991) 87. The prohibition on political activities is contained in the charters of all IFIs. Thus, for example, Article IV, Section 10 of the Articles of Agreement of the International Bank of the Reconstruction and Development (IBRD) states: ‘The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1.’

³³ I. Shihata, *The World Bank in a Changing World: Selected Essays and Lectures* Vol. II (1995), at 132–133.

³⁴ *Ibid.*, at 128.

³⁵ Rajagopal, ‘From Modernization to Democratization: The Political Economy of the “New” International Law’, in R. Falk *et al.*, (eds), *Reframing the International: Law, Culture, Politics* (2002) 140. In addition, the UNDP ‘devotes a full third of its funding to good governance projects’, *ibid.*, at 150.

offices are little concerned with 'good governance' when it comes to the impact of private investment on the rights of third world peoples.

2 Proliferating Human Rights Organizations: Implications

In the post-1945 period a range of international human rights organizations (IHRO) have been set up, a large number of which have come into existence in the last two decades. The IHROs include UN bodies (ECOSOC, UNDP, UNHRC, ILO, UNESCO, UNHCR), expert bodies established by UN organs or under particular human rights treaties (Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination against Women, Committee against Torture, Committee on the Rights of the Child, and others), and a set of activities authorized by the UN (such as in the mandates of UN peacekeeping forces). The expansion in the activities of IHROs can *inter alia* be gauged from the fact that the newly established office of the United Nations High Commissioner for Human Rights (UNHCHR) 'has tremendously expanded its size, reach, and focus through the opening of twenty-seven field offices around the world (from almost no offices in the early 1990s) and by providing project assistance to countries'.³⁶

It would of course be churlish to deny that international human rights law and organizations have in many ways empowered progressive social forces in third world countries. Even authoritarian governments have had to take human rights on board and take cognizance of criticisms made in IHROs from time to time.³⁷ But 'rights cannot be higher than the economic structure of society and its cultural development conditioned thereby'.³⁸ Furthermore, since IHROs focus more on civil and political rights, as they lack the mandate, resources and political backing to seriously influence outcomes in the realm of economic and social rights, they have had only a minimal impact on the welfare of ordinary peoples in the third world. Indeed, the emphasis on civil and political rights allows the pursuit of the neo-liberal agenda by privileging private rights over collective social and economic rights. It is for this reason that the TCC and Northern states have made the language of human rights their own. Equally significant is the realization that IHROs can help deflect radical movements into more official channels that can be controlled through procedural formalities.³⁹ That is to say, 'as mass radical movements have increasingly emerged around the claims for human rights and democratic entitlement, a host of international organizations have emerged to program this area'.⁴⁰ The task of IHROs appears to be, in other words, more damage control than the production of welfare states. The role of humanitarian organizations like the Office of the United Nations High Commissioner for Refugees

³⁶ *Ibid.*, at 150.

³⁷ See T. Risse, S. C. Ropp, and K. Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (1999).

³⁸ K. Marx and F. Engels, *Selected Works* Vol. 3 (1970), at 19.

³⁹ See generally Kennedy, 'The International Human Rights Movement: Part of the Problem?', 15 *Harvard Human Rights Journal* (2002) 101.

⁴⁰ Rajagopal, *supra* note 35, at 150.

(UNHCR), on the other hand, is to essentially look after the victims of expanding and rapacious global capitalism.⁴¹ Where societal conflict cannot be prevented by the work of IHROs and human rights NGOs, they are assigned the task of creating conditions for the functioning of neo-liberal post-conflict states.⁴²

3 International Environmental Institutions: Redistribution of Global Property Rights

In the field of the environment 'a growing number of UN specialised agencies and other international organisations with some measure of competence over environmental matters have become important institutions of global and regional environmental governance ... Equally important is the extensive network of supervisory bodies, conferences of the parties and commissions established by environmental treaties ...'.⁴³ IIs with a mandate to protect the environment include the UNEP, WTO, Commission on Sustainable Development (CSD), the International Maritime Organization (IMO), the World Bank (the Global Environment Facility, in particular), Food and Agricultural Organization (FAO), International Atomic Energy Agency (IAEA), UNESCO, and the five UN regional commissions.⁴⁴ In addition, there are the treaty mechanisms and bodies established by individual international environmental law conventions.⁴⁵

