The New Haven School of Jurisprudence and Non-State Actors in International Law in Policy Perspective

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The New Haven School defines law as a process of decision that is both authoritative and controlling. It provides an intellectual apparatus to allow those who make use of it to clarify goals, to place past decisions in relation to the goals so clarified and to appraise such decision trends for their compatibility with and approximation to the clarified goals; it will enable observers to project future development in decision and to invent alternatives to approximate the preferred goals.

This article demonstrates how the New Haven School’s methodology can be applied to the analysis of non-state actors in international law. The New Haven School dissects “decision” into seven discrete, but interrelated functions: intelligence, promotion, prescription, invocation, application, termination and appraisal. The New Haven School’s approach will identify which non-state actors are effective decision-makers in which particular decision function in the global decision process. The New Haven School is especially empowering individuals and non-state actors as they participate in the process of decision.

Key Words: New Haven School, observational standpoint, theories of law and theories about law, policy-orientation, process of decision, decision functions, non-state actors, the Economic Social Council, Specialized Agencies, civil society

Preface

This article consists of two parts: Part One introduces basic features of the New Haven School of Jurisprudence which distinguish the New Haven School from all other major jurisprudential schools of thought and explains how the New Haven School’s intellectual apparatus is organized for decision-making; and Part Two shows how the intellectual framework of the New Haven School can be applied to the analysis of the growing role of non-state actors as decision-maker in the global process of authoritative decision.

Part One: The New Haven School of Jurisprudence

I. Introduction

The New Haven School of Jurisprudence was first developed by Professors Myres S. McDougal and Harold D. Lasswell, and further refined by Professor W. Michael Reisman, all of Yale Law School.¹ The locus classicus of the New Haven School is Lasswell and McDougal’s two-volume treatise, Jurisprudence for a Free Society: Studies in Law, Science and Policy (1992).² In their celebrated article in the Yale Law Journal, McDougal and

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Lasswell called for “conscious, efficient, and systematic training for policy-making” as a purpose of legal education “to serve the needs of a free and productive commonwealth.” And they said:

None who deal with law, however defined, can escape policy when policy is defined as the making of important decisions which affect the distribution of values. Even those who still insist that policy is no proper concern of a law school tacitly advocate a policy, unconsciously assuming that the ultimate function of law is to maintain existing social institutions in a sort of timeless status quo; what they ask is that their policy be smuggled in, without insight or responsibility. But neither a vague and amorphous emphasis on social “forces,” “mores,” and “purposes” nor a functionalism that dissolves legal absolutism for the benefit of random and poorly defined ends nor a mystical invocation of the transcendental virtues of an unspecified good life can effect the fundamental changes in the traditional law school that are now required to fit lawyers for their contemporary responsibilities. Their direction is toward policy but their directives are at too high a level of abstraction to give helpful guidance. What is needed now is to implement ancient insights by reorienting every phase of law school curricula and skill training toward the achievement of clearly defined democratic values in all areas of social life where lawyers have or can assert responsibility. Their theory about law is blended by the traditions of American legal realism and some of the best contemporary thought of the social sciences, and exhibits the common framework of inquiry, distinctively identifiable in its coherent and systematic approach to the study of law. They call this new theory “a policy-oriented jurisprudence” since a jurisprudence that conceives law as a product of, and an instrument in, society must promote preferred ends of a society. It is sometimes called “a configurative jurisprudence,” which has at least three major characteristics: (a) it must be contextual, i.e., it must perceive all features of the social process of immediate concern in relation to the manifold of events comprising the relevant whole; (b) it must be problem-oriented; and (c) it must be multi-method.

In early 1960s some observers started referring to this emerging group of scholars from New Haven and their characteristic conceptions of law as “The New Haven Approach” or “The Yale School of International Law,” in allusion to, and contrast with, Hans Kelsen’s Vienna School of positivism. Professor Eugene V. Rostow observed way back in 1973 as follows:

[T]he most remarkable feature of McDougal’s influence as a teacher is that so few of his pupils experience a need to demonstrate their independence by rebelling. . . . He has established not a sect, but a school. In almost every case, his students are indeed scholars, not acolytes. What they learn from McDougal and Lasswell is a systematic way to study Law, and to judge it, as an integral part of the social process, in its relationship to all the forces, social and political.

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4 Id. at 46-47.
moral, which shape the law, and guide its course through time.\textsuperscript{11}

“A school of thought” emerges both self-consciously and by being characterized and identified as such by others because of the common use by its proponents or supporters of basic tenets underlying an intellectual methodology. A group may develop into a school when its practice of the common mode of expression or its application of a common methodology flourishes at a given time and space. By 1974 a group of proponents of a policy-oriented jurisprudence came to be known as “the New Haven School.”\textsuperscript{12} The New Haven School has since then often considered comparable to such schools of thought as the Austrian or Vienna School of Economics,\textsuperscript{13} the Vienna Circle of Philosophy,\textsuperscript{14} and the Chicago School of Economics.\textsuperscript{15}

II. Self-Scrutiny

The New Haven School is concerned with a process in which individual human beings try to influence the way social choices are made about the production and distribution of their preferred values, i.e., what they want, and with the ways in which those decisions should be made.

The New Haven School’s focus is on human beings: who makes decision and what consequences that decision will create on other human beings.

Lasswell and Abraham Kaplan called this focus on human beings “hominocentric politics,” and defined it: “As science, it finds its subject matter in interpersonal relations, not abstract institutions or organizations; and it sees the person as a whole, in all his aspects, not as the embodiment of this or that limited set of needs or interests. As policy, it prizes not the glory of a depersonalized state or the efficiency of a social mechanism, but human dignity and the realization of human capacities.”\textsuperscript{16} Thus, we deal with the sovereignty of the people and not, says Reisman, “a metaphysical abstraction called the State.”\textsuperscript{17}

At the fundamental level the New Haven School starts with the self-scrutiny of an observer or a decision-maker because it is human beings that make choices and those choices are influenced by their self-system. The New Haven School, at the outset, appreciates that an observer cannot be a wholly objective analyst of the community process he examines as he is both a product of, and a participant in, that very process.\textsuperscript{18} The New Haven School thus requires that you must, as a matter of thinking mode, disengage and separate yourself from the object of your observation. That can only be achieved by your careful self-scrutiny by checking (i) your emotional or neurotic tendencies; (ii) parochial tendencies that everybody accumulates, knowingly and unknowingly, over time as you grow up within your groups, be they ethnic, linguistic, geographical,


\textsuperscript{13} W. Michael Reisman, “The View from the New Haven School of International Law,” 86 American Society of International Law Proceedings 118 (1992);


\textsuperscript{16} “[M]cDougall’s] work has pervaded professional consciousness to the point where we may say, as Auden said in his eulogy of Freud, that ‘To us he is no more a person/Now but a whole climate of opinion/under whom we conduct our different lives.’” W. Michael Reisman, “Theory About Law: Jurisprudence for a Free Society,” 108 Yale Law Journal 935, 939 (1999).


