Prepublication Version: The Evolution of International Law

Milena Sterio, Cleveland State University

Available at: https://works.bepress.com/milena_sterio/1/
The Evolution of International Law
Milena Sterio*

I. Introduction

Globalization, a phenomenon which can be described as inter-connectivity between regions, peoples, ethnic, social, cultural and commercial interests across the globe, has affected different legal fields, one of which is international law.1 Reshaped by the potent forces of globalization, international law has transformed itself from a set of legal rules governing inter-state relations, to a complex web of transnational documents, providing a normative framework for all sorts of different actors on the international legal scene.2 Phenomena which used to belong to domestic realms are now examined and monitored through the international legal lens. Our planet is “shrinking” because issues such as the environment, nuclear weapons, disease and terrorism have become of global concern, and are thus measured by international law parameters.3 Domestic law has lost its omnipotent, “sovereign” power and is now supplemented, corrected, and watched over by international law.4 Thus, international law has undergone an evolutionary process over the recent decades, transforming itself from an inter-state conflict resolution instrument, to a powerful global tool, present in every-day life and influential of many state actors’ and non-state entities’ decisions and policies.

This Article examines the evolution of international law brought about by the impact of globalization, as well as the role that globalized international law plays in different legal fields, and the impact that it asserts on state and non-state actors. First, this Article describes the transformation of international law, by focusing on four different phenomena: the proliferation of actors in international law; the proliferation of

---

* Assistant Professor of Law, Cleveland-Marshall College of Law. J.D., Cornell Law School, magna cum laude, 2002; Maitrise en Droit (French law degree), Université Paris I-Panthéon-Sorbonne, cum laude, 2002; D.E.A. (master’s degree), Private International Law, Université Paris I-Panthéon-Sorbonne, cum laude, 2003; B.A., Rutgers University, French Literature and Political Science, summa cum laude, 1998. The author would like to thank Ekaterina Zabalueva for her excellent research assistance and input with this Article.

1 Many scholars have attempted to define globalization. See, e.g. Paul Schiff Berman, From International Law to Law and Globalization, 43 COLUM. J. TRANSAT’L L. 485, 490 (2005); Philippe Sands, Turtles and Torturers: The Transformation of International Law, 33 N.Y.U. J. INT’L L. & Pol. 527, 537 (2001); see also infra Part II. Legal scholars also refer to globalization, for example, by calling for the need for a broader frame of analysis entitled “law and globalization.” Berman, supra note 1, at 490. Moreover, the term “globalization” has been used in many different fields besides the law, such as anthropology, sociology, etc. For example, anthropologists have argued that we live in the “global cultural ecumene” or a “world of creolization.” Ulf Hannerz, Notes on the global Ecumene, PUB. CULTURE, Spring 1989, at 66; Robert Foster, Making National Cultures in the Global Ecumene, 20 ANN. REV. ANTHROPOLOGY 235 (1991); Ulf Hannerz, The World in Creolisation, 5 AFR. 546 (1987). Sociologists, similarly, have shifted their emphasis from bounded “societies” to a “starting point that concentrates upon analyzing how social life is ordered across time and space…..” Anthony Giddens, THE CONSEQUENCE OF MODERNITY 64 (1990).

2 See infra Part II.


4 Id. at 936 (“[t]he traditional Westphalian notion of sovereignty by which a state had absolute territorial control and the right to exercise domestic powers free from external constraints has, in large part, become unrecognizable.”); id. at 941 (“[i]n various ways, the scope of sovereignty today is determined in a ‘top-down,’ or vertical fashion, with international norms being imposed from without.”).
norms in international law; the proliferation of organizations in international law; and the expansion of jurisdiction in international law. Then, this Article assesses the role that globalized international law plays in different legal fields, namely, international human rights, international criminal law, and private international law. Finally, this Article focuses on the impact that globalized international law has played on state actors, as well as on the individual, by reshaping their behavior in the international realm.

II. Transformation of International Law

International law, as studied through a traditional framework, included two types of normative systems: one promulgated by states themselves for their domestic relations, and the other promulgated among states for inter-state relations.5 Throughout the 20th century, such a formal view of international law became inadequate. For one, the creation of individually enforceable norms in the field of international human rights transformed individuals into international law players.6 Moreover, non-governmental organizations (“NGOs”) came to play a prominent role on the international legal scene, as did various regional organizations, institutions, and judicial bodies.7 The proliferation of actors in international law contributed to a proliferation of international legal norms. Moreover, even classic legal actors, such as courts, changed their role in light of this modernization of international law. For example, judges today seem more willing to apply international norms transnationally, to engage in a transnational judicial dialogue, or to condone conceptions of universal jurisdiction.8

Thus, as scholars have already noted, international law has transformed itself, changed by the powerful forces of globalization.9 Globalization refers to a “stretching process,” in which “connections have been made between different social contexts or regions and become networked across the earth as a whole.”10 For the purposes of international law, globalization means that in a globalized world, international law recognizes different state interests and finds ways to give effect to them, with the specific consequence that what one state does on a particular matter may be of specific interest to another state.11 Thus, activities which were treated as local under the traditional conception of international law are now internationalized.12

Moreover, to add to this globalization puzzle, international legal norms seem no longer to be created mainly by state actors; rather, today we deal with a world of transnational law-making, cross-border activity and interaction, where state and non-state actors together “disseminate alternative normative systems across a diffuse and

---

5 Berman, supra note 1, at 485.
6 Id. at 488.
7 Id. at 488-89.
8 Id. at 489. For a discussion of universal jurisdiction, see infra, Part II.D.
9 See generally Sands, supra note 1, Berman, supra note 1.
11 Sands, supra note 1, at 537.
12 Id. at 538.
constantly shifting global landscape.” The phenomena worth describing brought about by the globalization of international law include the proliferation of actors, norms, and organizations in international law, as well as the expansion of traditional international jurisdictional concepts.