As in the case of IHROs, it would be absurd to suggest that international environmental laws and institutions do not go some way towards promoting and protecting the global environment. But it is equally true that in the *absence of an effective implementation of the principle of common but differentiated responsibility based on the premise of the historic responsibility of the North in causing environmental damage*, the operation of international environmental institutions (IENI) and laws involve the redistribution of property rights in favour of the advanced capitalist countries.⁴⁶ For when these countries developed, 'global private rights were granted to polluters; now, developing countries are asked to agree to a redistribution of those property rights without compensation for already depleted resources'.⁴⁷ On the other hand,

⁴¹ Chimni, 'The Geopolitics of Refugee Studies: A View from the South', 11 *Journal of Refugee Studies* (1998) 350.

⁴² Chimni, 'Refugees and Post-Conflict Reconstruction: A Critical Perspective', in E. Newman and A. Schnabel (eds), *Recovering From Civil Conflict: Reconciliation, Peace and Development* (2002) 163.

⁴³ P. W. Birnie and A. E. Boyle, *International Law and the Environment* (2nd ed., 2002), at 34–35.

⁴⁴ *Ibid.*, at 47 *et seq.*

⁴⁵ *Ibid.* For an overview of international environmental institutions see Desai, 'International Environmental Institutions: An Overview', in R. Dolzer and J. Thesing (eds), *Protecting our Environment: German Perspectives on a Global Challenge* (2000) 231.

⁴⁶ Mickelson, 'South, North, International Environmental Law, and International Environmental Lawyers', 11 *Yearbook of International Environment Law* (2000) 52.

⁴⁷ P. Uimonen and J. Whalley, *Environmental Issues in the New Trading System* (1997) 66. According to Sachs, 'rich people are rich because ... they were lucky enough not to have some of the ecological barriers that the poor people have', Sachs, 'Poor Man's Economist' Interview by Amy Barrett (2002) <http://www.nytimes.com/2002/12/15/magazine/15QUESTIONS.html?ex=1041393815&ei=1&en=9c2bed33e9d92c03>.

environmental laws that are irksome to the operation of transnational capital are often disregarded (for example, the Kyoto Protocol). An important reason for this is that

corporations influence almost every negotiation on the environment that has taken place under the auspices of the UN — including the Montreal Protocol to Protect the Ozone Layer, the Kyoto Protocol to the climate convention, and the biodiversity convention and its Biosafety Protocol. In the climate convention, even UN agencies such as UNEP and ... UNCTAD have offered their services as brokers for corporations interested in emission trading.⁴⁸

Finally, where possible, the environment cause is turned against the very victims of historical injustice to legitimize non-tariff barriers against their exports, as in the WTO.⁴⁹

4 *International Criminal Tribunals: Necessary Element of an Imperial Global State*

A significant new development is the establishment of international criminal tribunals. The past decade has seen *inter alia* the creation of the ad hoc International Criminal Tribunal for the Former Yugoslavia (1991), the ad hoc International Criminal Tribunal for Rwanda (1994) and the International Criminal Court (1998).⁵⁰ The rapid strides in international criminal law and jurisdiction, coupled with related developments in international human rights law (the *Pinochet* case) represent a movement towards making individuals accountable for their criminal conduct. The establishment of international criminal tribunals (ICT) form *a crucial element* of the nascent global state. While welcome in themselves, powerful states are unlikely to be the subject of their attention. A North-South divide characterizes the punishment of international criminal conduct. It is extremely unlikely that the leaders and armed personnel of Northern states would ever be dragged before the ICC. In any case, the US is extremely hostile to the ICC and is busy signing bilateral agreements with states to ensure that no American soldier is ever tried before it.⁵¹ Indeed, the Bush administration has 'carried on a determined drive to destroy the court' before it can begin its task of judging those accused of war crimes and crimes against humanity.⁵² On the other hand, ICTs may be used to (a) threaten third world leaders who dare to question and oppose hegemonic states; and (b) give a humane and cathartic dimension to the ravages of global capitalism for it does not involve attention to the

⁴⁸ A. Aggarwal *et al.* (eds), *Poles Apart* (2001) 382.

⁴⁹ Chimni, *supra* note 22, at 133.

⁵⁰ The Rome Statute establishing the International Criminal Court has already entered into force. As of February 2003, 89 states had ratified it.