\textsuperscript{21} “It is well known that the technique of analyzing definitions and criticizing propositional statements does not enable the ego to obtain access to ‘inconscious’. The conscious process itself may be under the domination or repetitive compulsions which are outside the awareness of the thinker. If rationality includes the notion of freedom of choice and hence freedom from obsession and compulsivity, it is obvious that rational thinking requires the use of appropriate procedures by means of which the thinker obtains access to pertinent facts about the self.” Harold D. Lasswell, “Clarifying Value Judgment: Principles of Content and Procedure,” 1 Inquiry 87, 92 (1958).
Facts do not organize themselves into concepts and theories just by being looked at; indeed, except within the framework of concepts and theories, cannot be answered without some preconceptions as he establishes the causal relationship among them collects the facts necessary for his inquiry and how observation of those events. How an observer concludes an observer has drawn from his inquiry; and (iii) expectations about his own losses or gains. An environment in which an observer finds himself reflects itself through his perspective and attitudes; his standards of behavior have been fashioned by continuing socialization within members of his groups and his reference to non-group members. A family is a primary group in a sense that how his family socialized the observer bears a significant effect upon his attitudes and perspectives. The extent to which he is bound by religion, traditions, mores and customs of the immediate community in which he lives shapes his subjectivity. Beyond such a primary environment, he has been exposed to a broader environment: the level of education he has acquired, the range of associations he has affiliated with, and so on. The predispositional variables can be most conveniently described in terms of: (i) the identifications an observer establishes in his relation to other individuals and groups; (ii) his demands for preferred interests, including those of pursuing an inquiry; and (iii) expectations about his own losses or gains. Social inquiry cannot proceed wholly free from bias—from the bias of those who conduct the inquiry and of those who appreciate its outcome. Objectivity cannot be achieved by simply collecting facts and presuming that they speak for themselves. Facts are not events; they are more often than not the conclusions an observer has drawn from his observation of those events. How an observer collects the facts necessary for his inquiry and how he establishes the causal relationship among them cannot be answered without some preconceptions as to the events he is observing and the goals he seeks.

The New Haven School establishes an observational standpoint by distinguishing theories about law and theories of law as a point of departure. The former is for scholars or disengaged observers to adopt an independent position free from official predispositions in order to develop their capacity, both intellectual and technical, required for development of policy in the promotion of common interest of a larger community. The latter is for official decision-makers to organize their intellectual apparatus as a set of its policies, procedures, and guidelines for making decisions and for justifying their choices. It is designed to maintain power by ensuring the stability, consistency and continuity of organizational practice and authority. The New Haven School refers to this official intellectual apparatus as “theories of law.” The officials practice these theories of law for obtaining and justifying decision outcomes.

The objectives of “theories about law” are (i) to better clarify policies in the making of a choice in life; (ii) to survey trends in decision so as to examine the extent to which preferred outcomes have been achieved in past policies; (iii) to analyze factors which accounted for success or failure of such policies; (iv) to project a future course of events if no intervention takes place; and (v) to invent and evaluate alternative approaches to the management of resources in order to fill the gap between policy objectives and projected future outcomes.

Although both theories of and about law are complementary and interaffective to each other, the boundary of intellectual orientation is clearly drawn between them.

III. Focus of Inquiry

The New Haven School applies the most comprehensive analytical method of the social sciences to enabling an observer to extend his inquiry to all relevant variables to locate law in its larger context. It does not consider law as a body of rules; rather, it is interested in decisions and the
consequences of the making and applying of rules for human beings since rules are not given and they are continually being made and remade. The New Haven School defines law as a process of authoritative decision, combining requisite elements of authority and control. The New Haven School’s unparalleled contribution is the throwing out of the notion that law is no more than an autonomous body of rules; it has rigorously introduced policy consideration into studies in law. For us, it is not rules that make a decision, which is a culminating choice among policy options, but the individual person that decides or makes choices.

Most rules, proverbs, and principles exist in pairs of complementary opposites because we live in a plural society, in which many different individuals and groups make demands for values with varying expectations about the conditions under which these demands can be met. The legal principles of these plural societies are also expressed to accommodate competing interests of all different groups. Naturally, they invoke one set of principles, which are themselves complementary, to justify their demands.

What would guide one to choose one set of principles over the other set of principles in competing or conflicting value demands? In the words of Lasswell and McDougal:

Just as there can be no neutral or autonomous theories of law, in the sense of rules devoid of policy content, so also there can be no theories about law, in the sense of knowledge or ignorance, without policy consequences. In the context of these exigencies, it is the unique opportunity of observers specialized to inquiry about law not merely to relate law to its past policy content, but rather, and further, to clarify and promote change toward policies better designed to serve the particular kind of public order for which they are willing to commit themselves with their fellow community members. It is only by the deliberate clarification of, and explicit commitment to, basic community goals—at all levels of abstraction and from both short-term and long-term time perspectives—that dependable, creative, and economic guidance can be given to the examination of past trends, the allocation of efforts to the assessment of factors affecting decision, and the evaluation of future probabilities and alternatives. Such policy orientation led to the formulation of the comprehensive, yet economical, intellectual apparatus by which to make a choice in a contextual, problem-solving and multi-method approach.

The New Haven School considers power an indispensable component of law. When decision or choice is made in accordance with expectations about who is to make what decisions, by what criteria, and by what procedures, that choice must be realized in practice. Control is such requisite power as to make decision effective and enforced. Authority supports power and power in turn sustains authority. “When decisions are authoritative but not controlling, they are not law but pretense; when decisions are controlling but not authoritative, they are not law but naked power.” Hence, law is considered a process of decision that is both authoritative and controlling.

The New Haven School does not describe the world’s different community decision processes through a dichotomy of national and international law, in terms of the relative supremacy of one system of rules or other interrelations of rules. Rather, the New Haven School describes them in terms of the interpenetration of multiple processes of authoritative decision of varying territorial compass.

The focus of inquiry must accordingly be directed to a social process in which people influence one another consciously or otherwise. A clear focus is thus set on a process of interaction relating to particular problems in question. The New Haven School speaks of “process” because there is an on-going interaction among people through time. The term “process” connotes that this interaction is one of the continual changes in interrelationships over a time period. We speak of “social” because the flesh-and-blood living beings are participants in that process of interaction, and we speak of “the world community” because the existence of the high frequency of interaction and the intensity of interdependence on a global scale causes the aggregate of people inhabiting this “shrunken globe” to realize their common stake. The term “community” has very broad meanings and is often defined loosely in daily conversation. When a group of people who share both common perspectives and

26 Id. at 26.
a sufficiently high frequency of interaction among them are territorially based, it is appropriate to call it “a community.”28 In any level of community from municipal through regional to global, people seek to broaden their identifications, expectations, and demands about values in both organized and unorganized ways transcending national territorial boundaries since they have become increasingly aware that the conditions under which these values can be secured are rapidly transcending the artificial man-made lines inherited from the arbitrary confines of feudalism. Interdependence on a global scale demonstrates the presence of the world community.29 The explicit perception of the world community is found in all New Haven writings, of which the most celebrated article is Rhodesia and the United Nations: The Lawfulness of International Concern by McDougal and Reisman.30 Criticizing the contention that “whatever the Rhodesians have done has been wholly within their own country”31 and, consequently, is insulated from international concern, and it affects nobody else, they argue that:

In the contemporary intensely interdependent world, peoples interact not merely through the modalities of collaborative or combative operations but also through shared subjectivities—not merely through the physical movements of goods and services or exercises with armaments, but also through communications in which they simply take each other into account. The peoples in one territorial community may realistically regard themselves as being affected by activities in another territorial community, though no goods or people cross any boundaries. Much more important than the physical movements are the communications which peoples make each other.32