A) New Actors in International Law

Traditionally, international law involved state actors and inter-state relations. Individuals, organizations, regional bodies, non-governmental institutions and the like were left outside the reach of international law. The United Nations was a forum open exclusively to state parties. The International Court of Justice (“ICJ”), as well as its predecessor, the Permanent Court of International Justice, were fora reserved for state grievances only. It was inconceivable that an individual would come before such tribunals, or that international law would govern anything but relations among state parties.

Today, the converse is true. International law, in its transformed or globalized version, governs all sorts of relations, including those implicating states, regional bodies, NGOs, trade organizations, commercial actors, and private individuals. It spreads into legal fields such as environmental law, labor law, trade regulations, antitrust, health, and insurance law, *inter alia*. Non-state actors play increasingly important roles in such fields. Examples of such non-state actors that have assumed player roles in globalized international law involve regional organizations, specialized bodies such as trade organizations, NGO’s, as well as private individuals.

For example, regional organizations play dominant roles within their “jurisdictions.” The North American Free Trade Alliance (“NAFTA”) is such a regional

13 Berman, *supra* note 1, at 492.
14 *Id.* at 492 (noting that traditional international law scholars located international law “in the acts of governmental bureaucratic entities, such as the treaties and agreements entered into by nation-states, the declarations and protocols of the United Nations… or other affiliated bodies, and the rulings of international courts and tribunals.”); *see also* BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW 2 (3d ed. 1999) (“Public international law primarily governed the activities of governments in relation to other governments.”).
15 BARRY E. CARTER, PHILIP R. TRIMBLE, ALLEN S. WEINER, INTERNATIONAL LAW (5th ed. 2007) at 14 (noting that the traditional concept of international law “was generally one of law between nation states.”) [hereinafter “Carter, Trimble, Weiner”].
16 *Id.* at 10-12 (noting the establishment of the Permanent Court of International Justice in 1921, and of the International Court of Justice in 1946, which were courts designed to “resolve legal disputes among nations.”).
17 Berman, *supra* note 1, at 487 (noting that in an earlier generation, the study of international law focused on norms promulgated by nation-states and among nation-states).
18 Paul Schiff Berman, A Pluralist Approach to International Law, YALE J. INT’L L. 301, 312 (2007) (noting that we need “a more fine-grained, nuanced understanding of the way legal norms are passed on” from such different groups in order to begin to study law and globalization) [hereinafter “Berman, Pluralist Approach”].
19 *Id.* at 312 (noting that a wide variety of non-state actors are engaged in the establishment of norms, which operate internationally and transnationally); *id.* at 321 (noting that states themselves are increasingly “delegating power to private actors who exist in a shadowy world of quasi public/quasi private authority.”).
power that acts as a sovereign in matters of trade within the North American continent.\(^\text{20}\) In Europe, the European Union undertakes a sovereign role in matters such as labor law, consumer regulations, antitrust, environmental law, etc.\(^\text{21}\) Moreover, NGOs play a hugely important role on the international scene. They challenge traditional models of state sovereignty with regard to different areas of law, and in particular human rights norms; they formulate global standards of corporate behavior; and they generally claim to represent some sort of a global interest.\(^\text{22}\) As another example, trade organizations, such as the World Trade Organization ("WTO"), dictate the terms of global trade by creating norms, by establishing an entirely new jurisdiction that handles disputes, and by tying state and non-state interest in a global web of trade relationships embodied in the organization’s structure and processes.\(^\text{23}\) Finally, private individuals exercise an increasing amount of influence in the international legal field.\(^\text{24}\) Private parties can now enter into investment treaties with state parties; moreover, they can sue state parties in specific tribunals for breaches of such investment relations.\(^\text{25}\) Private parties can also rely on international law to obtain certain guarantees, particularly in the field of human rights, and they can also sue state parties for violations of such international standards.\(^\text{26}\)

\(^{20}\) Berman, supra note 1, at 535 (discussing NAFTA ad hoc tribunals and their authority over national courts on trade matters as an example of NAFTA’s power in terms of articulating jurisdictional norms).

\(^{21}\) Cohan, supra note 3, at 940-941 (2006) (discussing the role of the EU in modern world and noting that the EU has been an active participant in many substantive conferences, such as the U.N. Conference on the Law of the Seas, the Conference on Cooperation and Security in Europe, several environmental organizations, and that it is a member of the Food and Agriculture Organization).

\(^{22}\) Berman, supra note 1, at 546 (noting the NGO’s are being taken into account by scholars more and more “as an important normative force on the international scene”); id. at 547 (noting that NGO’s formulate global standards of corporate behavior, and that such codes of conduct have emerged mostly in the human rights field, environmental protection, and fair labor standards); id. at 548 (noting that “NGO’s often claim to represent a global polity.”). Note, however, that some view NGO’s more as interest groups focused on particular issues than as representatives of general constituencies. Kenneth Anderson, The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society, 11 EUR. J. INT’L L. 91 (2000).

\(^{23}\) Many commentators have noted the increasing role of the WTO in developing a global common law of international trade. See, e.g., Raj Bhala, The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy), 14 AM. U. INT’L L. REV. 845, 850 (1999); Berman, supra note 1, at 521.

\(^{24}\) “The concerns, the actors, and the processes of ‘public’ international law have been expanded – ‘privatized’- in this century.” Ralph Steinhardt, The Privatization of Public Law, 25 GEO. WASH. J. INT’L L. & ECON. 523, 544 (1991). See also Berman, supra note 1, at 510 (noting that conflicts law and international business transactions have become a “staple of state-to-state relations, and non-state or private actors have taken an increasingly important role in the articulation and enforcement of international standards.”).


\(^{26}\) For example, individuals can now bring their claims against state parties directly in the European Court of Human Rights. Sands, supra note 1, at 546-547 (describing the evolution in the European Court of Human Rights procedures, culminating in allowing access to the tribunal to individual victims). Similarly, individuals can bring complaints against state parties in the Inter-American Court of Human Rights. Claudio Grossman, The Velasquez Rodriguez Case: The Development of the Inter-American Human Rights
Thus, it is no longer true that international law represents a body of law that governs relations among states; on the contrary, it is a complex web of treaties, regulations, customary norms, codes of conduct and the like that shapes relationships among state as well as non-state actors along horizontal and vertical axis of power.  