⁵¹ On the US unwillingness not to be party to the ICC, *The Economist* aptly noted in an editorial comment: 'In the 1990s, the United States played the key role in setting up tribunals to put on trial individuals accused of war crimes and genocide in Rwanda and ex-Yugoslavia. Yet, alone among its allies, it now opposes the permanent international criminal court ... primarily because it could not win an absolute exemption for its own soldiers. And that attitude is nothing new: American governments have seen the corpus of international law as a useful device to restrain or vilify other nations, while refusing to let it apply to their own.' *The Economist*, 5 December 1998.

⁵² Lewis, 'On the West Wing', *The New York Review of Books* (13 Feb. 2003) 7.

international causes of internal conflicts in third world societies, whose manifestation in unspeakable violence is their real subject.

C International Political Institutions: The UN and the Legitimization of Neo-liberalism and Use of Force

The UN may be described as the key international political institution in the world. Today, the relationship between the state and the UN is being reconstituted by limiting the sovereignty of the third world and affecting its ability to shape the future world order. This reconstitution is a cumulative result of (a) assigning a greater role to the corporate actor within the UN; (b) redefining the principle of non-use of force by legitimizing the use of force by the Western power bloc against third world states; and (c) adopting the neo-liberal state as a model for its member states, manifested in particular in its peace-building efforts in post-conflict societies. The reconstitution of the relationship of the third world state and the UN is critical for the emergence of the imperial global state as it, among other things, confers legitimacy on a new set of ideas and actions that go to promote the interests of the TCC. Each of the features mentioned above deserves brief elaboration.

1 Growing Role of the Private Corporate Actor

The private corporate actor is coming to play a greater and more active role within the UN system. The Global Compact idea is its embodiment.⁵³ 'There is a danger of such linkages being exploited . . . while only paying lip-service to the ideals and principles for which the United Nations was created . . . Moreover, because the actors who are being linked up with have considerably more financial and political clout, there is a danger that the United Nations will come out the loser'.⁵⁴ Indeed, the attempt to *bluewash* the image of transnational corporations is not in the realm of possibility, but a reality today.⁵⁵

The invasion of the UN system by the private corporate actor has been underway for some time. In the 1970s and 1980s international organizations such as UNIDO, UNCTAD and UNDP were 'facilitating the further liberalization of international and national markets' by heavily promoting free trade and export-processing zones of

⁵³ United Nations Secretary-General Kofi Annan first proposed the Global Compact in an address to the WEF on 31 January 1999. He challenged world business leaders to help build the social and environmental pillars required to sustain the new global economy and make globalization work for all the world's people. The Compact's operational phase was launched at a high-level event at UN Headquarters on 26 July 2000. The meeting, chaired by the Secretary-General, brought together senior executives from some 50 major corporations and the leaders of labour, human rights, environmental and development organizations. For more about the Global Compact see <http://www.unglobalcompact.org/Portal/>.

⁵⁴ J. Oloka-Onyango and D. Udigama, *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*, UN Doc. E/CN.4/Sub.2/2000/13, 15 June 2000, Sub-Commission on the Promotion and Protection of Human Rights, 52nd session; Sethi, 'Corporate Codes of Conduct and the Success of Globalization', 16 *Ethics and International Affairs* (2002) 100.

⁵⁵ See, for example, Mimkes, 'Bayer and the UN Global Impact: How a Major Chemical and Pharmaceutical Company Bluewashes its Image' at http://www.cbgnetwork.org/home/UN_Global_Compact/un_global_compact.html.

interest to transnational corporations.⁵⁶ The private corporate actor today participates more directly in the UN system. Take, for example, the International Telecommunications Union (ITU). As Braithwaite and Drahos point out,

some of the most direct forms of capture of international regulatory processes are to be found at the International Telecommunications Union (ITU), where US companies in particular use support of their government to gain the chairmanship of technical committees, which they use to write their own patents into global technical standards. Three hundred companies have succeeded in placing their employees on ITU committees.⁵⁷

The UN also increasingly turns to the corporate actor for financing the Organization and is coming to adopt corporate management philosophy in the running of it.⁵⁸ What may thus be called *the process of privatization of the UN system* reduces the possibility of UN forums being at the centre of collective action by third world states to constrain these giant private actors. Consider in this regard the following developments over the last decade: abandonment of attempts to adopt a code of conduct for transnational corporations, the shutting down of the UN Center for Transnational Corporations (CTC), the 'repositioning' of UNCTAD, and the marginalization of development issues in the UN system.⁵⁹ While the UN still continues to pay obeisance to the global poor, it actively promotes the interests of transnational capital and makes futile appeals to it to serve the cause of international justice.