To describe the world social process or any level of process, the New Haven School adopts the following scheme:

Man (actor, participant) acts to optimize values (preferred events) through institutions affecting resources.33

The term “values” is used here without any of the metaphysical or other connotations it may have in ordinary language. People in the world community both make demands and become subjected to counter-demands while trying to maximize all or certain values at their disposal in relation to other participants in the world social process. Eight value-institution categories are used to analyze this process. As Lasswell explains, “It is convenient to think in terms of a short list, and to use a list that roughly approximates the categories by which data are obtained and processed in the historical and social sciences.”34 These eight value institutions are: (1) Power: the giving and receiving of support in government, politics, and law; (2) Wealth: the production and distribution of goods and services, and consumption; (3) Enlightenment: the gathering, processing, and dissemination of information; (4) Skill: opportunity to acquire and exercise capability in vocation, professions, and other social activities; (5) Well-being: safety, health, and comfort; (6) Affection: intimacy, friendship, and loyalty; (7) Respect: recognition, whether personal or ascriptive; (8) Rectitude: participation in forming and applying norms of responsible conduct.35 These eight categories are not ranked in order of importance in any culture; we assume that the relative position of value varies with respect to subjectivities, time, and culture. These categories of preferred events enable the observer to describe social reality more specifically and systematically than does a simple descriptive fiat of the term “social reality.”36 When these value-institution categories or their equivalents are used to analyze any social process, they can be more specific in any degree desired.

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28 There exist communities at various levels of intensity from a small hamlet through a city to a body politic and beyond. The level of community can be defined according to the range of value effects resulting from a given social interaction. See Talcott Parsons, The Social System 91 (New York: Free Press, 1951); Robert MacIver, Community: A Sociological Study 22-30 (Abingdon, Oxon: Frank Cass & Co., Ltd, 1936, 3rd edn). See generally Carl J. Friedrich (ed.), Community: Nomos II (New York: Liberal Arts Press, 1959).

29 For the relevancy of the world community, see McDougal, Lasswell & Reisman, “Theories About International Law,” supra note 7, at 189-195; C. Wilfred Jenks, Law in the World Community (London: Longmans, 1967).

30 Myres S. McDougal & W. Michael Reisman, supra note 27, at 1.


32 McDougal & Reisman, supra note 27 at 12.

33 See generally Lasswell and Kaplan, supra note 16.


35 For elaboration, see Lasswell & McDougal, Jurisprudence for as Free Society, supra note 2, at 335-373.

36 See Lasswell & Kaplan, supra note 16, at 56-73.
The description of events in a particular community in reference to the most comprehensive community of mankind facilitates the clarification of problems in question. The interaction among participants in any social process culminates at a certain point in time and space in specific events where participants lose or gain what they perceive as preferred interests. Such a culmination of events involving losses and gains is called "outcomes," the sequence of which can be differentiated in terms of pre-outcome, outcome, and post-outcome phases. The New Haven School has developed a conceptual technique based on cultural anthropology to describe any social process most systematically in terms of those who participate in it (Participants); the significant perspectives of the participants, i.e., their identification pattern, their value demands, and their expectations (Perspectives); the situations in which their interactions take place (Situation); the resources at their disposal on which they draw in order to achieve their demands (Bases of Power); the ways they manipulate and manage their bases of power to achieve their objectives (Strategies); the immediate results of the process of interaction (Outcomes); the long term effects of the outcomes and process (Effects).

As mentioned earlier, law is defined, in most comprehensive terms, as authoritative decision. It is a response from authorities to claims lodged by claimants who are participants in the social process on authoritative decision-makers demanding that their controversies arising from the process of interaction be resolved. Claims consist of "facts" as seen by claimants, claimants’ demands, and policy that would justify their demands.

In these multiple processes of decision-making, people make a decision to maximize their preferred events through institutions affecting resources. The New Haven School has dissected what the term ‘decision’ is made of in terms of its seven discrete, but interrelated decision functions as: (1) Intelligence: the gathering, processing, and disseminating of information relevant to the making of choices; (2) Promotion: the active advocacy of policy alternatives; (3) Prescription: the fashioning of one of competing policies as ‘law’ and projecting it as the authoritative policy of the community in question; (4) Invocation: the provisional characterization of events of deviation from prescriptions and the invocation of an authoritative response; (5) Application: the applying prescriptions to an alleged deviation, with sanction; (6) Termination: Putting an end to existing prescriptions and other arrangements that no longer reflect appropriate public order goals; (7) Appraisal: the on-going evaluation of the general performance of the decision process.

As each of these functions may be performed by different groups in a variety of settings, it is critical to identify who is performing which function, where, for what purpose and how. The New Haven School’s principles of content and procedure (i.e., what to examine and how to think about problems) will ensure that our analysis of the problem at hand is attuned to the realization of policy goals.

In his seminal contribution to the development of the New Haven School, Michael Reisman developed a notion that international lawmaking is “a process of communication,” in which three coordinate communication components are simultaneously transmitted to the target audience, i.e., “the policy content, the authority signal and the control intention.”

The New Haven School’s communications model, in the words of Reisman, liberates the inquirer from the limiting and, in the international context, the distorting model of positivism, which holds that law is made by the legislature. From the standpoint of communications theory, some law may indeed be made by specialized lawmaking institutions, but
any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior must be considered as functional lawmaking.41

To facilitate actual decision-making, the New Haven School specifies a set of intellectual tasks that is necessary for decision-making as “it is the range of tasks performed, as well as the quality of performance which determines the relevance of inquiry for policy.”42 Such specific intellectual tasks must include the following:

1. Clarification of the goals of decision;
2. Description of the trends toward or away from the realization of these goals;
3. Analysis of the conditioning factors that have accounted for past decision;
4. Projection of probable future developments, assuming no outside intervention; and
5. Invention of particular alternatives and strategies to the realization of the preferred goals.43

The New Haven School explicitly postulates a public order of human dignity as basic public order goals; it approximates the optimum shaping and sharing by all human-beings of all values: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude.

The intellectual apparatus that the New Haven School provides and the intellectual tools it equips you with will enable you to locate yourself in all contexts to understand where you can be most effective in the global process of decision. And so, it is no surprise that “the New Haven School can be especially empowering for individuals not associated with the state, a class that classical international law all but disenfranchised.”44

Now, let us see, as a case study, how New Haven’s intellectual apparatus can be applied to the analysis of the role of non-state actors in international law.

Part Two: Non-State Actors in International Law in Policy Perspective

I. Introduction

The notion of non-state actors itself derives from a dichotomy of the states as subjects of international law and other non-state entities as objects. Rosalyn Higgins’s comment is real today: “the whole notion of ‘subjects’ and ‘objects’ has no credible reality, and, in my view, no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint.”45 The centrality of the only “states as subjects” approach hinges on the creation of “the entrance requirements,” a technique employed by territorial elites to safeguard their vested interest by setting up a rigid requirement for participation by non-state entities in the organized arenas of formal law-making.46 In such organized arenas these states represented by their respective governments are gatekeepers. To illustrate, the Preamble of the Charter of the United Nations proclaims at the outset that it is “We the people” that set out our purposes and designed how to achieve them, but in the end it concludes that it is “our respective Governments” that agreed to establish the United Nations.