B) Proliferation of Norms in International Law

International law today encompasses thousands of different norms. Those include, *inter alia*, multiple conventions and treaties in a multitude of areas of law, a significant number of customary norms ranging from fields such as human rights to foreign direct investment, a vast number of international legal decisions stemming from various international tribunals, numerous international legal doctrines emanating from scholars and publicists writing in a broad range of fields, as well as soft law instruments such as codes of conduct, gentlemen’s agreements, governmental statements, etc.

Such a proliferation of international legal norms stems from several factors. First, the latter half of the 20th century has witnessed a proliferation in the number of international legal bodies – organizations, institutions, conferences, tribunals – which all, as one of their roles, draft and issue international law instruments. Second, also over the course of the last century, international law has expanded into a variety of fields that had traditionally been left to state sovereign reign. International law now governs areas like health law, consumer law, labor law, and antitrust law, which entails more international laws and regulations in those areas. Third, and most important, international law now plays a different role in today’s globalized world. While a century ago, international law was only meant to govern relations among states, this is no longer true. International law aims to influence a variety of state and non-state actors, in many

---

*Sands, supra* note 1, at 548 (noting a great increase in the norms of international law).


*See, e.g.,* Sands, *supra* note 1, at 553 (noting that today there are over twenty-five permanent international courts and tribunals); *see also* Carter, Trimble, Weiner, *supra* note 15, at 11-13 (describing the different international norm-creating institutions that have developed since World War II); *see also* Harold Hongju Koh, *Is There a “New” New Haven School of International Law*, 32 YALE J. INT’L L. 559, 564 (2007), (noting that today we live in a world where non-state actors are capable of serving as transnational decisionmakers) [hereinafter “Koh, ‘New’ New Haven School”].

different legal fields, along different normative axis.\textsuperscript{34} It influences states’ legislative bodies,\textsuperscript{35} supreme judicial organs,\textsuperscript{36} individual expectations,\textsuperscript{37} diplomatic concerns, foreign policy issues, as well as a vast number of domestic legal areas on a substantive level.

While it may be true that the proliferation of legal norms itself contributed to the fact that international law seems so inherently present in such different legal spheres, it may conversely be said that the higher level of interaction among state and non-state parties in the recent decades has caused the very same proliferation of international legal rules. In other words, the more states and non-state actors interact, the more friction they create and the more law they need in order to resolve their differences. Similarly, global interaction also induces parties to negotiate to prevent friction and future disputes, thereby contributing to the proliferation of international legal norms.

C) Proliferation of Organizations in International Law

International law has not only witnessed a proliferation of legal norms, it has also witnessed an expansion in the number of international legal organizations. At the end of World War I, victorious states created the League of Nations, predecessor organization to the United Nations and a body charged with the at least theoretical prevention of another bloody war.\textsuperscript{38} At the same time, states realized that an international arbitrator may be needed in other substantive areas, such as health, labor, or communications law.\textsuperscript{39} In other words, states seemed to realize that if they achieved coordination in substantive areas of law, then they would be less likely to engage in violent conflict in general. Thus, the League of Nations was outfitted with special offices, such as the International Telecommunication Union and the International Labour Office, charged with the task of studying and promoting international cooperation on various issues of international interest.\textsuperscript{40} Along the same lines of thinking, the Permanent International Court of Justice was created, leading at least some to believe that the peaceful settlement of disputes through international law was possible.\textsuperscript{41} While these developments proved inefficient in
preventing the outbreak of World War II, at least they geared states toward joint organizational efforts as a method of preventing conflict.

The end of World War II saw the creation of the United Nations, the supreme international organization, charged with many tasks but most importantly, conceived as a global peacemaker that would replace any unilateral use of force with joint decision-making and acting on the international legal scene.\(^{42}\) In the wake of the United Nations establishment, other regional bodies, assuming the roles of regional peacekeepers, were equally born. In Europe, the North Atlantic Treaty Alliance (“NATO”) was established with mostly Western European states as members, as well as the United States, to counter the threatening power of the former Union of the Soviet Socialist Republics (“USSR”) during the Cold War.\(^{43}\) In Africa, the Economic Community of West African States (“ECOWAS”) was created as a mixed organization: its mission is economic, but it encompasses mercenary forces that are charged with keeping peace in West Africa.\(^{44}\)

Embracing the post-World War I ideas of preventing conflict by transferring substantive decision-making in different areas to international bodies, international actors engaged in negotiation to create international monetary, trade, economic, insurance, investment, and other types of organizations. Thus, a multitude of international organizations were created in the latter half of the 20\(^{\text{th}}\) century, including the International Monetary Fund, the WTO, the World Bank, the International Center for the Settlement of Insurance Disputes (“ICSID”), World Intellectual Property Organization (“WIPO”), etc.\(^{45}\) Similarly, states within the same regions acted to create regional organizations charged with similar objectives. Organization for Security and Cooperation in Europe, Association of Southeast Asian Nations, Organization of American States as well as the Organization of African Unity are examples of such regional bodies.\(^{46}\)

The higher level of interaction among international law actors in the 20\(^{\text{th}}\) century seems to have produced a myriad of international and regional bodies charged with resolving state, as well as non-state actors’ differences on substantive levels and with providing an institutional forum where such different actors can assert their grievances.

D) Expansion of Jurisdiction in International Law

It seems logical that the recent higher level of international interaction would produce more friction. In order to resolve disputes and to allocate international responsibility, international law has developed and expanded its traditional notion of jurisdiction. Historically, jurisdiction was conceived as the territorial power of the

\(^{42}\) Dunoff, Ratner, Wippman, supra note 29, at 25 (noting the United Nations was formed in 1945, that it is a multilateral body designed to address a diverse set of issues, and that its Security Council is charged with maintaining international peace and security).