2 Embracing the Neo-liberal Mode: The Case of Post-conflict Societies

It comes therefore as no surprise that the UN is prescribing the neo-liberal state as the norm to member states. This becomes evident from the model of reconstruction recommended to post-conflict societies. Today, as the UN Secretary-General (UNSG) has noted, 'virtually every part of the United Nations system, including the Bretton Woods institutions, is ... engaged in one form of peace-building or another ...'.⁶⁰ Indeed, the UN pretends to be a surrogate state until 'peace building' has been successfully achieved and an accountable state put in place. The meaning of 'an accountable post-conflict state' is a state that can come to terms with the legitimacy crises and social protest generated by the implementation of a neo-liberal adjustment programme and greater integration into the world economy. In the circumstances, formal compliance with the norms of liberal democracy, as is insisted on, changes very

⁵⁶ B. Emadi-Coffin, *Rethinking International Organization: Deregulation and Global Governance* (2002), at 123 and 151.

⁵⁷ Braithwaite and Drahos, *supra* note 4, at 490.

⁵⁸ Bennett, 'Multinational Corporations, Social Responsibility and Conflict', 55 *Journal of International Affairs* (2002) 403; Lee, Humphreys, and Pugh, 'Privatization in the United Nations System: Patterns of Influence in Three Intergovernmental Organizations', 11 *Global Society*, (1997) 339; UNHCR, UNHCR Corporate Code of Conduct (2000) <http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=PARTNERS&id=3d904d954&ID=3d904d954&PUBLISHER=TWO>.

⁵⁹ See South Centre, *For a Strong and Democratic United Nations: A South Perspective on UN Reform* (1997).

⁶⁰ UNDP, Management Development and Governance Division, Bureau for Development Policy: *Governance in Post-Conflict Countries* (2000) <http://magnet.undp.org/Docs/crisis/monograph/Monograph.htm>, para 21.

little.⁶¹ The parties which participate in ‘post-conflict’ elections are compelled, given the absence of adequate resources, to follow World Bank and IMF prescriptions.⁶² The post-conflict state therefore continues to be repressive and its resources continue to be privatized. There is consequently little possibility of implementing a reconstruction agenda that pays heed to people’s needs and frames policies with their participation in mind.

3 *Sovereignty and the Use of Force: Monopoly of the Western Power Bloc*

The UN is also the medium through which the Western power bloc exercises a global monopoly over the legitimate use of force. The post-Cold War period has seen the emergence of a globalized Western state conglomerate, which has been termed ‘an integrative authoritative organization of violence’.⁶³ This power bloc comprises the states of North America, Western Europe, Japan and Australasia. Shaw points out that ‘the Western state’s authoritative deployment of violence is now structurally reinforced by its increasing, if problematic integration with the legitimate international world authority-structure of the United Nations’.⁶⁴

It is clear that the UN depends for both its resources and its political direction on the West, and that the united West is mostly able to mobilize the UN system to its own purposes. Despite the deeply ambiguous relationship between the main component of the West (the USA) and the UN, it is difficult to conceive of either without the other. The mutual dependence of Western power and the UN system is fundamental. Major and minor exercises of Western military power have been legitimated through the UN; the UN has not authorized or undertaken any significant actions against Western interests.⁶⁵

When the Western state conglomerate cannot act through the UN it turns to its own organizations like NATO, which has been repositioned and expanded in order to meet the security concerns of the Western power bloc in the post-Cold War era. The bombing for six weeks of the former Yugoslavia in 1999 was one instance of the Western power bloc acting outside the framework of the UN Charter. But even in cases when the power bloc acts outside the framework of the UN, it returns to it for legitimacy, even if tenuous, as it did in the case of Kosovo.⁶⁶ While the war against Iraq disclosed differences between the Western bloc countries, it is important to remember, as Falk has pointed out, ‘even France and Germany, credited with taking an anti-American position, were arguing for an avoidance of war within the essential framework insisted upon by the U.S and the U.K’.⁶⁷ Second, the differences did not lead

⁶¹ Ihonvbere, ‘The State, Constitutionalism and Democratization’, 490 *Seminar* (2000) 24.