International organizations, though often referred to as non-state actors, are part of the gatekeepers, which are essentially the extension of the state apparatus, distinguished from the rest of the participants in the global decision process which is civil society in Antonio Gramsci’s sense, i.e., non-state and private entities.47 In zeroing in the organized arenas of formal law-making, conventional analysis in terms of government organs tends to overlook numerous private initiatives involved in the anterior processes that precede such formal law making in organized arenas.48 This is unfortunate because, as Michael Reisman states, “[a] moment’s reflection should dispel the notion that legislation originates, transpires and concludes in the legislature.”49 There is more than meets the eyes.
A list of Major Groups and Stakeholders recognized by the United Nations Environment Programme (UNEP) is illustrative; it attests how wide the range of participants in the UNEP decision-making process really is. The concept of the nine “Major Groups” established by Agenda 21 at the ‘Earth Summit’ in 1992 recognizes the following: farmers, women, the scientific and technological community, children and youth, indigenous peoples and their communities, workers and trade unions, business and industry, non-governmental organizations, and local authorities. A group of non-governmental organizations is just one of the nine major groups. The UNEP uses the term ‘civil society’ as an umbrella term covering all nine Major Groups, whose representatives influence and collaborate with UNEP and participate in the Governing Council/Global Ministerial Environmental Forum and its related meetings.

There are other private entities not included in the definition of UNEP’s Major Groups such as political parties, gangs, and private armies which also participate in the global decision process. For the purpose of this article, I treat international organizations not as “non-state actors,” but primarily as decision-making arenas. Although formal and final decisions are made in the name of international organizations, “the actors that participated in shaping the content of the decisions of these organizations disappear in the shadow of the organizations.”

Territorial elites representing the membership of these international organizations are formal and official decision-makers whom various non-official and private entities influence and collaborate with in the decision-making process provided by these international organizations.

II. Non-State Actors in Context: Multiple Affiliations and Complex Layers of Decision Processes

As “[n]o dependable relationship exists between a structure that is called ‘governmental’ in a particular body politic and the facts of authority and control,” so “we, the people” of different territorial communities are participating in any international decision process through numerous entities operating in both public and private spheres of different levels of community before that decision process culminates in the making of the final authoritative decision by “our respective Governments”.

Functionally, therefore, states represented by their respective territorial elites are not the sole category of participants in the global decision process even though they will continue to be primary participants in that process.

When we focus on individual human beings who constitute groups and communities, it becomes evident that individual human beings have their own demands, identifications and expectations. They act on their own behalf or act collectively to maximize values through institutions affecting resources. Groups and different levels of community they choose to join will accordingly be multiple and complex; their affiliation and consociation become transnational, interpenetrating territorial boundaries and cultures. In this global social process, participating individuals and groups in pursuit of their demands compete, coalesce, collaborate, co-operate each other, taking account of the activities and demands of other participants. Such interaction among participating individuals and groups generate competing claims on the authoritative decision process for response. It is, therefore, ineluctable to see a much wider range of actors other than states which participate in the global decision process.
To use the New Haven School’s terminology, by a participant in the global decision process, “we mean an individual or an entity which has at least minimum access to the process of authority in the sense that it can make claims or be subjected to claims.” These participants include, apart from states and international organizations, the elites of transnational non-governmental organizations operating in the wide range of value sectors from those concerned with economic development, health, food, and population to those concerned with religious practices and teaching, fraternity, family, and skills and knowledge development, multinational business corporations, transnational professional associations, gangs, terrorist groups, and individuals. As Mahnoush H. Arsanjani observes, the expansion of the range of relevant actors to include non-state entities has further complicated the dynamics of decision making at the international level. Non-state entities have become more influential in decision making at international fora through the adroit use of various strategies. Likewise, rapid communications systems which are not always subject to the control of the state apparatus have required quicker reactions to international events than the organized deliberative multilateral system can supply.

Students of the New Haven School are not so much concerned with making any material distinction between the term ‘participants’ and the term ‘actors’ as making sure that the accurate and comprehensive framework of inquiry is employed to map social and decision contexts. What the New Haven School offers is a conceptual tool accurately to describe and assess any social process. We focus on individuals and groups in the first category of a situation analysis by asking who are relevant actors in the situation (participants), followed by what are their subjectivities, their identifications, expectations and demands (perspectives), where they are interacting (situations), what resources they are using (strategies), and with what culminating events (outcomes) or what longer-term consequences (effects).

We often use the term “actors” and “participants” interchangeably, as indicated in the fundamental schema for characterizing the social process: “Man (actors, participants) acts to optimize values (preferred events) through institutions affecting resources.” What is important is “a comprehensive delineation which permits the observer, with minimal preconception, to identify those who are in fact actors in each context.” And the following explanation is given:

The first step is to provide the observer with a ‘checklist’ that covers the various conceivable ‘form’ of interaction in the world community. Otherwise, significant modes of participation may be overlooked. The great variety of practices that comprise the planetary social process, therefore, encourages the responsible observer to use a more general delineation or taxonomy in the initial phase of any survey. Once a provisional list of participants is developed, those who are critical actors can be identified, again on a tentative basis, by their apparent impact on the pattern of value shaping and sharing in the situation under scrutiny.

“[I]n this model,” says Higgins, “there are no ‘subjects’ and ‘objects,’ but only participants. Individuals are participants, along with international organizations . . ., multinational corporations, and indeed private and non-governmental groups.”

A. Non-State Actors and Specialized Agencies of the United Nations

It cannot be denied that the combined effect

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58 W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, supra note 12, at 578.
59 Arsanjani, supra note 53, at 52.
60 But see Math Noortmann, “Understanding Non-State Actors in the Contemporary World Society: Transcending the International, Mainstreaming the Transnational. Or Bringing the Participants Back In?,” in Math Noortmann & Cedric Ryngaert (eds.), Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers 153 (Farnham, Surrey, UK: Ashgate Publishing, 2010): “The main difference between the ‘participants’ and ‘actors’ approach is not one of empirical focus but one of concept and theoretical outlook, it is not the unit of reference, but the unit of analysis.”
63 McDougal, Reisman & Willard, supra note 56, at 816.
64 Id. at 816, n.12
65 Higgins, supra note 45, at 50.
of the provisions of Article 57 of the United Nations Charter regarding the various specialized agencies brought into relationship with the United Nations and the provisions of Article 71 regarding the Economic and Social Council’s (ECOSOC) consultation with non-governmental organizations has contributed to the spawning of non-governmental organizations around the world.

These specialized agencies have “wide international responsibilities in economic, social, cultural, educational, health, and related fields,” and for that reason, they were brought into relationship with the United Nations to undertake international economic and social co-operation “for the accomplishment of the purposes set forth in Article 55.” It provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

A corollary of the purposes set forth in Article 55 is the promotion and development of various non-governmental organizations, the tasks of each of which are similarly delineated in the corresponding areas of responsibilities of the specialized agencies.

As evidenced in the provisions of Articles 70 and 71, ECOSOC’s competence to allow “representatives of the specialized agencies to participate, without vote, in its deliberations” and ECOSOC’s competence for “consultation” with NGOs are almost comparable in its essential function. It allows non-state actors, i.e., those entities external to the membership of the United Nations, to participate in ECOSOC’s decision process. Yet, the form and substance of NGOs’ relationship with either ECOSOC or any of the specialized agencies are vastly diverse and varied from one NGO to another, reflecting the different “size, resources, impact, methodology, objectives and approach to international organizations.” By the same token, ECOSOC and the specialized agencies have their own diverse and idiosyncratic ways of dealing with NGOs.