\(^{43}\) Id. at 26.

\(^{44}\) Carter, Trimble, Weiner, supra note 15, at 1070 (noting that “[ECOWAS] began peacekeeping operations in Liberia” and that “its forces have since operated in Sierra Leone and the Ivory Coast.”).

\(^{45}\) Dunoff, Ratner, Wippman, supra note 29, at 26.

\(^{46}\) Id.
sovereign to impose its laws on its subjects and to enforce its laws in its judicial organs.\textsuperscript{47} Today, however, jurisdiction in international law is mostly extra-territorial.\textsuperscript{47}

First, the development of human rights norms has contributed to the idea that some crimes are so heinous that any nation in the world, acting on behalf of the entire international community, can punish the offender.\textsuperscript{48} Thus, the concept of universal jurisdiction was born, defined as the power of any state to punish offenders of universal crimes, such as piracy, war crimes, slave trade, or genocide, without requiring any territorial or substantive links to the prosecuting forum.\textsuperscript{49} What this concept practically entails is tremendous. Adolf Eichmann, a German citizen living in Argentina, was tried in Israel, under the theory of universal jurisdiction, for crimes against humanity which he committed during World War II in Germany, when Israel was not even a state.\textsuperscript{50} Pinochet, the former Chilean dictator was indicted in Spain on charges of crimes against humanity, for acts committed during his reign in Chile, and involving Spanish victims.\textsuperscript{51} Hissein Habré, who ruled Chad in the 1980’s, was recently subject to an international arrest warrant in Belgium, under Belgium’s universal jurisdiction law.\textsuperscript{52}

Moreover, states have been willing to grant access to their domestic courts to victims of human rights violations, even where such victims are foreign or when such violations took place in foreign countries or were committed by foreign defendants. Thus, the Alien Tort Statute\textsuperscript{53} in the United States has been interpreted to provide jurisdiction – and possibly a cause of action – to foreign plaintiffs suing foreign defendants for violations of the laws of nations.\textsuperscript{54} Similarly, the United States federal

---

\textsuperscript{47} Berman, \textit{supra} note 1, at 530 (noting that traditionally, questions of jurisdiction were analyzed by reference to physical location).

\textsuperscript{48} The development of the human rights movement implied, first, that what a state did to its own citizens was of international concern and that government officials could be responsible and prosecuted for abuses against their own population. \textit{See} Carter, Trimble, Weiner, \textit{supra} note 15, at 779 (noting that the Nuremberg trials after World War II were “important precedents in establishing the responsibility of government officials for human rights abuses, even abuses committed against their own population”). Then, the development of human rights norms came to encompass the idea that some crimes are so horrific that any state can punish their offenders, in the name of the world community. \textit{See}, e.g. Restatement (3d) of the Foreign Relations Law §404 (1987), which specifies that “[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern…” (emphasis added).

\textsuperscript{49} Dunoff, Ratner, Wippman, \textit{supra} note 29, at 380 (“[t]he traditional rationale for universal jurisdiction is that the prohibited acts are of an international character and are of serious concern to the international community as a whole.”).

\textsuperscript{50} \textit{See generally}, Attorney-General of the State of Israel v. Adolf Eichmann, 36 I.L.R. 277 (1962).

\textsuperscript{51} David Sugerman, \textit{From Unimaginable to Possible: Spain, Pinochet, and the Judicializattoin of Power}, 3 J. SPANISH CULTURAL STUDS. 107, 116 (2002); Berman, \textit{supra} note 1, at 534.

\textsuperscript{52} Dunoff, Ratner, Wippman, \textit{supra} note 29, at 383.

\textsuperscript{53} 28 U.S.C. §1350.

\textsuperscript{54} Filartiga v. Pena Irala, 630 F.2d 876 (2d Cir. 1980) (holding that the Alien Tort Statute provides jurisdiction to a foreign plaintiff for a violation of the law of nations); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (holding that the Alien Tort Statute is a jurisdictional statute, that it was not intended to create a new cause of action for torts in violation of international law, but that the First Congress understood that the Alien Tort Statute would provide a cause of action for a limited number of violations of the law of nations, such as violation of safe conducts, infringement of the rights of ambassadors, and piracy; holding also that today, “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18\textsuperscript{th} century paradigms we have recognized…”).
courts have accepted to entertain a judicial challenge to the system of military commissions to try al Qaeda detainees, established by President Bush, exemplifying once more the expanded role of domestic courts in litigation centering around human rights abuses and implying violations of international legal obligations.\(^{55}\)

Finally, because state and non-state actors interact frequently on the international commercial scene, states have been willing to assert extra-territorial jurisdiction to regulate commercial conduct occurring abroad but having effect on domestic markets.\(^{56}\) For example, the United States relies on the so-called effects doctrine to establish the extra-territorial reach of the Sherman Act, which American federal courts, as well as the Supreme Court, have confirmed can regulate conduct occurring abroad.\(^{57}\) Similarly, American courts rely on a variation of the effects doctrine to regulate securities markets and to reach fraudulent conduct that took place abroad.\(^{58}\) The European market authorities, although initially critical of the American approach, seem to have adopted similar jurisdictional tests that strive for the imposition of extra-territorial regulation of foreign conduct having effects on the European market.\(^{59}\)

Similar issues have arisen in connection with the regulation of Internet activities. Recently, a French court ordered Yahoo! to block access in France to a Yahoo! auction site selling Nazi memorabilia, as this kind of sale was illegal under French criminal laws.\(^{60}\) Yahoo! immediately moved for a U.S. court order declaring that the French court

---

\(^{55}\) In Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), the five-justice majority of the Supreme Court held that the military commission system set up by the Bush Administration to try al Qaeda detainees did not satisfy the requirements of so-called Common Article 3 of the 1949 Geneva Conventions. While the Supreme Court did not decide whether these Conventions gave rise to judicially enforceable private rights in domestic courts, id. at 2794, the majority struck down these military commissions because the Uniform Code of Military Justice, the statutory authority for the President to establish military commissions, is conditioned upon compliance with the law of war, including the Geneva Conventions. Id. at 2786.

