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Prospects for a “World (Internal) Law?”: Legal Developments in a Changing International System

JOST DELBRÜCK

INTRODUCTION

Traditionally, international law was conceived of as exclusively inter-state law. However, in the course of the late Nineteenth and the Twentieth Centuries, other subjects of international law emerged. Thus, international intergovernmental organizations were gradually recognized as international legal entities endowed with a limited legal capacity to act under international law. In addition, individuals also gained international legal status in the course of the development of the international protection of human rights, particularly after World War II. It is a common characteristic of these new subjects of international law that they derive their (limited) international legal status from legal enactments by states as the original members of the international legal community. Therefore, although the international intergovernmental organizations, foremost the United Nations Organization (UNO), came to play an increasingly important role in the international system, the recognition of new subjects of international law did not lead to a reconsideration of the understanding of international law as a principally inter-state legal order.

Today, due especially to the impact of globalization—understood as a process of denationalization of markets, politics, and law on the international as well as the national levels—it is no longer true that international law is an exclusively inter-state legal order.¹ Its state-centeredness is giving way to a broader understanding of the scope and reach of international legal principles.

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and norms now extending to various new actors in the international system. In short, international law is in the process of transforming, at least partially, into a World Law or World "Internal" Law extending to states, governmental and non-governmental organizations, and other non-state corporate entities, as well as groups and individuals. This paper will begin with a closer analysis of the concepts of "World Law" and "World Politics" (Part I), followed by a short summary of the stages of development of the international system (Part II). It will then address, in some detail, the development of international law under the impact of globalization (Part III), and will conclude with some tentative remarks on the potential structure of a new World Law (Part IV).

I. THE CONCEPTS OF WORLD LAW AND WORLD POLITICS

The concept "World Law" ("Weltinnenrecht") was introduced as an analogy to the concept "World Politics" ("Weltinnenpolitik"). Both concepts have a nice political appeal but are quite problematic. They appear logically to require the pre-existence of an organized entity (for instance, a World State) within which such politics and law can be developed and implemented. This is what C.F. v. Weizsäcker—and other authors following him—intended the concept "World Politics" to mean. It is banal to observe that such a World State or superior Authority does not exist and that it is not even desirable. On
a closer look, however, it becomes clear that this seemingly logical connection between the concepts of World Law and World Politics and a pre-existing organized superior entity is not a necessary one. The alleged logical connection rests on an unwarranted state-centered perception of the notion of politics and law. Neither the determination and pursuance of politics nor the enactment and enforcement of law presuppose the existence of a superior state or a state-like entity as is evidenced by the existence of a rather loose-knit international legal community, or—in political science terms—the international or regional communities of states.\(^5\) Both concepts—World Law and World Politics—can legitimately be applied to the meta-state level. Consequently, World Law may be defined as a body of law that transcends the notion of strictly inter-state law but does not exclude it; that is World Law encompasses in its scope and application state and non-state actors, transactions and situations of most different kinds beyond the state or national level. Thus, World Law, if it really exists, constitutes a body of law that is the result of a partial transformation of the traditional inter-state law, i.e. public international law, complemented by further legal components. In turn, the concept of World Politics denotes the political transactions of states and the different non-state actors in the global realm beyond the national level in pursuit of—ideally—the common interests of humankind.

II. OBSERVATIONS ON THE DEVELOPMENT OF THE INTERNATIONAL SYSTEM AND THE IMPACT OF GLOBALIZATION ON ITS STRUCTURE

It is a questionable undertaking to divide historic developments into distinct phases or periods, because the specific characteristics of a given period do not appear abruptly but rather emerge over a longer time span. These fully unfold and later become overlaid by new developments and are ultimately replaced by the latter. Despite these methodological reservations, however, it is safe to distinguish roughly three major stages in the development of the international system: first, the so-called classical period that is—particularly by the Anglo-American literature—often referred to as the “Westphalian System,” beginning with the conclusion of the Westphalian Peace Treaty of 1648; second, the

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\(^5\) For an in-depth discussion of whether or not the concepts of World Politics and World Law can be used on the meta-state level, see L. MEYER-BRUNS, WELTINNENPOLITIK—STAATLICHE SOUVERÄNITÄT IN DER INTERNATIONALEN GEMEINSCHAFT [WORLD POLITICS—STATE SOVEREIGNTY IN THE INTERNATIONAL COMMUNITY] (1998).
period of the international organization of the community of states that dates from the late Nineteenth Century and fully unfolds during the Twentieth Century; and third, the present period of globalization. With respect to each of these periods the phenomenon of overlapping developments in the international system is quite apparent: the classical period emerges some time before 1648 with the gradual formation of the modern territorial state. The period of the international organization of the community of states takes shape in the second half of the Nineteenth Century and replaces the classical system after World War I. Presently, we can observe the gradual overlaying of the international organization of states by the phenomenon of globalization.

A. The Classical International System

With regard to its actors, the classical international system was quite homogeneous. It was exclusively dominated by the sovereign territorial or nation states, and even the Holy See—today a non-territorial special subject of international law—conformed to the prevailing notion of a territorial state entity during the classical period. Sovereignty was the leading paradigm and pervasive legal principle in the international system of the classical period. States perceived themselves as clearly delimited independent legal subjects committed to self-preservation. The most conspicuous expression of sovereignty was the *liberum ius ad bellum*, the sovereign right of states freely to go to war. International customary law as the legal order of the classical international system contained only a few substantive principles and norms. Aside from customary law, international law was mainly constituted by bilateral treaties. Moreover, even seemingly multilateral treaties were understood by legal doctrine as sets of bilateral treaty relations—a clear indication of the dominance of the principle of sovereignty that requires state consent to any legal obligation incurred. To conceive of multilateral treaties as a surrogate for the absent central lawmaking authority was as alien a notion for the sovereign states as the concept of an international central law enforcement authority.

The classical international system transcended itself in a curious dialectical process. Because of socio-political changes and technological breakthroughs

6. WALTHER SCHÜCKING, DIE ORGANISATION DER WELT (1909) is a groundbreaking book by Walther Schücking that describes the fundamental change in the structure of the international system that characterizes the second stage of its development.

7. See WILHELM GEORG GREWE, EPOCHEN DER VOLKERRECHTSGESCHICHTE passim (1984); see also Delbrück, Structural Changes, supra note 1, at 6.
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(means of transportation by land and sea, industrial production of goods, revolutionary advances in weapons technology), demands on the domestic resources that were indispensable for the self-preservation of the sovereign territorial state increased to a degree that transcended the capacities of even the largest states. The response to these needs was found, on the one hand, in colonial expansion, and on the other—particularly relevant in the present context—in inter-state cooperation for the mutual provision of the needed resources. The result was an increasing interdependence of states. Thus, self-preservation as the ultimate raison d'état led sovereign states to follow a strategy that promoted the limitation and even the partial destruction of the very foundation of self-preservation, i.e. national independence, and created interdependence instead. In other words, a change of paradigm in the international system and its legal order was initiated. The transition of the international system to that of the institutional organization of states gained momentum.