It is the consultative status accorded by ECOSOC that determines which NGOs will be given access to the organized decision arena of ECOSOC. It is essential to bear in mind that ECOSOC is itself an organized decision arena of the most comprehensive universal international organization, and at the same time ECOSOC is the sole “gatekeeper” who actually shapes “global civil society.” It declares, “The granting, suspension and withdrawal of consultative status, as well as the interpretation of norms and decisions relating to this matter, are the prerogative of Member States exercised through the Economic and Social Council and its Committee on Non-Governmental Organizations.” Those NGOs accredited by ECOSOC with consultative status must operate in accordance with the UN Charter and

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67 Id. at art. 71.
68 Id. at art. 57(1).
69 Id. at art. 59.
70 Id. at art. 55.
71 417
ECOSOC resolution 1996/31.77

B. Non-State Actors and Civil Society

The non-state actors within the purview of ECOSOC are not concerned, in principle, with the power process per se of any body politic. But there are many private consociations competing with the state. As Max Weber observed that:

The law of the state often tries to obstruct the coercive means of other consociations. . . . But the state is not always successful. There are groups stronger than the state in this respect. . . . This conflict between the means of coercion of the various corporate groups is as old as the law itself. In the past it has not always ended with the triumph of the coercive means of the political body, and even today this has not always been the outcome.78

Where non-state actors such as opposition political parties or armed private groups were involved in seeking to supplant the authority and control of the state, the hitherto monopolized domain of coercive means of the state is breached, and they will start competing with the extant territorial elites for power. Michael Reisman and I called these private groups “aspirants,” who are “groups which seek to participate in authoritative processes of a community with the aim of achieving influence or lawful control.”79 They are non-state actors like political parties, pressure/interest groups or citizens’ action groups or even private armies like the Sudan People’s Liberation Movement/Army.80 The point of emphasis is that the monopolization of coercive means by the territorial elites to the exclusion of any other entities in a given body politic is the hallmark of the state.81 Nonetheless, even that power of monopoly of the state becomes liable for erosion by non-state actors within the state when they acquire coercive means. It is not difficult to understand, therefore, that other consociations are more likely to be in a position to complement, compete with, and supplant, the authority and control of the state in any other value processes of a community. Let me indicate salient features of non-state actors’ activities in the major value processes.

Power: Since most non-state entities are seeking to achieve a particular political end, they are seeking some form of power and exercising that power to varying degrees by influencing decision without assuming formal political power. Non-state entities seeking formal power as a scope value within the body politic in which they operate, are usually political parties. Should participation in civic arenas be denied, internal political arenas would become irregular, and when such non-state actors acquire significant political strength, they would become liable for suppression by the incumbent territorial elites of the body politic. These aspirants would be more likely to resort to higher levels of coercion with a view to organizing a proto-state. The latest non-state actor which organized a proto-state was the Sudan People’s Liberation Movement/Army, which had negotiated with the government of the Republic of Sudan for a referendum on whether Southern Sudan should be independent by seceding from Sudan proper.82 Unlike any other non-state actors, those counter-territorial elites who are aspirants are more often than not “outlawed” by the incumbent territorial elites because they are not only competing with the extant territorial elites in power, but also seeking to replace them—sometimes extraconstitutionally.83 As H.L. Nieburg aptly summarizes: “Every group that acts as a proto-state does not seek to become a revolutionary regime. Yet, in some cases, the process at work produces that result. Violence is the essential cutting edge that creates and maintains ecological separation between integrated social organizations.”84

80 See the Permanent Court of Arbitration case, The Government of Sudan / The Sudan People’s Liberation Movement/Army (Abyei Arbitration), which was conducted under the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State. The Final Award was given on 22 July 2009, available at <http://www.pca-cpa.org/showpage.asp?pag_id=1306>.
The decolonization process allowed newly emerging internal elites to set up “national liberation movements.” Many obtained observer status in the U.N. and its related agencies and/or regional organizations like the then-Organization of African Unity. For those aspirants such as the FLN in Algeria, the SWAPO in Namibia, the various contenders in Angola, the Polisario Front in Western Sahara, and the PLO, access to organized international arenas was an important issue, as was the recognition of representatives prior to their gaining control over territory. Non-states seeking some form of “recognition” are, in turn, subjected to claims by others for conformity to critical international standards of conduct.

Globalization and the development of communication and information technology have made recognition of aspirants real. Ahead of any other states, France recognized Libya’s rebel leadership, the Libyan National Council, as the sole legitimate representative of the Libyan people in March 2011 even though the Libyan National Council had not secured the level of conflict and territorial control in a portion of Libya for according the status of insurgents or belligerents. The United States granted Libyan rebel leaders full diplomatic recognition as the governing authority of Libya on July 15, 2011. In the words of Secretary of State Hillary Rodham Clinton, the rebels’ Transitional National Council “has offered important assurances today, including the promise to pursue a process of democratic reform that is inclusive both geographically and politically.”

Wealth: There are three categories of non-state actors operating in the global wealth process: (i) transnational business entities whose primary purposes are profit-making, capital accumulation, capital investment, and expansion of business; (ii) labor unions in the sharing of wealth; and (iii) not-for-profit organizations whose primary purposes are to ensure the policies and practices of business entities in the first category are fair, socially responsible, and environmentally sound and sustainable in the long run.

In the wake of the collapse of the Soviet Union, neo-liberalism ruled the world economy. As the state’s responsibility for provision of primary social services was being relegated to private entities, even NGOs, not normally considered for-profit entities, have grown “to a $1 trillion industry, riding the global wave of privatization of services.” Globalization has reinforced the effective reach of transnational business entities in setting global standards and forms of best practices in their respective areas of business activities such as financial transactions (foreign direct investment, bonds, and insurance), transportation, construction, and so on. In the beginning these standards were originally introduced by major actors in a particular industry in their business agreements, which have subsequently become common usage and practice among many other entities in the same industry. Such development can be considered akin to “adhesion contracts” that cannot be negotiated. “In the eyes of the community,” explained Lasswell and McDougal, “the power exercised by unofficial organizations may be both controlling and authoritative.”

Just like the tripartite representation of states, workers, and employers of the International Labour Organization, workers and trade unions as well as business and industry associations play major roles in shaping policy for workers’ wages, industry’s investment, and so on.

Enlightenment: International professional associations obtain and disseminate information and increase the general level of understanding of particular subject-matters in which their respective associations have expertise. The role of the *Institut de Droit International* and the International Law Association to the development of international law is undeniable. Mass communication media and international news agencies such as Al Jazeera, AFP, AP, BBC, CNN, NHK, Reuters, and so on are principal channels through which public perceptions

86. Id. at 442-44.
are shaped about what is happening around the world.

**Skill:** Increasingly, groups trained in information technology are developing an interactive democracy in which people receive news and respond to it by expressing their views, which in aggregate quickly become public opinion. Recent political changes for democracy which started off in Tunis first in January 2011 spread quickly to Cairo, Tripoli, and Bahrain in less than a month, all thanks to the Internet and training provided by a unique transnational skill group called “the Centre for Applied Non-violent Action and Strategies” based in Belgrade, Serbia.92

**Affection:** Historically, individuals associated themselves in pursuit of their demands on the basis of group identification, be it cultural, ethnic, linguistic or religious. Minority groups within a body politic often sought to establish an equal political basis with the dominant group of the territorial community. These groups often extend across territorial boundaries into neighboring states, affecting that state’s policy. What is commonly referred to as “war lords” in Afghanistan, Congo, Somalia, or any other similarly conflict-torn states, are local political families which enjoy a broad ethnic group’s support.