⁶² Chimni, *supra* note 42, at 165–166.

⁶³ M. Shaw, *Theory of the Global State: Globality as Unfinished Revolution* (2000) 199.

⁶⁴ *Ibid.*, at 200.

⁶⁵ *Ibid.*, at 216.

⁶⁶ It has thus been argued that Security Council Resolution 1244 (1999) retrospectively justified the bombing of former Yugoslavia. This is an erroneous view. See Chimni, ‘The International Law of Humanitarian Intervention’, in *State Sovereignty in the 21st Century* (2001) 115.

⁶⁷ Falk, ‘Resisting the Global Domination Project: Interview with Prof. Richard Falk’, *Frontline*, 25 April 2003. Available at <http://www.flonnet.com/fl2008/stories/20030425004002300.htm>.

to any action within the UN to stop the war. Moreover, when the war was over conciliatory gestures were forthcoming from all the 'dissenting' states, culminating in UN Security Council Resolution 1483 of 22 May 2003, in which the capitulation was formalized.

In terms of international law the reconstitution of the relationship between sovereignty and use of force is taking place through (a) attempts to declare the principle of sovereignty an anachronism in the context of human rights violations, thereby justifying the idea of armed humanitarian intervention;⁶⁸ and (b) attempts to reinterpret Articles 2(4) and 51 of the UN Charter to justify the pre-emptive use of force. The third world hopes to use the contradictions and differences of opinion within the Western power bloc on the doctrine of pre-emptive use of force to prevent a complete change in the rules governing the use of force. However, this is not a serious possibility since no Western state wants to displease the US.

D Global Networks of Sub-national Institutions and Spaces: Eroding Sovereignty from Below

1 Web of Sub-national Authorities

Underpinning the emerging global state is a web of sub-national authorities and spaces that represent, along with the world of NGOs, its decentralized face. A network of sub-national authorities and spaces helps deal with and surmount the problem of state sovereignty in a bid to push forward the ongoing globalization process. Their growth is crucial in eventually replacing the sovereign state with a set of disaggregated authorities that could be influenced and regulated by the emerging global state. As Slaughter points out:

The state ... is disaggregating into its separate, functionally distinct parts. These parts — courts, regulatory agencies, executives, and even legislatures — are net-working with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order. Today's international problems — terrorism, organised crime, environmental degradation, money laundering, bank failure, and securities fraud — create and sustain these relations.⁶⁹

Increasingly, as others have also noted, 'government regulators, mayors, professional associations, and others, operate transnationally and thereby constitute a variety of cross-border networks'.⁷⁰ While the role of transgovernmental order should not be overstated, it reveals how sovereignty can be disaggregated and placed in the service of the emerging global state.⁷¹

⁶⁸ Chimni, *supra* note 66.

⁶⁹ Slaughter, 'The Real New World Order', 76 *Foreign Affairs* (1997) 184.

⁷⁰ S. Sassen, *Global Networks: Linked Cities* (2002) 2.

⁷¹ Sassen, 'The State and Economic Globalization: Any Implications for International Law?', 1 *Chicago Journal of International Law* (2000) 109.

2 Decentred Law-making Processes

The state is also no longer the exclusive participant in the international legal process, even though it remains the dominant actor in law-making. The globalization process is creating ‘a multitude of decentred law-making processes in various sectors of civil society, independently of nation-states’.⁷² According to Teubner, ‘*Lex Mercatoria*, the transnational law of economic transactions, is the most successful example of global law without a state’.⁷³ It is ‘the paradigmatic case’.⁷⁴ Thus, for example, the work of the Basle Committee has been crucial in regulating the liquidity and solvency of banks in individual jurisdictions in the United States and the European Union.⁷⁵ What is worrisome is the absence of transparency and the lack of a ‘public’ voice in the emergence of law without a state.⁷⁶ Second, the deterritorialized legal order takes advantage of its well-honed internal practices to subvert state legal orders, in particular in third world countries. Thus, intra-firm transactions are used by transnational corporations to avoid paying taxes and respecting foreign exchange laws of these countries. Third, global law without the state often does not take into account the socio-economic context in third world countries.⁷⁷

3 Growing Network of Cities

Finally, the global state is underpinned by a network of cities that are coming to play a crucial role in the globalization process. According to Sassen, ‘the managing and servicing of much of the global economic system takes place in a growing network of global cities and cities that might be best described as having global city functions’.⁷⁸ To put it differently, the firm, market and state are rendered global through a system of cities. They are today the international financial and service centres of the world. Indeed, the connectivity of these cities is the infrastructure of the emerging global state. Thus, an ‘alternative metageography of a network of cities’ is being

⁷² G. Teubner, *Global Law without a State* (1997), at xiii.