B. The International System in the Era of International Organization of the Community of States

Self-preservation of the sovereign states required inter-state cooperation as a complementary strategy of safeguarding domestic welfare and national security. This cooperation, in turn, necessitated inter-state relations that were more permanent and reliable than those the traditional bilateral treaty relations could provide. Consequently, in the second half of the Nineteenth Century, one could already observe a trend toward institutionalized cooperation founded on multilateral treaties. Examples are the so-called Administrative Unions like the International Telegraphic Union (1865—still active today as the International Telecommunications Union) and the Universal Postal Union (1874—still active under the same name today). This movement toward institutionalized cooperation culminated in the founding of the League of Nations in 1919. The “philosophy” of this organization was modeled along the lines of Kant’s “Federalism of the Free States” and other older and contemporary proposals for the organization of states.  

From a political science perspective, the foundation of international organizations constituted a change of the structure of the international system. The types of actors participating in the transactions in the international system became more diversified. However, the debate between the realist and neorealist school and the protagonists of the theory of integration and related schools of thought continues today. The question is whether these new actors are—at least to some degree— independent actors or whether they are simply instruments used by powerful states to promote their national interests.9

International law also had doctrinal difficulties in coming to grips with international organizations as new actors in the international system. It took almost fifty years until the reality of the era of international organizations was finally recognized by international law, and international legal personality was attributed to international organizations.10 However, from an international law perspective the importance of the international organization of the community of states is not restricted to the recognition of international organizations as limited and derivative subjects of international law. In the present context, the impact of the institutionalization of inter-state cooperation on the status and role of the sovereign states is of equal relevance. Already in the early administrative unions, in which membership—according to the self-perception of the Member States—did not infringe upon their sovereign status,11 such membership


11. State members remained the “masters of the founding treaties” of the international organizations. It is interesting to note that the German Constitutional Court in in its Maastricht decision of 1993 had recourse to this notion. Arguing that with increased powers of the European Community/Union provided by the Maastricht Treaty the Federal Republic of Germany did not suffer restrictions of its sovereignty that would be incompatible with the provisions of the German Constitution, the Basic Law. The Court observed that the
resulted in a *de facto* limitation on the sovereign freedom of action of the members. Although from a strictly legal point of view they may have remained the masters over the constituent treaties of these organizations and their membership, in fact, their sovereign freedom of action could only be preserved by leaving the organization. This, in turn, would mean that the departing member would lose the very benefits of cooperation for which the respective state had joined the organization in the first place. However, membership in an international organization meant, and still means today, a considerable limitation on the sovereignty of the Member States in legal terms as well. Depending on the scope of the mandate of an international organization and its competences, such limitation of the members’ sovereignty in some cases could even extend to the obligation to submit to majority decisions. Finally, the monopolist status of the sovereign states in the international system was also relativized by the fact that territorial non-state entities were accorded full membership in some international organizations alongside with state members (for instance, then-colonial India and Canada were accepted as full members in the Universal Postal Union).  

This process of increasing limitations on state sovereignty and of the institutionalization of interstate cooperation culminated in the foundation of the United Nations and the rapidly growing number of various international and regional fora for the coordination of cooperative policies. Observing these developments in the 1960s, Wolfgang Friedmann was inspired to speak of the “changing structures of international law” and of the transformation of international law from a mere “law of coexistence” into an “international law of cooperation.”

state members of the EC/EU still remained the “masters of the Treaty” and could end their membership unilaterally. See BVerfGE 89, 155 (190, 198). However, the truth is that under the present international law of treaties such “unilateral” withdrawal is not permissible unless provided in the treaty, which is not the case with the EC/EU Treaties. For a critical review of the Maastricht decision, see STEPHAN HOBE, DER OFFENE VERFASSUNGSSTAAT ZWISCHEN SOUVERÄNITÄT UND INTERDEPENDENZ [THE OPEN REPUBLIC BETWEEN SOVEREIGNTY AND INTERDEPENDENCE] 354 (1997).


Indeed, with regard to the second phase of the development of the international legal order, one can speak of a change of paradigm: The classical international law that was dominated by the paradigm of sovereignty transformed into an international law that is predominantly informed by the new paradigm of peace. This new international law can rightly be called—at least ideally—an "international law of cooperation," notwithstanding all setbacks and lapses into past patterns by some great as well as some smaller powers.

C. The International System Entering the Era of Globalization

There is an ongoing debate over whether the process of globalization had already begun at the times of the old Hittites, or in the era of the Hanseatic League, or only after the end of World War II when the then-existing international community of states decidedly committed itself to an all-embracing liberalization of world trade.\(^1\) Regardless of who is right in this debate, there are good reasons to conclude that globalization has captured the eye of a broader public only in recent decades. And it is safe to say that globalization only became the object of extensive scholarly research during this same period. The reasons for this rather late interest in the phenomenon of globalization are manifold and cannot be laid out in detail in this paper. Only a few main factors may be indicated. First, the end of the Cold War allowed an increasing public awareness of the grave transborder problems such as dangers to the environment, the world climate, and the worldwide migration process. Second, the new electronic media that developed rapidly in qualitative leaps not only widened new arenas for economic activities, but also created an unprecedented worldwide network between economic actors, private organizations, groups and individuals. The result of this is the now oft-described process of globalization of markets, politics, and law.\(^1\)

Mentioning politics and law along with markets—and one should add society—as areas impacted by globalization indicates that, according to the position taken here, globalization cannot be understood as simply an economic or even more restrictedly as a market phenomenon. It is a much deeper process or set of processes that will considerably change our modes of life in various


\(^{15}\) See Held et al., supra note 14, at 3, 5; see also Delbrück, Globalization of Law, supra note 1, at 110.
areas, particularly in the domestic political and social arenas, but also on the international level. It is this aspect of globalization and not the rather superficial epiphenomenon of an unfettered global capitalism that ultimately appears to feed the uneasiness or even the angst of people with regard to globalization.

This section will address briefly the impact of globalization on the international system, and then deal more extensively with the influence of globalization on the development of international law. As mentioned earlier, globalization is understood as a process of denationalization. That needs further elaboration. First, it has to be realized that states, for quite some time now, have withdrawn from fulfilling tasks within the domestic sphere and on the international level that hitherto were regarded as genuinely public tasks. Within the domestic sphere, this withdrawal from public tasks is implemented by shifting public tasks to private actors who are not only private entities in terms of their legal status but are also clearly part of the private sector in substance. In part, however, the implementation of public responsibilities is also transferred to public/private partnerships, as in the case of the privatization of prisons.17 On the international level, the withdrawal of states from fulfilling public tasks is implemented by transferring the “production of public goods” to non-state entities vested with public authority, such as supranational organizations where the Member States participate in the organizations’ decision-making process. However, the decisions taken are those of the organs of the supranational institutions. (The reduction of direct democratic legitimization of the exercise of public authority by these supranational institutions that comes along with these developments can only be referred to at this point.)