**Rectitude:** Of all rectitude groups, none is more influential in its reach than the Roman Catholic Church. Its power reflects the cohesiveness of its tenet, the strength of organizational hierarchy, and, above all, an enormous number of its followers around the world. The international legal status of Vatican as Holy See attests to the unique position enjoyed by the Catholic Church.

**Well-being:** Private well-being groups such as Médecine Sans Frontières have increasingly active in alleviating the suffering of people in natural calamities such as earthquakes, tsunamis, typhoons and other natural disaster situations. The International Committee of Red Cross plays a special role in humanitarian assistance.93

**Respect:** Many private associations have been major non-state actors in the protection of human rights. As transnational business corporations expand their operational scope across boundaries and cultures, respect deprivations are committed by them as well. Although in conjunction with activities of the United Nations, the role played by private individuals and groups in the creation of the United Nations Global Compact is noteworthy.94

All private groups in the value processes enumerated above complement and, sometimes compete with, programs of official agencies while seeking to increase their influence and effectiveness “by finding niches in critical decision functions which would allow them to shape prescriptions incorporating their preferred policies.”95

### III. Policy for Non-State Actors’ Participation in Decision-Making

It is individual human beings acting collectively as the ultimate actors in all groups, (whether they are territorial, functional, organized or unorganized,) which comprise participants, including non-state actors. As McDougal, Lasswell, and Lung-chu Chen explained:

Ours is a world of pluralism and diversity, a global arena in which various participants—groups (territorial and functional, governmental and nongovernmental) and individual human beings—constantly interact under ever-changing conditions. All of the above-mentioned group participants—nation-states, groups, and private associations—are forms of associations through which individuals cooperate to achieve fulfillment of their demands.96

The fundamental premise for such diversity is “the reciprocal honoring of freedom of choice about participation in value processes.”97 The perspectives and operations of the individual human being are the basic empirical foundation of pluralism and diversity. And the basis of authority of government is the will of the people as expressed in Article 21(3) of the Universal Declaration of Human Rights, now

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97 Id. at 7.
considered customary international law and *jus cogens*. 98

We no longer consider sovereignty in terms of “a metaphysical abstraction called the State,” but in terms of “the sovereignty of individuals.” 99 We must accept that the basis of authority expressed in Article 21(3) of the Universal Declaration of Human Rights perforce extends to claims for participation in the global decision process. 100 Authority for such participation is summed up by Article 20 of the same Declaration which provides: “Everyone has the right to freedom of peaceful assembly and association.” 101

Participation by civil society in multiple decision processes of varying territorial compass perforce involves a huge number of private entities across all value processes. Several of these private entities are well organized through their respective systems of representation linking their affiliated organizations from local and national through regional to international membership organizations. The range of participants should be as comprehensive as feasible, but it must be calibrated by the principle of economy to ensure the effectiveness of representation. The principle of effectiveness also requires participants’ capacity to enjoy participatory rights to bear their corresponding obligations because participation entails responsibility.

To be responsible participants, they need to meet the requirements of transparency and accountability. They need to disclose to the public at large pertinent information about their organizations, purposes, activities and what their sources of funding are; and they need to be accountable for their act and conduct. 102

IV. Recent Trends of Non-State Actors as Authoritative Decision-Makers

A. General Framework for Participation

Perhaps it is appropriate now to examine the real effect of what is referred to as the clear “distinction” between participation without vote in the deliberations of ECOSOC for any UN member and representatives of the specialized agencies under Articles 69 and 70 of the UN Charter, on the one hand, and “consultation” with NGOs under Article 71, on the other. 103 Part II of Resolution 1996/31, Principles Governing the Nature of the Consultative Arrangements, further elaborates that distinction by stating that:

Under Articles 69 and 70, participation is provided for only in the case of States not members of the Council, and of specialized agencies. Article 71, applying to non-governmental organizations, provides for suitable arrangements for consultation. This distinction, deliberately made in the Charter, is fundamental and the arrangements for consultation should not be such as to accord to non-governmental organizations the same rights of participation as are accorded to States not members of the Council and to the specialized agencies brought into relationship with the United Nations. 104

The distinction underlined by Resolution 1996/31 is formalism in reiterating the states as subjects of international law. In contrast, even though the *Guidelines for Participation of Major Groups and Stakeholders in Policy Design at UNEP* acknowledge that the Rules of Procedures of the Governing Council provide for “international non-governmental organisations having an interest in the field of the environment” to attend “as observers at public meetings of the Governing Council and its subsidiary organs, if any,” 105 the *Guidelines for Participation* adopted a more creative approach for the engagement of non-state entities as follows:

Subject to approval of the President of the Governing Council, the accredited organisations

98 Universal Declaration of Human Rights, G.A. Res. 217(III), U.N. Doc. A/810, at art. 21(3): “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures,” available at <http://www.un.org/en/documents/udhr/index.shtml>.


100 See Volker Röben, “Proliferation of Actors,” in Rüdiger Wolfrum & Volker Röben (eds.), *supra* note 52, at 511, 524: “Individuals and private organizations operating on the international level rather exercise their right to self-determination directly. Democratic self-government drives many of the most important actors.”


104 Ibid.

are allowed, under the coordination of the MGFC [Major Groups Facilitation Committee]:

a) To participate in the Ministerial Round Tables of the GMEF [Global Ministerial Environmental Forum];

b) To have 9 seats in each of the plenary sessions of the meeting (opening, closing, GMEF, Committee of the Whole);

c) To have the opportunity to submit their written input to the President;

d) To participate in the open-ended subsidiary organs and bodies of the meeting.106

It is a truism to say that there is a gap between what is formally stated in the official pronouncement and how actual practice develops. In the process of the actual implementation of formal statements, somewhat different interpretations and applications will be made by those who are in the “trade,” so to speak. It is the “operational code.”107 According to Reisman, “what is distinctive about the operational code is that it is a private public law in systems in which public is supposed to be public; those authorized to play control functions and those who deal directly with them come to accept procedures that deviate from the myth system as licit.”108

It is not helpful, therefore, to get entangled in the semantic and syntactic exercise of the difference between “participation” and “consultation”109 because “consultation” is only one of the forms of “participation,” and a wide range of participants perform a variety of decision functions in different decision arenas, organized and unorganized. The effectiveness of their participation hinges on how they can make use of access to a particular process of authority; what kind of resources they have at their disposal; what kind of instrument of policy they can employ in the course of performance of their various functions; and what kind of outcome they seek to achieve with what effect.

B. The Need for Functional Analysis

The moment we recognize that the reality of globalization has deconstructed a dichotomy of national and international law, in terms of the relative supremacy of one system of rules or other inter-relations of rules, we cannot afford to entertain the conventional theory about the states as the only subjects of international law; nor can we subscribe to the common conception of law-making in domestic political systems. Rather, it is more useful to adopt the New Haven School’s functional approach to describe the world’s different community decision processes in terms of the interpenetration of multiple processes of authoritative decision of varying territorial compass.