⁷³ *Ibid.*, at 3.

⁷⁴ *Ibid.*, at 8. The practices of *lex mercatoria* include standard form contracts, ICC INCOTERMS, customs of trade, voluntary codes of conduct, international commercial arbitration, private institutions formulating legal rules for adoption, intra-firm contracts and the like. In response to criticism that *lex mercatoria* is still dependent on the sanctions of national courts, Teubner writes that ‘it is the phenomenological world construction within a discourse that determines the globality of the discourse, and not the fact that the source of use of force is local’, *ibid.*, at 13. In other words, the fact that the law without the state eventually invites its reinvention through international bodies like UNCITRAL or receives eventual state sanction does not take away from the fact that they originated in the practices of non-state actors.

⁷⁵ J. Weiner, *Globalisation and the Harmonisation of Law* (1999), at Ch. 3.

⁷⁶ As Alston points out, the growth of governmental networks ‘implies the marginalization of governments as such and their replacement by special interest groups ... it suggests a move away from arenas of relative transparency into the back rooms’, Alston, ‘The Myopia of the Handmaidens: International Lawyers and Globalization’, 8 *EJIL* (1997) 441.

⁷⁷ For example, if one accepts the fact there is no single global financial market but that ‘globalized finance consists of local markets, rooted in different socio-economic structures, patterns of savings and investment, and regulatory traditions’ then it is necessary to consider the impact of global financial deregulation and reregulation on third world countries. Picciotto and Haines, ‘Regulating Global Financial Markets’, 26 *Journal of Law and Society* (1999) 355; Weiner, *supra* note 75, at 136–139.

⁷⁸ Sassen, *supra* note 70, at 2.

engendered.⁷⁹ But it needs to be recognized that the coming together of cities has also a centralization dynamic at work that places the city in the South in a hierarchical order dominated by the cities of the North: New York, London, Tokyo, Frankfurt, Geneva and others.⁸⁰ This centralization dynamic is a function of concentration in control, ownership and profit appropriation. The cities in the South, on the other hand, have the significant function of recycling ideas and norms and making available in the form of subsidiary firms a set of services (accountancy, advertising, banking/finance, law, etc) for the operation of transnational capital. It is also in cities that the TCC culture is reproduced and embedded.

3 The Nascent Global State: Further Reflections on Process and Implications

The global state under construction has serious implications for the states and peoples of the Third World. Among other things, the network of international law and institutions that constitute it are undermining democracy at both inter-state and intra-state levels. First, the process through which sovereign economic, social and political decision-making is being relocated from third world states to IIs is marked by an absence of transparency and effective participation. Second, despite the increasingly intrusive nature and function of IIs, they remain unaccountable in international law to those who are affected by their acts of omission and commission. The consequence of these two features is the substantial transformation of the meaning of democracy and the resulting establishment of polyarchy in third world countries. The IIs seek to sustain and legitimize the state of affairs by deploying their knowledge production and dissemination functions to discredit alternative frameworks of development (or non-development). These aspects of the operation of IIs may be considered in a little more detail.

A Absence of Effective Participation in IIs

1 WTO Negotiations: Absence of Deliberative Democracy

Today third world states are being compelled to relinquish sovereign economic, social and political space to IIs without effectively participating in the negotiations leading to the adoption of relevant treaty regimes or, in other cases, in the decision-making afterwards. An instance of the first is the negotiation and adoption of legal texts constituting the Final Act of the Uruguay Round of Multilateral Trade Negotiations that led to the establishment of the WTO. Things have not changed since, as is evidenced by the protest of a large group of third world countries, in particular African countries, at being continually sidelined in WTO talks at the Third Ministerial

⁷⁹ Taylor, Walker and Beaverstock, 'Firms and their Global Service Networks', in Sassen, *supra* note 70, at 95.

⁸⁰ Sassen, *supra* note 70, at 6 *et seq.*