Second, one has to remember that due to the revolution of telecommunications technology, states are, to some extent, losing their steering capacity. State control over the financial markets, and over radical right wing or racist Internet communications that run counter to the principles and values of rule of law and democracy-oriented societies, has become increasingly

16. For a more recent extensive discussion of the meaning of the notion of globalization, see Delbrück, Structural Changes, supra note 1, at 13.
difficult—to put it mildly. To compensate for this loss of state control and steering capacity, states have more and more turned to the extraterritorial exercise of public authority. This deterritorialization of state-based government, in turn, contributes to the further erosion of the classical model of the territorial nation state.¹⁹

Third, another major factor in the denationalization process is that in various contexts non-state organizations and groups are entering into areas of political action that have been either abandoned by states or opened up through the new opportunities of transfrontier communications. Non-governmental organizations (NGOs) like Greenpeace and Amnesty International, in taking on the role of “self-appointed” agents of the public interest, represent a particularly clear example of this process. It has to be added that multinational enterprises (MNEs) have taken on a political role as actors in the transnational arena, more than ever. As important as the work of these non-state actors in the public sector may be, it again poses a serious problem of legitimization, as these NGOs—not to speak of MNEs—do not have any democratically generated mandate.²⁰

What do these developments mean for the structure of the international system? The answer is short: the monopoly of the state as a political actor in the international system has been entirely broken. Along with states, international governmental organizations, NGOs, MNEs, groups (e.g. indigenous peoples, ethnic minorities) and even individuals participate in the interactions in the international system. The question is, has international law reacted to these developments in and of the international system, and, if so, in what way? This question, and other legal developments not directly related to international law but highly relevant to our subject, will be addressed in the following section.

III. OBSERVATIONS ON THE DEVELOPMENT OF INTERNATIONAL LAW UNDER THE IMPACT OF GLOBALIZATION

The legal developments in international law that are relevant to our subject shall be demonstrated in four areas of international law: first, the expansion of the number of subjects of international law; second, the new modes of law-making and the new foundation of the binding force of international law; third,

¹⁹ For more details, see Delbrück, Structural Changes, supra note 1, at 31.
²⁰ See Peters, supra note 18.
the changing modes and procedures of international law enforcement, and fourth, the changing conceptualization of sovereignty.

A. New Subjects of International Law

During the early days of the second phase of the international legal system’s development, the erosion of the so-called *numerus clausus* of the subjects of international law that dominated international legal doctrine up to the end of the Nineteenth Century was already clearly visible. In the second half of the Twentieth Century, this erosion not only continued but definitely accelerated. Without any serious debate, supranational organizations such as the European Community/European Union, which are based on international treaties just like international organizations, were recognized as subjects of international law, i.e. they were accorded the legal capacity to act under international law. Furthermore, with the firm establishment of the international protection of human rights, the individual gained the status—hardly contested today—of a derivative and limited subject of international law. This is evidenced in substantive human rights law by the provision of human rights law by the fact that individuals have standing before international human rights courts (in Europe and in the Americas) and before international non-judicial monitoring bodies established under several leading international human rights conventions. There is still considerable political resistance against recognizing certain group rights such as the right to self-determination of national minorities or of indigenous peoples. Efforts within the United Nations to codify the rights of indigenous peoples have made some progress but are still far from success. By contrast, the International Labor Organization did adopt

a convention on indigenous peoples in 1989\textsuperscript{24} that replaced the earlier, less far-reaching convention of 1957.\textsuperscript{25}

According to the still dominant international legal doctrine, neither NGOs nor MNEs possess international legal personality.\textsuperscript{26} However, in view of the actual development of the law, such a doctrinal stance is hardly tenable anymore and is losing support. An analysis of existing international law reveals that in general NGOs have not become subjects of international law merely because of their factual existence, as is the case with states. Yet, a number of NGOs have been attributed rights directly under international treaty law. Given the generally accepted definition of international legal personality, i.e. that it is the capacity to possess rights and duties under international law, then attributing rights to NGOs based on international treaties means recognizing them as functional, derivative and limited subjects of international law. Thus, NGOs are entitled by international human rights conventions to certain fundamental rights (right to association, freedom of speech, procedural rights in the sense of \textit{locus standi} before international human rights courts and monitoring bodies). Other NGOs are accorded rights of participation in the implementation of international environmental law, as in the case of the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (1994).\textsuperscript{27} These findings do not imply that all NGOs have been recognized as—albeit limited—subjects of international law today. What is clearly established, however, is the principle that this legal status \textit{can} be accorded to NGOs.\textsuperscript{28} The tiring, circular

\textsuperscript{24} Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382.

\textsuperscript{25} Convention (No.107) Concerning the Protection and Integration of Indigenous and other Tribal and Semi-tribal Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247.

\textsuperscript{26} See generally OPPENHEIM, supra note 10, at 21 (hinting at such organizations being accorded some rights on the international plane).

\textsuperscript{27} Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, 33 I.L.M. 1328 (1994). For the many other instances where NGOs are rights under primary rules (treaties) and secondary rules of international law in the implementation of international environmental law, see SONJA RIEDINGER, DIE ROLLE NICHTSTAATLICHER ORGANISATIONEN BEI DER ENTWICKLUNG UND DURCHSETZUNG INTERNATIONALEN UMWELTRECHTS [THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS IN THE DEVELOPMENT AND IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW] 281, 254 (2001).

\textsuperscript{28} On the legal status of NGOs under primary and secondary rules of international law, see MICHAEL HEMPEL, DIE VÖLKERRECHTSSUBJektivität INTERNATIONALER NICHTSTAATLICHER ORGANISATIONEN [THE INTERNATIONAL LEGAL PERSONALITY OF INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS] 4 passim (1999). NGOs as limited subjects of international law are also recognized by some other authors. See IGNAZ SEIDL-HOHNVELDERN & GERHARD LOIBL, DAS RECHT DER INTERNATIONALEN ORGANISATIONEN [THE LAW OF INTERNATIONAL ORGANIZATIONS] 84 (7th ed. 2000); OTTO KIMMINICH & STEPHAN HOBAN,
argument that international law is inter-state law, NGOs are not states, and therefore NGOs cannot be subjects of international law has been disproved by state practice. It must be added that NGOs have been granted substantial rights of participation in the work of the UN Economic and Social Council under article 71 of the UN Charter and under U.N. secondary law, i.e. the rules of procedure of the Council and its sub-organs (observer status, rights of petition, oral contributions). The same is true for many other international governmental organizations. Based on these developments, Hermann Mosler spoke of NGOs as subjects of the secondary international law already in the early 1960s, without any noticeable echo in the international legal community at the time.

With regard to MNEs, one can observe that ad hoc international courts of arbitration have in some cases recognized the international legal status of MNEs. Yet unlike their historic predecessors (the Hanseatic League, the English (British) and Dutch East India Companies, the Hudson Bay Company, or the Congo Company), which at times were treated as international legal subjects, MNEs are not generally recognized as international legal subjects. However, MNEs have been addressees of rules of the so-called "international soft law" (codes of conduct) as well as decisions and resolutions by international organizations like the UN and the OECD, particularly in the context of the international campaign against Apartheid.