\(^{56}\) Berman, supra note 1, at 531 (noting problems caused by cross-border activity and the desire by local communities to apply their norms to extraterritorial activities). Such extra-territorial regulation has already occurred in fields such as antitrust, securities, tax, trademark protection, etc. See, e.g., Milena Sterio, Clash of the Titans; Collisions of Economic Regulations and the Need to Harmonize Prescriptive Jurisdiction Rules, 13 U.C. DAVIS JOURNAL OF INT’L L. & POL’Y 95 (2007) [hereinafter “Sterio, Clash of the Titans”].

\(^{57}\) See United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945); Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); F. Hoffman LaRoche v. Empagran, 542 U.S. 155 (2004) (recognizing the extra-territorial reach of the Sherman Act but holding that the exercise of such jurisdiction would not be reasonable where a foreign plaintiff’s claim is based wholly on foreign harm because it “creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.”). But see Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) (tempering the extra-territorial application of the Sherman Act with considerations of “international comity”).

\(^{58}\) Dunoff, Ratner, Wippman, supra note 29, at 373; Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968); see also Consol. Gold Fields PLC v. Mincoro S.A., 871 F.2d 252, 261-62 (2d Cir. 1989).

\(^{59}\) Re Wood Pulp Cartel, [1988] E.C.R. 5193 (upholding the extra-territorial assertion of European Community competition law where conduct occurred abroad but was “implemented” within the European market). Note thus that the European Court of Justice never adopted the infamous “effects” test, but that in practice, its “implementation” test operates very similarly to the effects test. See Dunoff, Ratner, Wippman, supra note 29, at 375.

order was unenforceable, and provoking somewhat of a judicial battle.\footnote{Yahoo! Inc. v. La Ligue Contre Le Racisme et L’antisemistisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). This decision was reversed by the Ninth Circuit on the ground that the district court could not obtain personal jurisdiction over the original French plaintiffs until they actually sought to enforce the judgment or otherwise engaged in activity in California. Yahoo! v. La Ligue Contre Le Racisme et L’Antisemistisme, 379 F. 3d 1120 (9th Cir. 2004).} Ultimately, Yahoo! capitulated by voluntarily deciding to comply with the French order,\footnote{See Press Release, Yahoo!, Yahoo! Enhances Commerce Sites for Higher Quality Online Experience (Jan. 2, 2001) at http://docs.yahoo.com/docs/pr/release675.html (announcing new product guidelines for its auction sites that prohibit “items that are associated with groups which promote or glorify hatred and violence).} but this judicial controversy highlights particularly well the type of extraterritorial problematic linked to the assertion of jurisdiction in today’s globalized world.\footnote{Dunoff, Ratner, Wippman, supra note 29, at 349.}

Thus, jurisdiction in modern, globalized international law recognizes the interactivity among all sorts of international state and non-state actors, and provides not only access to more tribunals but also a basis for imposing substantive laws in an extraterritorial manner.\footnote{“This more fluid model of multiple affiliations, multiple jurisdictional assertions, and multiple normative statements captures more accurately than the classical model of territoriality and sovereignty the way legal rules are being formed and applied in today’s world.” Berman, supra note 1, at 537.}

III. The Role of International Law in Different Fields

The globalization or evolution of international law has impacted different legal fields. Three of such fields where the effects of globalization are the most striking include human rights law, international criminal law and private or commercial international law.

A) International Human Rights

International law in its proliferated, or globalized, version, has played an important role in several different legal fields. One of such fields is human rights law, where the evolutionary trend on the international scene has had a major impact.

a. Creation of International Norms

The evolution of international law has brought about the creation of many new human rights norms.\footnote{Dunoff, Ratner, Wippman, supra note 29, at 17 (“…the human tragedy of World War II led governments… to devote significant resources to the creation of a corpus of law aimed at protecting individuals from their own governments.”).} Thus, throughout the 20th century several human rights conventions have been negotiated and many customary human rights norms have emerged.\footnote{Major documents in the human rights field negotiated after World War II include the Universal Declaration of Human Rights, the Genocide Convention, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention Against
expanded number, but also because of their evolutionary nature. Because international law no longer governs purely state relations, but also encompasses the rapport of non-state actors vis-à-vis different states, a different set of norms has emerged to cover such new relations.

For example, the prohibition on torture, arising out of the 1984 Torture Convention and out of other treaties and international customary norms, necessarily implies several things. States parties to the Torture Convention may not invoke torture as an official governmental policy in their international relations with other states. Moreover, states may not treat individuals in ways that amount to torture, even when such individuals are their own citizens. Finally, judges of one state may attempt to prosecute officials of another state for acts amounting to torture.
As the above discussion of the Torture Convention exemplifies, this new type of international human rights norms differs from other, more traditional types of international norms. Under traditional international law norms, State A may not do certain things to State B, or to State C, or to any other State. Conversely, States B, C, and the like may not do the same thing to State A. States A, B, and C, however, may do whatever they wish within their own borders. New human rights norms vary strikingly from the traditional model. For one, they do not regulate the behavior of State A vis-à-vis the other states; rather, they regulate what State A does to its own citizens and residents within its borders, as well as whether State A can justify its behavior before States B and C, at the risk of seeing its leaders indicted for violations of such human rights norms in States B and C.72

Moreover, the new type of human rights norms is coupled with other changes in international law, in a manner that strengthens its role in state behavior. As mentioned above, states traditionally exercised their jurisdictional powers territorially.73 The evolutionary trend of international law has led states to rely more and more on extra-territorial jurisdiction,74 and such powerful exercise of state judicial powers has been particularly important in the human rights field. Thus, these new human rights norms are often accompanied by the notion of universal jurisdiction, meaning that they can be enforced by any state, anywhere in the world, against any offenders.75 The Torture Convention, mentioned above, has a provision providing for universal jurisdiction for a possible prosecution of offenders.76 Moreover, new human rights norms sometimes go beyond simply prohibiting states from doing something: some of them also impose certain duties on states, such as the duty to either prosecute or extradite offenders.77

Finally, modern human rights norms are more potent in light of the globalization of international law. In other words, because of the proliferation of actors in modern international law, states, as well as various non-state actors are now charged with the creation, implementation, and monitoring of human rights norms.