In these multiple processes of decision-making, people make a decision to maximise their preferred events through institutions affecting resources. The New Haven School has dissected what the term “decision” is made of in terms of its seven discrete, but interrelated decision functions as: (1) Intelligence: the gathering, processing, and disseminating of information relevant to the making of choices; (2) Promotion: the active advocacy of policy alternatives; (3) Prescription: the fashioning of one of competing policies as “law” and projecting it as the authoritative policy of the community in question; (4) Invocation: the provisional characterisation of events of deviation from prescriptions and the invocation of an authoritative response; (5) Application: the applying of prescriptions to an alleged deviation, with sanction; (6) Termination: Putting an end to existing prescriptions and other arrangements that no longer reflect appropriate public order goals; and (7) Appraisal: the on-going evaluation of the general performance of the decision process.

All these decision functions are distinct and discrete, and the performance of each decision function affects the performance of every other function. All these decision functions relate to authoritative response to claims about a set of problems developing in the global social process. For the purpose of this article, I will focus on how various non-state entities perform any one of these decision functions to varying degrees.

The Intelligence Function: The intelligence function is the starting point for any action; it includes the gathering, processing, and disseminating

106 Guidelines for Participation, supra note 51.
107 W. Michael Reisman, Folded Lies: Bribery, Crusades, and Reforms 15-36 (New York: The Free Press, 1979), McDougal, Lasswell & Reisman, “The World Constitutive Process,” supra note 37, at 260: “[I]t is not unusual to discover, for example, that the authority formally provided in a written constitutional charter may be ignored, or totally redefined by unwritten practice.”
108 Id. at 18..
of information essential to decision-making.\textsuperscript{110} The information and data assembled and evaluated clarify conditions that account for the current state of affairs and help direct the necessary action to improve the situation.

As indicated in Agenda 21, non-state entities are actively participating in gathering information, and monitoring events in local communities.\textsuperscript{111} Most notably, NGOs such as the International Commission of Jurists, Amnesty International, and Human Rights Watch actively perform the intelligence function relating to the protection and development of human rights law. Amnesty International’s activities are fact-based and include sending experts to talk with victims; observing trials; interviewing local officials; liaising with human rights activists; monitoring global and local media; publishing detailed reports on human rights conditions; informing the news media; and publicizing our concerns in documents, leaflets, and posters, advertisements, newsletters and websites.\textsuperscript{112}

In other value process areas, the World Wildlife Fund, Oxfam International, the Bank Information Center, and so on\textsuperscript{113} undertake various intelligence tasks. All these NGOs are better positioned than territorial elites and their functionaries of the state to initiate any effort that may result in either limiting the state power or altering the direction of the extant policy.\textsuperscript{114}

Intelligence is the most critical and indispensable initial input to activate the decision process. The quality of intelligence shapes all the subsequent decision functions, but “the utility of the most accurate and timely intelligence depends upon a decisionmaker capable and willing to use it.”\textsuperscript{115}

The Promotion Function: On the basis of the intelligence gathered and processed, the decision phase turns to the promoting function which refers to the advocacy of policy alternatives, including the taking of initiatives which lead to the enactment of prescriptions. For non-state entities which are mostly denied access to organized arenas of decision because of “the entrance requirement,” the promotion function provides them with opportunity to play a critical role in stimulating demands for the enactment of new prescriptions. Several NGOs are initiating, participating in the decision process or co-opting, incorporating or circumventing the various phases of the global decision process, as analysed by Judge Oda in his dissenting opinion on the \textit{Legality of Nuclear Weapons cases}.\textsuperscript{116} “The idea behind the resolution whereby the General Assembly (and also the WHO) requested advisory opinions, had previously been advanced by a handful of non-governmental organizations (NGOs) which initiated a campaign for the total prohibition of nuclear weapons...”\textsuperscript{117} The contributions by various NGOs to the conclusion of multilateral conventions cannot be overstated.\textsuperscript{118} Notable recent examples include the United Nations Convention on the Rights of the Child,\textsuperscript{119} the Rome Statute for the International Criminal Court,\textsuperscript{120} and the International Campaign to Ban Landmines which led to the Mine Ban Treaty.\textsuperscript{121}


\textsuperscript{114} Steve Charnovitz, “How Nongovernmental Actors Vitalize International Law,” in Arsanjani \textit{et al}. (eds.), supra note 53, at 136: “an initiative to limit government power is not likely to emanate from governments and is instead more likely to come from interested private actors.”

\textsuperscript{115} McDougal, Lasswel & Reisman, “The Intelligence Function,” supra note 110, at 366.

\textsuperscript{116} Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 \textit{ICJ Rep}. (8 July), at 226, 330, 335.

\textsuperscript{117} \textit{Id.} at para. 8. See also Judge Oda’s separate opinion in \textit{Legality of the Use by a State of Nuclear Weapons in Armed Conflict}, 1996 \textit{ICJ Rep}. (8 July), at 88, 96: “[I]t also seems to be clear from the records of the Forty-fifth and Forty-sixth World Health Assemblies for 1992 and 1993, respectively, that resolution WHA46.40 was initiated by a few NGOs which had apparently failed in an earlier attempt to get the United Nations General Assembly to request an advisory opinion on the subject.” at para 9.


and the Cluster Munition Coalition’s work for the Convention on Cluster Munitions.122 Without their advocacy campaign and lobbying around the world, it would not have been possible to have these treaties concluded. As Stephan Hobe states, “NGOs do not only participate in state-initiated conferences but have also taken up the role of initiatives of state conferences.”123

**The Prescribing Function:** The prescribing function is communicating people’s expectations about policy, authority, and control through reciprocal claims and mutual tolerance in their interactions.124 Sequentially, the prescriptive function has four distinct phases: the initiation of the process, the evaluation of relevant facts and potential policies; the formulation of the policy to be projected as authoritative for the community; and the communication of the prescriptive content and expectations about authority and control to the target audience. As mentioned in the promotion function above, NGOs play a considerable role in the first two phases.

To appreciate the realistic scope and range of the prescribing function that can be performed by non-state actors, the narrow range of the “sources” of international law as specified in Article 38 of the Statute of the International Court of Justice is far from satisfactory.125 The stark reality is that no decisions of any of the international organizations operating worldwide today, including the United Nations, have been mentioned in Article 38. Since most decision arenas in which NGOs participate are parliamentary or quasi-parliamentary settings like international conferences, the exclusion of decisions of international organizations would *ipso facto* preclude a large portion of NGOs’ contribution to the prescribing function. Nevertheless, however tenuous its relevance may be, subparagraph (b) of Article 38, “international custom, as evidence of a general practice accepted as law,” may be invoked to recognize a contribution of non-state entities in general and NGOs in particular to the prescribing function as the development of customary international law.126

**The Invoking Function:** The invoking function is for claimants who characterize, from their perspective, on-going events in terms of extant prescriptions by asserting a certain set of facts about what has happened, what policies or prescriptions have been violated, and what remedies might be available to cure the deteriorating conditions. International NGOs which have networks with national NGOs which are most knowledgeable in the local conditions of various countries initiate the invoking function. “The quality of the process of authoritative decision depends in no small measure upon the ability of individuals and non-state actors to challenge unlawful deprivations.”127

Many NGOs are accorded a *locus standi* not only in international human rights organizations such as the European Court of Human Rights and the American Commission on Human Rights, but also in the World Trade Organization’s dispute settlement panel and various accountability mechanisms of IFIs such as the World Bank and the Asian Development Bank. NGOs are in a position to lodge claims on behalf of victims before these international decision arenas.128

**The Application Function:** Non-state actors face the perennial barrier, i.e., “the entrance requirement,” mentioned at the outset, to the organized arenas of decision as the applying function is the final characterization of the events alleged by claimants in terms of extant prescriptions and the management of sanctioning measures to secure enforcement. It is considered the prerogative of the state elites. They undertake the various forms of application such as “investigation,” “fact-finding,” “reporting,” “negotiation,” “good offices,” “mediation,” “commissions of inquiry,” “conciliation,” “arbitration,” and “adjudication.”