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EINFÜHRUNG IN DAS VÖLKERRECHT [INTRODUCTION TO INTERNATIONAL LAW] 151 (7th ed. 2000). Some authors are skeptical but do not rule out the possibility that NGOs could become limited subjects of international law. See Hermann H.-K. Rechenberg, Non-governmental Organizations, in III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (EPIL) 612, 617 (Rudolf Bernhardt et al. eds., 1997). A similar stance is taken by KARL DOEHRING, VÖLKERRECHT [INTERNATIONAL LAW] (1999).

29. For an overview, see Rechenberg, supra note 28.

30. See generally Hermann Mosler, Die Erweiterung des Kreises der Völkrechtssubjekte [The Extension of the Number of Subjects of International Law], 22 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 1 (1962). It is noteworthy that hardly any major treatise on international law mentions NGOs, and those that do, do so without regard to the early hints at a possible change in the structure of the international system as diagnosed by Mosler at the time. For a glaring example, see Volker Epping, in VÖLKERRECHT [INTERNATIONAL LAW] (Eberhard Menzel & Knut Ipsen eds., 1999) 78 (stating "Ihnen [i.e. NGOs] kommt grundsätzlich keine Völkerrechtssubjektivität zu." [They (i.e. the NGOs) do not possess international legal personality, in principle]).

31. See Peter Fischer, Transnational Enterprises, in 4 EPIL 921, 925 (2000).

32. Id. at 923.

33. On codes of conduct, see Ernst-Ulrich Petersmann, Codes of Conduct, in 1 EPIL 627 (1992). See also Jost Delbrück, Apartheid, in UNITED NATIONS—LAW, POLICIES AND PRACTICE, supra note 9, at 35 (discussing UN action against apartheid involving MNEs as owners of oil tankers transporting oil to South Africa in violations of embargos proclaimed by the United Nations).
These findings may be interpreted to mean that there is at least a trend in contemporary international law that this hitherto predominantly inter-state law is transforming, in part, into a transnational legal order encompassing international governmental organizations and non-state actors as well as states.

B. New Modes of International Lawmaking and the New Foundation of the Binding Force of International Law

1. General Remarks on the Sources of International Law

Far into the Twentieth Century, the classic sources of international law were international customary law and treaty law. As a subsidiary source, the general principles of law recognized by civilized nations—but compare article 38(1)(c) of the Statute of the International Court of Justice—were recognized as well. In conformity with the then-leading paradigm of sovereignty, the binding force of these customary or treaty-based norms rested on the consent of the states, except in the view of a few authors who based the binding force of international law on the *opinio iuris* of the people or on the desire inherent in human beings for norms regulating social relations. As a consequence of this understanding of the nature of international law, customary international law was considered binding only in those states that did not protest against the recognition of a rule of customary law (the controversial so-called *persistent objector* principle). Similarly, treaties were considered to be binding only upon the parties to the treaties (the *pacta tertiis nec nocent nec prosunt* principle).

This widely accepted "pure" doctrine on the sources of international law has never been fully consistent with state practice, particularly after World War

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34. Cf. GEORGE SCHELLE, PRÉCIS DE DROIT DES GENS 31 (1932) ("[L]a source du droit intersocial est la même que celle de toute autre cause juridique: elle est unique et se trouve dans le 'fait social'. Toute norme sociale ou intersociale dérive d'une contrainte qui s'impose d'elle-même aux individus... La source du droit international découle des rapports internationaux; son caractère obligatoire dérive de la nécessité des ces rapports... ").


I. With regard to customary international law, one can observe that since the advent of the Twentieth Century, international legal doctrine and state practice have increasingly modified the requirements for the formation of rules of customary international law, i.e. the requirements for state practice to constitute relevant state practice in this sense. Originally, a widespread practice by the greatest number of states possible was held to be necessary. Later this requirement was relativized to the extent that in no instance did the practice have to be observed by all states in order to form the basis of a new rule of customary international law. In the course of time, the requirement was lowered even further in the sense that state practice of only some states, including those most concerned with the subject matter of the customary rule at issue, was considered sufficient. Only those states that expressly rejected the new rule or protested the constitutive state practice were considered exempt from the binding force of the new customary rule. The rest of the states, neither actively involved in the relevant state practice nor commenting on the state practice or the new rule, would be deemed to have implicitly consented.

In the international law of treaties, the binding effect of certain categories of treaties on states not parties to the treaties (third states) was increasingly founded on the argument that such treaties (for instance, treaties determining state boundaries, demilitarization, or internationalization of rivers or canals) create an objective status or regimes that must be respected by third states. Thus, after World War I, the Permanent Court of International Justice (PCIJ) decided in the Wimbledon Case that by the internationalization of the Kiel Canal in the Versailles Peace Treaty of 1919 an objective status had been established that took precedence over German neutrality. In the Aaland Islands Case, the Commission of Jurists, set up by the League of Nations Council in 1919, decided that the demilitarization of the Islands provided by a treaty


between the Great Powers Great Britain, Prussia, and Russia of 1856,\textsuperscript{41} created an objective status established in the interest of the European Community of States and was therefore binding on Sweden, although the latter was not a party to the original demilitarization treaty.\textsuperscript{42}

2. Lawmaking Treaties

Under the influence of the changes occurring in the international system since the end of World War II, present state practice takes up these older, but at the time very progressive, approaches. One of the changes in the international system mentioned relates to the fact that the international community of states has, in an unprecedented manner, resorted to the instrument of the multilateral lawmaking treaty as a surrogate for central international legislative authority. In the present context, the most important feature of these lawmaking treaties (\textit{traités lois}) is that they are directed toward a common goal of all parties and that, therefore, implementation of the treaty obligations is owed by each party to all the other parties. This, in turn, means that a violation of one of the treaty obligations by one party vis-à-vis another party constitutes a violation of the obligation vis-à-vis all the other parties to the treaty, regardless of whether these other parties themselves directly suffered injuries from the violation. For example, if one party to a multilateral human rights convention violates the rights of its own citizens or of nationals of another state party to the convention, all other states party to the convention are entitled to sanction the culprit state. This intra-treaty \textit{erga omnes}–effect of certain kinds of treaties constitutes a fundamental shift of the international law of treaties toward an objective character of international law. Additional evidence of this change in the character of international law can be found in the jurisprudence of the International Court of Justice (ICJ) and in the fact that, particularly after World War II, elements of a hierarchy of norms have been introduced into international law by through the recognition that there are fundamental norms that are non-derogable (\textit{ius cogens}). In the famous \textit{Barcelona Traction} Case of

\textsuperscript{41} See Convention, annexée au traité de paix de Paris, Mar. 30, 1856, 15 Recueil des traités 788. For the Peace Treaty of Paris of 1865, see Traité general de paix l' Autriche, Mar. 30, 1856, 15 Recueil des traités 770.