“…individual states, the United Nations, and various regional organizations, including the Council of Europe, the Organization of American States, and the Organization of African Unity, working with countless non-governmental human rights organizations, scholars, and lawyers, have developed an extensive body of human rights treaties, declarations, and related instruments in an effort to develop and clarify international human rights norms. These same actors have also

---

72 Thus, states today are obligated to cede sovereignty to the international community, which imposes standards of “good governance and human rights norms” on all states. Cohan, supra note 3, at 941.
73 Berman, supra note 1, at 530.
74 See supra, Part II.D, for a discussion of extra-territorial jurisdiction.
75 See supra, Part II.D, for the concept of universal jurisdiction.
76 Article 5 of the Torture Convention provides for different basis of jurisdiction, including territorial jurisdiction, passive personality and nationality principles, and it then goes on to specify that “[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction…” Torture Convention, supra note 66, article 5.
77 For example, the Torture Convention has an “extradite or prosecute” provision in its article 7. Torture Convention, supra note 66, article 7. Moreover, the Genocide Convention contains a provision requiring member states to “give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.” Genocide Convention, supra note 66, article 5.
developed a complex system of institutions designed to monitor and to some extent to implement existing norms. These institutions include regional human rights courts, treaty bodies, groups of experts, and more.”  

b. Limitations on State Sovereignty

Because of their powerful reach and impact on state behavior, new human rights norms impose severe limitations on state sovereignty. As indicated above, they dictate that State A may no longer do whatever it wishes within its own borders – a concept that had prevailed for many centuries in international law. Precisely because the globalized version of international law takes into account individual interests, it affords individuals more protection from state intrusion into their affairs by limiting state sovereign powers.

It had long been the role of domestic law to define what a sovereign may do to its subjects. For example, nobody would dispute the fact that our Constitution grants our President the power to enter into agreements with other nations, or the power to nominate judges on the Supreme Court, or the power to approve the Congressional budget. Nobody would dispute the fact either that our Congress has the power to draft laws that criminalize certain individual behaviors, or that require us to pay taxes or get licenses if we want to engage in certain professional activities. Somehow, we accept the notion that our sovereign, domestically, can require us to do certain things or to refrain from doing certain things. We also respect the idea that if another individual, or our sovereign, does something that offends our rights, we can seek redress from our judicial organs.

The evolutionary version of international law attempts to play a similar role by creating important human rights norms that function somewhat like domestic law. New human rights norms require our sovereign, as well as us, individuals, to refrain from engaging in certain types of behaviors, and as a corollary, to do certain things. For example, our sovereign may not condone torture as an official state practice; if it finds out that somebody in its territory has engaged in torture, it must punish such groups or individuals accordingly. Moreover, because new human rights norms sometimes create

78 Dunoff, Ratner, Wippman, supra note 29, at 443.
79 In fact, many scholars have noted that the traditional 19th century model of state sovereignty became outdated in the 20th century. See e.g. MATTHEW HORSMAN & ANDREW MARSHALL, AFTER THE NATION-STATE: CITIZENS, TRIBALISM AND THE NEW WORLD DISORDER, ix (1994) ("The traditional nation-state, the fruit of centuries of political, social and economic evolution, is under threat."); George J. Demko & William B. Wood, Introduction: International Relations Through the Prism of Geography, in REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY 3, 10 (George J. Demko & William B. Wood eds., 1994) ("Once sacrosanct, the concept of a state’s sovereignty- the immutability of its international boundaries- is now under serious threat."); KENICHI OHMAE, THE END OF THE NATION STATE, viii (1995); see also Berman, supra note 1, at 523.
80 Torture Convention, supra note 66, articles 1 and 7. Moreover, other international conventions impose affirmative duties on states to punish violators of norms that such conventions seek to protect. See, e.g., Genocide Convention, supra note 66, article 4; Convention (No. 1) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, art. 50; Convention (No. 2) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85, art. 51; Convention (No. 3) Relative to the Treatment of Prisoners of War, Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 130; Convention (No. 4) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 147.
privately enforceable judicial rights,\(^1\) individuals can seek redress from domestic or international judicial organs for violations thereof, either by other individuals or by their own sovereign.\(^2\) The latter idea – that one may sue its own sovereign for violations of some supra-national norms,\(^3\) which transcend the powers of such sovereign and impose limitations on its powers – is particularly revolutionary and had no place in traditional international law.

The field of human rights law, in itself, thus represents a stark departure from traditional international law models. In its modern, evolutionary version, human rights law goes even further, by creating firm limits on state sovereignty and by establishing norms that govern inter-state and intra-state behavior.\(^4\) Thus, the “new” state sovereignty actually requires states to participate in a complex web of international, transnational regimes, institutions, and networks in order to accomplish what they could once do on their own, within their specific jurisdiction.\(^5\)

Thus, globalized international law has imposed so-called “vertical constraints” on states, whereby external human rights norms are imposed on states “by diplomatic and public persuasion, coercion, shaming, economic sanctions, isolation, and in more egregious cases, by humanitarian intervention.”\(^6\) A direct result of this phenomenon is the fact that a sovereign state must now answer not only to its own nationals, but also to the international community on the whole.\(^7\) A state may no longer reject a norm based on a claim of exclusive sovereignty, as such a notion no longer exists. For example, sovereignty will no longer operate as an excuse for violations of human rights norms against slavery, genocide, torture, or arbitrary confiscation of property; moreover, human rights norms have evolved to encompass claims of indigenous populations, special needs of the disabled, health care, education, etc.\(^8\)

The most fundamental point about human rights law is that it establishes a set of rules for all states and all peoples. It thus seeks to increase world unity and to counteract national separateness… In this sense, the international law of human

\(^{1}\) For example, in the United States there has been significant debate over whether certain provisions of the Vienna Convention on Consular Relations grant individuals private judicially enforceable rights in American courts. See Bruno Simma and Carsten Hoppe, *The LaGrand Case: A Story of Many Miscommunications, in INTERNATIONAL LAW STORIES* (John E. Noyes, Laura A. Dickinson, Mark W. Janis eds. 2007) (describing this controversy).