Non-state actors’ participation in the application function, that had started with the tasks of monitoring compliance with treaty-obligations of

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123 Hobe, *supra* note 118, at 323.


126 Hobe, *supra* note 118, at 320.


129 See McDougal, Lasswell & Reisman, “The World Constitutive Process,” *supra* note 37, at 429-432; see also art. 33(1) of the UN Charter.
human rights instruments, has vastly broadened as to include access to judicial bodies, and conversely the ICJ has increasingly become the target of popular appeal that it allow “more and diverse voices to be heard in addition to those of the States parties to the proceedings, especially those belonging to groups traditionally silenced by the primacy accorded to States’ interests.”

Traditionally, the technique to overcome the “entrance requirement” was for the state of private corporations to espouse its nationals’ claims before international tribunals. Today, the proliferation of bilateral investment treaties (BITs) and free trade agreements (FTAs) that have empowered investors to bring their own claims against host states has rendered the démarche of diplomatic protection unnecessary for the settlement of investor-state disputes. The investors’ right to bring claims against the host state has generated the case law through the investor–state arbitrations, and private attorneys are now making “global administrative law” in the course of such arbitrations.

Increasingly NGOs are participating in the applying function process by way of filing amicus curiae briefs in international tribunals. The adament refusal by the ICJ of NGOs’ amicus briefs notwithstanding, NGOs have won partial success in the Appellate Body of the WTO. As indicated by the NAFTA Free Trade Commission and demonstrated by the Methanex Tribunal, a growing trend is to accept NGOs’ amicus briefs.

The Terminating Function: The termination function sometimes takes place concurrently as the prescribing function is being performed. The former terminates an extant prescription that has become short of meeting demanded public order goals and the termination of a prescription itself often leads to a new prescription. Non-state actors being unofficial, private groups cannot be formal “terminators,” but as in the prescribing function they would be active promoters of new prescriptions. They represent “affected parties” which are mostly private citizens.

As in the prohibition of child labor, anti-personnel land-mines, and cluster munitions, the termination function is designed to keep prescriptions in line with the goals of world public order. NGOs campaign for withdrawing certain incidental benefits of recognition from the target government or terminating obsolete policies for international financial institutions’ financial assistance.

The Appraising Function:
Various non-state entities of varying degrees of effectiveness perform the intelligence, promotion, law-making or prescription, invocation, and application functions of decision-making and help enormously the performance of the on-going appraisal function. The core task of appraisal is to identify who is responsible for success or failure in terms of the policy objectives of the larger community. Non-state actors contribute to ECOSOC’s reporting task on the performance of its responsibilities.

V. For the Future

Antonio Gramsci’s writings suggest “a sturdy structure of civil society” is in the core of the state, which is “only an outer ditch” and civil society is behind it as “a powerful system of fortresses and earthworks.” I draw upon Gramsci’s ideas about “a complex and well-articulated civil society” to be constructed “within the hush of political society” by the initiatives of the private individuals. It is the critical contributing force of private groups and associations that build and re-confirm the hegemony of the governed, i.e., the sovereignty of individuals.


133 See Shelton, supra note 130.


136 Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, Part II, Chapter C, 44 *International Legal Material* 1345, 1365 (2005).

137 See UN Charter, art. 62 & 64.

138 Gramsci, supra note 47, at 238.

139 Id. at 268.
A. Bridging the Gap between Vertical Internal Processes of Decision with the Horizontal International Process of Decision

In domestic political arenas the question of law-making is initiated and addressed systematically in institutionalized and organized settings such as public hearing fora and public opinions surveys, periodical elections, parliamentary deliberations, governments’ review boards, and judicial proceedings. In international political arenas, however, no formal process or mechanism exists in which private individuals or groups have access to any organized arena of decision. The commonly-held conception of law-making perpetuates this disconnection between the vertical order of the state’s domestic arenas and the horizontal order of international arenas. The separation of the international process of the world community and the internal process of the state is thus used as a pretext to rationalize the “entrance requirements”, and vice versa. The combined effect is to buttress and rationalize the “entrance requirements”, and vice versa. The combined effect is to buttress and safeguard the power base of territorial elites. Even in modern democracies ordinary private citizens’ participation in decision-making processes on foreign affairs is rarely open unless public hearings are held. It remains entirely within the domain of public officials.

The range of operations undertaken and decision functions performed by various non-state actors, however, abundantly demonstrates that non-state actors are now transcending the neat traditional separation of the two processes. “Hegemony” in Gramsci’s sense must be continuously reconstructed in the context of ongoing social change by educating private individuals and groups for support to a newly emerging social order.

Non-state actors are bridging the gap between the internal vertical processes of bodies politic and the international horizontal process of the world community. As Pascal Lamy, Director-General of the WTO, says, “the degree of legitimacy decreases with distance from domestic political processes.” For an international decision to be legitimate, the general support of a majority of citizens in their national decision outcomes. These national decision outcomes will in turn become part of input to the international decision process. Two separate processes of decision will thus be interlocked. These processes are functional since there is no centralized overall “political infrastructure” to support oversight of such two discrete processes.

To integrate the artificially segregated processes, we will need the stronger political leadership of territorial elites of states who are supported by the influence and power of the legislature and its relevant political parties in the state concerned. Without the development of open political processes within the state, “participation” in the international process would become a mere rhetorical exercise.

From the perspectives of the territorial elites non-state actors are interlocutors from outside. It is the territorial elites that regulate non-state actors’ access to the organized arenas of international organizations by deciding which non-state actors to consult with. Under these circumstances, non-state actors must not only co-opt, and ride with, the power of the government and the legislature of the country, but also stimulate demands and expectations about authority for non-state actors.


142 But see Noortmann, supra note 73, at 118: ‘Civil society is not served by co-opting NGOs into a bourgeois governmental or State system, but by creating independent opposition to secure the necessary checks and balances to establish a liveable, just, sustainable society.’
as effective participants in the global constitutive process of decision.  Civil society is, after all, part of political society and non-state actors made of private individuals should become “its normal continuation, its organic complement,” rather than entering into conflict with it. Non-state actors, as participants in that global process of decision, must capitalize on the will and capability of local and national institutions such as local courts, local police, civil service, local media and civil society in order to transnationalize the internal decision process of their country and integrate it with the global process of decision.

143 See Reisman, supra note 95, at 21-22.
144 Gramsci, supra note 47, at 239.
145 See Eisuke Suzuki, ‘Reconfiguration of Authority and Control of the International Financial Architecture’ in Mahnoush H. Arsanjani et al. (eds), supra note 53, at 271, 296