1970,\textsuperscript{43} the ICJ recognized that there are fundamental principles of international law such that all states "have a legal interest in their protection, they are obligations \textit{erga omnes}.” The Court went on to say that “[s]ome of the corresponding rights of protection have entered into the body of general international law . . . ; others are conferred by international instruments of a universal or quasi-universal character.”\textsuperscript{44} Since that time, there has been a growing recognition that in addition to norms of general (customary) international law, multilateral treaties for the protection of fundamental international community interests have \textit{erga omnes}-effect, i.e. they are binding upon third states.\textsuperscript{45} There is a consensus with regard to the existence of \textit{ius cogens} that it has \textit{erga omnes}-effect, i.e. that all states are bound by these norms whether they have consented to them or not.\textsuperscript{46} In summary, all of these developments indicate that international law is moving away from the traditional doctrine that international law is binding upon states only with their express or implicit consent. International law is transforming into an objective legal order.

3. \textit{The Legitimacy of International "Legislation"}

The changes in the international lawmaking process mentioned above are important elements in the development of the concept of a world law as discussed here. Another important development, related to lawmaking authority, is closely related to these changes in the function, the role and the effects of multilateral treaties as lawmaking treaties. Looking more closely at the \textit{erga omnes}-effect of such treaties protecting fundamental interests of the international community, it becomes evident that the states participating in the drafting and conclusion of lawmaking treaties with intended \textit{erga omnes}-effect claim for themselves the authority to create law for the international community. That is, at least with regard to the provisions protecting fundamental values of the international community, they claim the authority to

\textsuperscript{43} Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), 1970 I.C.J. 3 (Feb. 5) (Second Phase Judgment).

\textsuperscript{44} \textit{Id.} at 33.

\textsuperscript{45} For a more detailed discussion of the \textit{erga omnes}-effect of community interest or public interest norms, see Delbrück, \textit{supra} note 38. The \textit{erga omnes}-effect of treaties protection fundamental public interests does not mean that they become binding upon third states in full detail, but rather that third states owe the implementation of the fundamental principles involved to the international community.

\textsuperscript{46} One consequence of the \textit{erga omnes}-effect of \textit{ius cogens} is that the notion of the persistent objector is generally rejected as incompatible with the concept of \textit{ius cogens}.
create law that is binding for all. That raises the difficult problem of the legitimization of these states to “legislate” for the international community at large. There are two arguments to support the legitimacy of this kind of lawmaker in, one substantive and the other procedural in nature. First, the erga omnes-or third party-effect is restricted to norms and principles that articulate an international public interest or international community interest. In all other cases, the pacta tertiiis-principle prevails. Second, in pursuing the ideas of Jonathan Charney with regard to the new modes of creating international customary law, to which we will return later, legitimization of establishing erga omnes-norms by treaty does not require that all states participate in the drafting and conclusion of such treaties. Instead, all states must merely have an opportunity to participate in the lawmaking and in the necessary discourse over the substantive meaning of the “public interests” to be included in the treaty. In fact, the international community has already been following this road for quite some time. In addition, non-state actors like NGOs have increasingly influenced the international lawmaking process. They have employed their expertise and by participating in the international discourse, not only within the organs and subcommissions of international organizations but also on the occasion of universal conferences, have thereby contributed to the legitimacy of the erga omnes-norms elaborated by the international organizations or the respective state conferences.

4. Framework Conventions and Internationalized Domestic Administrative Action

Another innovation in the way international treaty law has been introduced into state practice is the instrument of the so-called framework convention. These multilateral conventions determine only basic principles of the intended state conduct. The concrete obligations of the parties and the detailed

47. On the notions of the "international community interest" or "international public interest," see Bruno Simma, From Bilateralism to Community Interest in International Law, VI RECUEIL DES COURS 229 (1994); Jost Delbrück, The Role of the United Nations in Dealing with Global Problems, 4 IND. J GLOBAL LEGAL STUD. 277, 293-96 (1997); Delbrück supra note 38, at 32. On third party effect of certain treaties, see also Christian Tomuschat, Obligations Arising for States without or against Their Will, 241 RDC 195 (1993).


regulations are left to the later conclusion of amending protocols or—in the case of highly technical regulations—are delegated to expert committees or technical institutions. The reason for this procedure is that framework conventions, particularly in the area of international environmental law, require a high degree of scientific expertise for the elaboration of the detailed regulations and more often than not need to be amended because of the rapidly changing science. Doctrinally, the amending protocols constitute treaty amendments that frequently enter into force through a simplified procedure, i.e. by a majority vote of the parties to the framework convention that is then binding upon all parties, including the opposing minority, or that allow opposing parties to exempt themselves from the protocol by opting out, albeit within a relatively short term. This procedure too reflects the “legislative” character of the lawmaking process.

It is equally worth noting that the organ responsible for filling in the framework convention with detailed regulations usually includes expert administrators recruited from national government agencies. This leads to a shifting of the lawmaking process to the executive branch of governments. This, in turn, has major implications for the role of national parliaments in the lawmaking procedure. Their role is significantly reduced. Since in many cases these expert commissions also include experts from international organizations, the result is a vertical interplay of international and domestic administrations and an internationalization of domestic administrative agencies. In sum, the delegation procedure strongly resembles the similar procedure followed in domestic legal orders, i.e. that the legislature delegates the detailed regulation of framework provisions of a particular statute to the executive—another hint that international law is moving away from traditional procedures of lawmaking.

51. See id. at 250.
52. On this aspect, see id. at 249.
53. For rich material on the vertical interplay of international and domestic administrative action in the areas of the international protection of the environment, international administrative health law, and international communications and transport law, see id. at 288-487.
5. Customary International Law

Similar developments are taking place in the creation of international customary law. According to the traditional rules, developing international customary norms and principles took considerable time. The requirements were a uniform widespread state practice over a prolonged period and a corresponding opinio iuris. The resulting slow process of establishing customary law was increasingly considered inadequate to meet the regulatory needs of the international community. In relatively recent times, this attitude towards international customary law has changed. First, modern communications technologies allow for a much faster development of opinio iuris. Second, a modification of the traditional sequence of steps in the development of a new rule of customary law took place. It is not state practice that needs to be established as a first step followed by a corresponding opinio iuris. Rather, the international community often articulates its opinio iuris, which is then followed by a corresponding state practice. This has become possible because the institutionalization of international cooperation within international organizations and large universal conferences offer the platform for states to debate extensively the substance and scope of necessary regulations and to make their consensus public through non-binding declarations. As Jonathan Charney has correctly observed, under certain conditions, these declarations, as the expression of the international community’s opinio iuris, when immediately followed by state practice, can transform into binding customary law within relatively short time. An example in point is the recognition of Exclusive Economic Zones (EEZs) as a principle of customary international law. The establishment of such zones was proposed during the Third United Nations Conference on the Law of the Sea. The proposal met with the support of participating states. State practice followed almost instantaneously, and certainly long before the end of the Conference and the entering into force of the new Law of the Sea Convention that recognized EEZs. The most important factor in fostering acceptance of this short-cut to the recognition of a new rule of international customary law—Simma speaks

54. Charney, supra note 35.
graphically of “instant custom”\textsuperscript{56}—here, again, is that all states at least have the opportunity to participate in the articulation of the new \textit{opinio iuris}. So far, modern state practice has conformed to this requirement. Here, as well, international lawmaking appears to take on a “legislative” character.