\(^{2}\) As noted above, individuals today are provided with numerous complaints procedures through international and regional organizations, committees, tribunals and other judicial bodies. See Dunoff, Ratner, Wippman, *supra* note 29, at 443.

\(^{3}\) For example, citizens of European countries may sue their own states in the European Court of Human Rights for particular human rights violations. Sands, *supra* note 1, at 546-47. Similarly, citizens of Central and South American countries may bring complaints against their states in the Inter-American Court of Human Rights. Grossman, *International Law Stories, supra* note 26, at 81-83. *See also infra* part IV.B. for a discussion of individual expectation under globalized international law.

\(^{4}\) Berman, *supra* note, at 527 (“While nation-states may not disappear, their sovereignty may well become diffused in order to accommodate various international, transnational, or non-territorial norms.”).

\(^{5}\) For the idea of “new” sovereignty, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

\(^{6}\) Cohan, *supra* note 3, at 941.

\(^{7}\) *Id.* at 942.

\(^{8}\) *Id.* at 943.
rights is revolutionary because it contradicts the notion of national sovereignty – that is, that a state can do as it pleases in its own jurisdiction.\textsuperscript{89}

An influential report issued in December 2001 by the International Commission on Intervention and State Sovereignty (ICISS) supports this revolutionary view of human rights norms that operate as a vertical constraint on state sovereignty. The ICISS report, entitled “The Responsibility to Protect,” highlighted the need to update the U.N. Charter to incorporate this new understanding of state sovereignty.\textsuperscript{90} The report explained a shift from the traditional concept of sovereignty (“sovereignty as control”) toward sovereignty “as responsibility in both internal functions and external duties.”\textsuperscript{91} Thus, according to the ICISS Report, if a population is suffering and its state is unwilling or unable to halt the suffering, then the principle of non-intervention yields to the international responsibility to protect.\textsuperscript{92}

Thus, the revolutionary version of human rights law, imposed on states through the general evolutionary trend in international law, has imposed additional restrictions on states, thereby eroding the traditional notion of exclusive state sovereignty.

### B) International Criminal Law

The evolutionary movement in the international legal field has exercised tremendous influence in the area of international criminal law. The field itself is less revolutionary than international human rights law, as the idea of individual international responsibility for criminal acts seemed accepted several centuries ago.\textsuperscript{93} For example, states recognized the first international crime, piracy, early on, and sought to punish individuals having engaged in piracy, irrespective of such individuals’ state affiliation.\textsuperscript{94} Moreover, states held trials for war crimes as early as the fifteenth century, and enacted various legal codes in subsequent years.\textsuperscript{95} During the nineteenth century, states negotiated several treaties criminalizing slave trade, an act committed by individuals, not a state.\textsuperscript{96}

With the rise of human rights norms, the field of international criminal law came to encompass additional international violations having to do with attacks on human dignity.\textsuperscript{97} Thus, atrocities committed in civil wars became criminalized on an international level. To this end, throughout the 1990’s, the linkage of human rights protection with international criminal responsibility contributed to the creation of several international criminal courts, which are charged with prosecuting individuals accused of

\begin{itemize}
  \item \textsuperscript{89} David P. Forsythe, \textit{Human Rights and World Politics} 4 (1983) (emphasis added).
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} Dunoff, Ratner, Wippman, \textit{supra} note 29, at 607.
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} Id.
  \item \textsuperscript{96} Id.
  \item \textsuperscript{97} Dunoff, Ratner, Wippman, \textit{supra} note 29, at 607 (noting that state and non-state actors have accepted, over the last several centuries, the fact that individuals may be responsible under international law for acts against human dignity).
\end{itemize}
specific crimes. Moreover, specific criminal offenses have been affirmatively recognized as contrary to international law, and as providing substantive jurisdiction for prosecution in one of the newly created international criminal tribunals. Thus, the globalization forces behind the transformation of international law exercised an expansive influence on the field of international criminal law, by broadening its horizons and enlarging the idea of global accountability for heinous individual crimes.

a. Creation of New International Courts

While the idea of international criminal prosecutions gained popularity in the wake of World War II and the Nuremberg Tribunal, a very limited number of such trials actually took place during the second half of the 20th century. The 1990’s, however, witnessed a rebirth of the idea, which translated itself into the creation of several new international criminal tribunals.

Following the bloody civil wars in the former Yugoslavia and Rwanda, the United Nations utilized its Chapter VII powers to create two international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), and the International Criminal Tribunal for Rwanda (“ICTR”). These tribunals were charged with a specific mandate: to prosecute individuals accused of specific heinous offenses, such as genocide, war crimes and crimes against humanity, that took place in the territory of the former Yugoslavia and Rwanda respectively during a specific time period. The creation of the International Criminal Court (“ICC”) in 1998 followed the same evolutionary trend in international criminal law: the idea that individuals accused of extraordinarily heinous crimes should be prosecuted in an international forum.


99 For example, the ICTY specifically recognized that states had accepted that certain violations of customary international humanitarian law created individual responsibility. See Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia, October 2, 1995, at paras. 128-134.

100 The globalization movement also influenced the idea of international criminal responsibility by providing more alternatives to domestic criminal prosecution of human rights offenders. In today’s globalized world, actors outside the relevant state may provide support to the offender’s home state; foreign states may consider prosecuting the offender themselves under various extraterritorial jurisdictional principles; states may also act to set up international tribunals to try such offenders. Dunoff, Ratner, Wippman, supra note 29, at 608.