6. \textit{Transnational Lawmaking}

In addition to international lawmaking, the development of a transnational law, which is not a particularly new phenomenon, has become of major interest in the context of globalization (understood as a process of denationalization of the legal interactions in the international system between private actors). Traditionally, interactions between private actors were regulated by domestic law. However, private commercial actors, even on the domestic plane, felt the need to settle their disputes before private \textit{ad hoc} courts of arbitration outside of the state judiciary. The reason was—and still is—to achieve a faster and more practical decision in the dispute than state courts could normally provide.\textsuperscript{57} Particularly when the parties to a dispute are of different nationality, they agree upon which law should be applied by the arbitral tribunal. Swiss civil and commercial law was frequently agreed upon, but the law of the forum, i.e. the law of the country in which the tribunal resided, and, of course, the law of the home country of one of the parties could also be chosen to govern the dispute. With the rising importance of MNEs, this practice appears to be changing.\textsuperscript{58} Arbitration is still the choice of these enterprises, for the reasons earlier indicated. However, the norms and legal principles underlying the decisions are left to the arbitrator to determine, and they are increasingly derived from commercial usages and general principles of law extracted from

\textsuperscript{56} See \textsc{verdross} & \textsc{simma}, \textit{supra} note 35, at 362 (rejecting the notion of “instant custom” as a self-contradictory concept, but emphasizing that the development of customary international has greatly accelerated because of the intensified communication among states in international organizations and other fora).

\textsuperscript{57} See Daniel Girsberger, \textit{Entstaatlichung der friedlichen Konfliktregelung zwischen nichtstaatlichen Wirkungseinheiten: Umfang und Grenzen—Das Beispiel der internationalen Wirtschaftsschiedsgerichtsbarkeit} [Denationalization of the Peaceful Resolution of Disputes Between Non-state Actors: Scope and Limits—The Example of International Commercial Arbitration], in \textsc{39 berichte der deutschen gesellschaft für volkerrecht [bdgvr] [reports of the german society of international law]} 231, 233 (2000) [hereinafter \textsc{bdgvr}]. For an English summary, see also \textsc{bdgvr}, \textit{supra}, at 264-65.

\textsuperscript{58} For a discussion of the role of MNEs as lawmaking entities, see Peter T. Muchlinski, “Global Bukowina” Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community, in \textsc{global law without a state} 79, 90-101 (Gunther Teubner ed., 1997).
the accumulating jurisprudence of the courts of arbitration.\(^5\) Thus, a body of law has developed, and is still developing, that can be called transnational law—or, rather controversially, as a modern *lex mercatoria*\(^6\)—that, as to its substantive and procedural rules, is determined largely by non-state actors. A potentially similar development is occasionally discussed with regard to the internet.\(^6\) As tentative as these developments may be, they may be taken as an indication of an emerging legal pluralism beyond the state level.\(^6\)

**C. International Law Enforcement**

1. **International Law Enforcement through Judicial Proceedings**

Traditionally, international law enforcement was entirely decentralized. If the rights of an individual state had been violated, that state was dependent on the use of certain available means of enforcement, i.e. retorsion, non-forcible sanctions, and ultimately forcible reprisals or even waging war, in order to end the violation of its rights and to secure damages or other satisfaction from the culprit state.\(^6\) Particularly in the second half of the Nineteenth Century, the use of *ad hoc* international arbitral tribunals or arbitrators gained ground as an instrument of dispute settlement. Absent a binding international legal obligation to resort to arbitration, this instrument of peaceful dispute settlement could not change the decentralized character of international law enforcement, despite a widespread use of inter-state arbitration.\(^6\) The pro-arbitration

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59. Decisions rendered in these types of arbitration are very controversially discussed under the notion of "anational arbitration awards." See Girsberger, *supra* note 57, at 251.

60. *See generally MATTHIAS HERDEGEN, INTERNATIONALES WIRTSCHAFTSRECHT [INTERNATIONAL COMMERCIAL LAW] 23 (2d ed. 1995) (Whether this body of law is understood as an autonomous legal order or whether it is ultimately based on the recognition by domestic law or international law is also a matter of controversy: against its autonomous character it is argued that the decisions of the private international courts need execution by domestic courts and therefore require recognition by the latter.). The counter argument is that decisions reached by private international arbitration are increasingly implemented by the parties, the principle of reciprocity being the incentive to abide by an adverse court ruling. Thus, enforcement by domestic authorities is neither sought nor necessary; on the only relative importance of the question whether *lex mercatoria* is an autonomous body of law. See Girsberger, *supra* note 57, at 255.


62. For a more detailed discussion of the role and scope of transnational law and global legal pluralism, see generally *GLOBAL LAW WITHOUT A STATE, supra* note 58.


64. *See STARKE, supra* note 63, at 488-89.
movement reached the first point of culmination when the First Hague Peace Conference of 1899 established the Permanent Court of Arbitration (PCA) at The Hague. However, contrary to the intentions of the protagonists of an institutionalized procedure of dispute settlement, the PCA was and is not a permanent court. Rather it consists of a panel of potential candidates, who because of their expertise and personal integrity could be individually called upon ad hoc by the parties to a dispute, through the Secretariat of the Court, to serve as arbiter. Overall, the use of the PCA did not live up to the expectations of its founders.65

With the foundation of the League of Nations and the parallel establishment of the Permanent Court of International Justice (PCIJ), a second major attempt at overcoming the decentralized system of international law enforcement was undertaken. The international community pursued a kind of double strategy: on the one hand, it was based strictly on international law, although political dispute settlement by the League was also intended to set limits to the unilateralism exercised in international law enforcement. On the other hand, the concept of judicial settlement of disputes was to be strengthened by setting up a permanent international court staffed with independent judges. As adequate as this approach was from a theoretical point of view, in practice, the implementation of this double strategy proved to be unsatisfactory. The reasons are well known: First, the League of Nations possessed neither the appropriate competences nor the political power to act as an efficient law enforcement authority.66 Second, the PCIJ lacked obligatory jurisdiction and thus was not in a position to fulfill its function as dispute settlement authority to the extent hoped by the founding states and other nations of the world. Yet, it cannot be overlooked that the PCIJ adjudicated a large number of cases, some of which had a groundbreaking impact on the development of international law.67

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65. Between its establishment and the outbreak of World War II, only 20 cases were referred to the PCA; and after World War II, only 2. See id. D.J. HARRIS, LL.M., PH.D., CASES AND MATERIALS ON INTERNATIONAL LAW 911 (4th ed. 1991) reports 25 cases while MALCOLM SHAW, INTERNATIONAL LAW 738 (4th ed. 1997) refers to “some twenty cases” between 1900 and 1932. It must be noted, though, that international arbitration outside the PCA remained an important means of dispute settlement, particularly in inter-state disputes in trade-related matters.

66. See Clive Parry, League of Nations, in III EPIL 177, 184 (pointing to the adverse political climate in the 1930s with some major states—strongly supported by their populations engaged in wars of aggression in gross violation of the most basic principles of international law).

67. On the record of the PCIJ in historical perspective, see Hans-Jürgen Schlochauer, Permanent Court of International Justice, in III EPIL 988 (listing the 22 Judgments and 27 Advisory Opinions of the Court rendered between 1923 and 1935).
While the structural and political deficits of the League were—at least with regard to some essential issues—avoided in the Charter of the United Nations, the cardinal problem of an international judicial system, i.e. the source of obligatory jurisdiction of a world court, remained unresolved. The Statute of the new ICJ, unlike the PCIJ established as one of the principal organs of the United Nations (art. 7 UN Charter), does not provide for obligatory jurisdiction of the court. As under the Statute of the PCIJ, only if both parties to the dispute before the Court have voluntarily submitted to the Court’s jurisdiction are they obliged to participate in the proceedings and to accept and implement the judgment. Because of the Cold War, litigation before the Court was not very frequent in the early years. In recent years, however, we can observe an increasing use of the ICJ, particularly by third-world States. The establishment of the International Tribunal for the Law of the Sea in 1996, the greatly increased efficiency of the dispute settlement procedures within the World Trade Organization (WTO), and the establishment of an International Criminal Court as well as of the Criminal Tribunals for the punishment of war crimes and crimes against humanity for the former Yugoslavia and Rwanda, were a welcome indication that the idea of an institutionalized judiciary as an instrument of international law enforcement has gained momentum. In the context of the present paper, it is of special importance that with these steps state sovereignty is further curtailed. This is particularly true concerning the international prosecution of state and government representatives for war crimes and crimes against humanity based on international legal norms for the protection of human rights and intended to sanction violations of fundamental principles of international law. The concession on the part of states in permitting international judicial bodies directly to hold individuals responsible for the crimes mentioned constitutes a further inroad on state sovereignty and in a sense indicates another aspect of the denationalization process. A similar development has taken place within some regional systems for the international protection of human rights in that individuals are accorded standing before international law-based human rights courts and are entitled to bring actions against their own or a foreign state that is party to the respective convention.

69. For the definition of such crimes in the Statute of the ICC, see Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 1002.
70. See, e.g., Protocol No. 11, supra note 22, art. 34, at 5.
2. International Law Enforcement by Coercive Measures and Cooperative Forms of Securing Compliance with International Law

The concept underlying the UN Charter that the Security Council should possess a monopoly (albeit not a complete one) in applying coercive measures, including military action, failed utterly under the conditions of the Cold War. However, a centrally, i.e. Security Council-authorized, system of international law enforcement in various forms has taken shape in the course of time. Multilateral “peacekeeping operations” including the so-called “robust” peacekeeping had a mitigating effect in many violent conflicts and helped to curb unilateral illegal use of force.71 These successful interventions on the part of the United Nations notwithstanding, one has to admit that in view of the rise of ethno-nationalist conflicts in the wake of the end of the Cold War, the organization has reached the limits of its capabilities. In particular, the broad interpretation of the term “threat to peace” in article 39 of the UN Charter—a necessary and logical step considering the changing nature of violent conflicts from international to intra-state scenarios—has contributed to the dangers of an over-commitment of the United Nations.72 Furthermore, although the Security Council’s reading of article 39 has widened the scope of the applicability of Chapter VII of the UN Charter, it still leaves an only limited field of action for the organization given the number of serious violations of international law that fall below the threshold of the use of force.

Based on a critical assessment of these findings, international legal scholars and state practice have searched for alternative non-confrontational, i.e. cooperative, forms of international law enforcement that, by their very nature, could be more conducive in promoting compliance than confrontational enforcement. Such alternative cooperative forms of compliance are well known in domestic administrative law. Thus, the government can provide incentives for its citizens to comply with regulations or government programs, for instance, offering tax relief or other kinds of benefits. Clashes of interests between citizens and government agencies, particularly in local settings, can be resolved by hammering out formal agreements in place of hierarchical orders. It is no coincidence that these approaches to securing compliance have become known in administrative science as “cooperative administration,” as opposed to

72. See Delbrück, supra note 13.
hierarchical and ultimately repressive administration as the means of law enforcement. From an institutional point of view, it may be problematic to attempt to transfer such domestic approaches to the international plane. The domestic conditions appear to be too different from those existing on the international level. However, this reading of the cooperative compliance strategy is too narrow and, in a sense, too state-centered. As Abram Chayes and Antonia Handler Chayes have demonstrated impressively in their book on “The New Sovereignty,” the application of instruments used to secure compliance cooperatively are already quite visible in international state practice. A few examples of applying cooperative approaches to promoting compliance with treaty obligations that are most similar to the domestic approaches may be mentioned here. First, there are examples of seeking compliance by providing incentives to abide by treaty commitments. Thus, in order to induce compliance by all the parties to a treaty for the protection of the environment, they stipulate mutual benefits in their trade relations that could be withheld from a party not abiding by its treaty obligations. More important than this, to some extent still repressive approach, are agreements that are based on the principle of solidarity, i.e. on the commitment to mutual assistance in the implementation of the treaty. Non-compliance with environmental treaties often results from the fact that particularly developing countries do not possess the technical and financial resources to implement their obligations under the treaty. The cooperative approach to compliance aims at the provision of assistance by the stronger parties to the treaty to those less able. This assistance may consist of financial or technological and scientific aid, for example, for data collection and their assessment.

In addition, states parties to a particular treaty have resorted to institutionalizing their close cooperation by establishing a comprehensive monitoring system that would allow them more easily to reach consensus on the necessary environmental protection measure and on the standards of protection to be achieved. In the present context, it is important to note that in both of these approaches to cooperative compliance, non-state actors, namely NGOs, play an essential role. They become involved in practical implementation of protective measures where necessary (for instance, by educating the local people through persons they know and can trust). Another important function of NGOs is that they are usually well informed of the internal conditions of all

73. On this aspect and the following considerations, see ABRAM CHAYES & ANTONIA H. CHAYES, THE NEW SOVEREIGNTY—COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).
parties to the treaty in question, allowing them to exercise valuable monitoring functions. They are able to inform the public of treaty violations at any time and thus exercise political pressure to induce compliance. As in the case of the protection of human rights, the NGOs fulfill a public task that was traditionally looked after by the governments. Here, too, we observe an interconnection of state and non-state implementation of public tasks similar to that discussed with regard to the fulfillment of public tasks upon transfer of those tasks to supranational authorities.\textsuperscript{74}

\section*{D. The Changing Conceptualization of Sovereignty}

Correctly understood, sovereignty as a principle of international law has never been absolute, but relative in the sense that the sovereignty of one state found its legal limits in the sovereignty of the other states. The rather oddly phrased article 2 (1) of the UN Charter,\textsuperscript{75} speaking of the “sovereign equality” of the Member States, codifies this correct understanding of the concept of sovereignty. Despite its legal relativity—as discussed above\textsuperscript{76}—it was understood as embodying the supreme power, and therefore international legal obligations had to be interpreted according to the motto “\textit{in dubio pro suprema potestate}” (in case of doubt in favor of the supreme power). In other words, one could say that in the classical international system and its legal order the dogma was that there could be no state without sovereignty. However, this dogma was doctrinally overcome by Georg Jellinek about a century ago.\textsuperscript{77} In the course of his famous “Allgemeine Staatslehre” (Theory of the State), he came to the conclusion—far ahead of his time—that sovereignty was not the essence of statehood, but rather an accidental attribute of the supreme power of the state. Thus, statehood without sovereignty became a thinkable concept. Under the influence of this new conceptualization of sovereignty, the various changes in the status of the state as a subject of international law—as they were depicted in the preceding parts of the paper—could take place: the integration of states into the ever-tightening network of international organizations. This is also marked by the continuing retreat of the state from the fulfillment of

\textsuperscript{74} See \textit{supra} Part II.2.

\textsuperscript{75} The phrase is odd in the sense that “equality” as an abstract notion cannot be sovereign in any real sense of the word. But it does indicate that all states are legally equal, otherwise they could not be sovereign in the legal sense. Sovereignty and equality are two sides of the same coin.

\textsuperscript{76} See \textit{supra} Part II.1.

\textsuperscript{77} See \textsc{Georg Jellinek}, \textit{Allgemeine Staatslehre [General Theory of the State]} 262, 740 (3d ed. 1914); \textsc{Hobe}, \textit{supra} note 11, at 64.
hitherto genuinely state tasks—without any doubts being raised as to the continuing capacity of state to act under international law and thus retain the status of a subject of international law. Recent attempts in the international legal literature to declare incompatible with state sovereignty, and therefore illegal, the binding decisions of the UN Security Council authorizing enforcement measures under Chapter VII, are methodologically flawed and simply false. Under existing international law, the UN Member States, by virtue of their acceptance of the UN Charter, have agreed to the ensuing restrictions on their sovereignty.\(^7\) Sovereignty in the understanding of the critics is borrowed from past times, but unfortunately, there are occasional lapses into the past in state practice today. However, certain kinds of unilateral actions, namely the use of force, have increasingly met with severe criticism in the international community as, for example, the Soviet Union experienced after the invasion of Afghanistan in 1979\(^7\) and the United States after the air raids on Libya in 1986\(^8\) and on Sudan/Afghanistan in 1998.\(^1\) Unilateralism below the threshold of the use of force has also been openly criticized, such as the renunciation of the ABM Treaty by the United States in 2001.\(^2\) Reactions to this kind of old style sovereignty oriented policies pursued in an alleged "national interest" have become increasingly bold. Thus, the United States, for the first time, lost its seat on the Human Rights Commission established under the UN Covenant on Civil and Political Rights in 2001,\(^3\) and the Durban Conference against Racism of 2001 resisted intense pressure by the United States to replace language offensive to the United States in the final conference document.\(^4\) Whether the U.S. position in these matters was justified is immaterial at this point. The important aspect of these reactions on the part of a large segment of the international community is that international or rather global leadership cannot be successfully and credibly exercised unless in a cooperative and, at the same time, rule of law-based spirit. States will continue to play an important and even dominant role in the international system.

\(^7\) The concept of sovereignty with which the UN actions are supposed to be incompatible is an extraneous notion revived from pre-World War I times, not the concept on which the UN are based according to article 2(1) of the Charter.

\(^7\) On this forcible intervention, see 50 Archiv der Gegenwart [AdG], 23395 A (1980).

\(^8\) See 56 AdG, 29797 A (1986).


\(^3\) *Id.*

\(^4\) *Id.*
Nevertheless, their sovereignty—if one wants to hold on to the notion (and there are good reasons to do so)—has to be re-conceptualized. In the future, a "new sovereignty" is at issue, one that is formed by the paradigms of cooperation and compliance with the international legal order. In the words of Abram Chayes and Antonia Handler Chayes: "[o]ur argument goes further. It is that for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life." Leadership through representing a role model informed by the values of peace, cooperation and compliance with principles and rules of international law is the order of the day in the era of globalization.

IV. TENTATIVE OBSERVATIONS ON THE POTENTIAL STRUCTURE OF A "WORLD LAW"

In conclusion, the theoretical structure and substance of a potential "world law" will be sketched out based on the preceding analysis.

1. It can be shown that the globalizing international system increasingly presents itself as a multilevel system in which public tasks are implemented partly in horizontal cooperation and partly by vertically interconnected state and non-state actors.

2. One of the tasks to be performed within the multilevel system is the development of a legal order that transcends both traditional classical international law in scope and the inter-state law of cooperation as it has emerged since the end of World War I. The new legal order encompasses existing international law, but transforms such that it also extends to non-state actors. These become limited functional subjects of international law as needed. Under the influence of these new subjects of international law, international law itself also transforms in substance in that it becomes more focused on the protection of fundamental international community or international public interests.

3. In the course of this transformation process, international law increasingly develops into an objective legal order. Its binding force is becoming less dependent on the actual consent of states. Rather it takes on a "legislative" character and thereby becomes binding also on those states (and other actors) that did not consent to the recognition of certain rules for the

85. CHAYES & CHAYES, supra note 73, at 27 (emphasis added).
protection of international community interests (*erga omnes* effect of public interest norms). The legitimacy of such law rests on the fact that it results from a public discourse in various universal fora open to all states. Furthermore, it is essential for the legitimacy of such “legislated” international law that non-state actors participate in the public discourse preceding the adoption of public interest norms. Similar requirements apply to the accelerated creation of rules of international customary law that articulate public interests.

4. The new international legal order is complemented by the relatively autonomous development of legal regimes by non-state actors, i.e. by lawmaking beyond the state (“law without a state”). Thereby a pluralistic legal order develops that consists of the existing law, the partially transformed international law, and the (relatively) autonomous body of (transnational) law.

5. In order to ensure the necessary coherence of this comprehensive legal order, and particularly to preserve those fundamental principles of the rule of law that were hard fought for in previous centuries, there is a need for basic constitutional norms that serve as the integrating foundation of the composite new legal order. Contemporary international law has entered into a process of constitutionalization, evidenced for instance by the increasing hierarchization of international law (*ius cogens, erga omnes* norms).

6. We may call the comprehensive legal order sketched out here a “world law.” This legal order is increasingly characterized by a centralizing law enforcement. This is indicated by the strengthening of the international judiciary and the pursuance of strategies aiming at achieving compliance with international law by offering incentives and providing for effective compliance control by non-state actors; in other words, compliance is intended to rely more on cooperative approaches than on repressive or confrontational measures.

**CONCLUSION**

To “realists” the preceding consideration may be pure fiction; for traditional international lawyers, some of the observations may be disquieting. One can answer the realists by noting that the structural changes in the international system can be empirically verified. It appears to be unrealistic and even dangerous to close one’s eyes to these changes. To the traditional international lawyers the answer is: the envisaged “world law” will not replace

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86. See Jochen A. Frowein, *Konstitutionalisierung des Völkerrechts* [Constitutionalization of International Law], 39 BDGVR, supra note 57, at 427.
existing international law, and states will remain the most important actors in the international system. However, their sovereignty will be transformed into a “new sovereignty.” The function of a “world law” is to provide the framework for the emerging international or global civil society under law. Without the success of the vision of a global civil society under law, the great opportunities of globalization would be lost and it would become what its critics have said all along: nothing but capitalism let loose. It is the responsibility of international lawyers, among many others, to promote the cause of a global rule of law.