101 The Nuremberg trials took place in the so-called International Military Tribunal, established through the London Charter. Id. at 609.


103 Dunoff, Ratner, Wippman, supra note 29, at 653.

104 For a discussion on the creation of the ICC, see Milena Sterio, Seeking the Best Forum to Prosecute International War Crimes: Proposed Paradigms and Solutions, 18 Florida J. Int’l L. 887, 895 (2006) [hereinafter “Sterio, Seeking the Best Forum”].
While the jurisdictional mandates of some of these tribunals were strictly limited temporarily, territorially and substantively, they nonetheless represent a giant step toward solidifying the idea of individual international criminal responsibility, born in Nuremberg and laid to rest during the second half of the 20th century. That is, under the traditional notion of international law, most types of individual criminal responsibility would be handled under domestic law, within a domestic jurisdiction. If a Canadian family of a murder victim got angry with its Swedish killer, all it could do was to ask for diplomatic protest that the Canadian government could exercise against Sweden, on behalf of the Canadian victim and against the Swedish aggressor. Moreover, if a military dictator from a given country decided to exterminate a minority group, such acts would be seen as matters of purely domestic jurisdiction. In other words, the concerned state could, if it chose to do so, prosecute the military leader domestically. Practically speaking, such prosecutions never took place while the offending leader was still in power, and very rarely took place after a change of regimes because of reasons linked to regional instability, lack of democracy of the new regime, need for national reconciliation, lack of recognition of international criminal norms, etc.

The evolutionary movement that began transforming international law in general played a dominant role in transforming the international criminal law field. With the notion that international law encompasses much more than purely inter-state relations, international criminal law gained freedom to explore the idea of criminalizing individual offenses - typically handled in domestic fora - on an international level. The creation of the above-mentioned international tribunals was a logical step in that direction, as it provided specific jurisdictions to handle criminal prosecutions of individuals accused of international offenses.

More recently, the field of international criminal law has transformed itself once more, by encompassing the idea of hybrid tribunals – jurisdictions created by international agreement between the host country and the United Nations, which mix local law in their otherwise internationally-oriented statutes, and which employ a mix of

---

105 The ICTY and ICTR could prosecute individuals accused of genocide, crimes against humanity and war crimes; the ICTY could consider any crimes committed in the former Yugoslavia after 1991, up to the present, while the ICTR was confined to crimes in Rwanda in 1994; both tribunals are supposed to “wind down” and complete their work by 2010. Dunoff, Ratner, Wippman, supra note 29, at 653, 656.
106 As noted above, certain crimes had been internationalized early, such as piracy and slave trade. See Dunoff, Ratner, Wippman, supra note 29, at 607. However, most other crimes would be prosecuted within a domestic criminal system.
107 For a discussion of the traditional notion of state responsibility, including so-called diplomatic protection, see J.L. BRIERLY, THE LAW OF NATIONS 276-287 (6th ed. 1963).
108 Under traditional notions of sovereignty, any domestic policy choices, even those as flagrant as the decision to exterminate a minority group, would be free from external or internal constrains. See Cohan, supra note 3, at 914-915 (discussing “Westphalian sovereignty,” or the right of a sovereign state to be left alone from external interference, and “domestic sovereignty,” or the right of a sovereign state to be free of internal interference).
109 Dunoff, Ratner, Wippman, supra note 29, at 648. Note also that regimes often pass general amnesty laws exonerating government-sponsored atrocities. See Steven R. Ratner, New Democracies, Old Atrocities: An Inquiry in International Law, 87 Geo. L. J. 707, 720-729 (1999) (noting, inter alia, that Argentina, Uruguay, Chile, Brazil, Peru, Guatemala, El Salvador, Honduras, Nicaragua, Haiti, Ivory Coast, Angola, and Togo have all passed broad amnesty laws during the 1990’s).
domestic and international personnel. Examples of such tribunals include East Timor,\textsuperscript{110} the Special Court for Sierra Leone,\textsuperscript{111} the Iraqi High Tribunal\textsuperscript{112} and the Extra-Ordinary Chambers in the Courts of Cambodia Tribunal.\textsuperscript{113} These hybrid courts solidify the idea of international criminal responsibility while recognizing the need to involve aggressors’ home countries in the prosecution process, for substantive as well as practical reasons. Moreover, they exemplify the notion of globalization – the idea of inter-connectivity between the local and global domains and the linkage between domestic and international matters.

\subsection*{b. Creation of New Offenses}

With the rebirth of international criminal tribunals and their quick creation in the 1990’s, it became crucial to define specific offenses that would merit such high-profile prosecution in the international dimension. International law, even in its most traditional form, encompassed the idea that individuals should be treated fairly during war time.\textsuperscript{114} This notion logically follows the main premise of traditional international law: states, at peacetime, have unlimited sovereignty within their territory. At wartime, however, states transcend their borders and encroach on other states’ sovereignty. Thus, special rules are needed to address situations where jurisdictional lines become blurred and territory no longer equals sovereignty.

The multiple Hague Conventions stemming from the beginning of the 20\textsuperscript{th} century,\textsuperscript{115} the four Geneva Conventions negotiated in the wake of World War II,\textsuperscript{116} and its two

\begin{thebibliography}{99}
\bibitem{110} For a discussion of the East Timor court, see Ellis, supra note 102, at 121-125; see also Note, \textit{Prosecuting Saddam and Bungling Transitional Justice in Iraq}, 45 VA. J. INT’L L. 467, 519 (2005) [hereinafter “Prosecuting Saddam”].
\bibitem{111} For a discussion of the Special Court for Sierra Leone, see Sterio, Seeking the Best Forum, supra note 104, at 895-99; see also Ellis, supra note 102, at 136-39 (discussing the Special Court for Sierra Leone in the context of an accountability policy in Liberia).
\bibitem{112} For a discussion of the Iraqi High Tribunal, see generally, Prosecuting Saddam, supra note 110; \textit{MICHAE L P. SCHR AF & GREGORY S. MCNE AL, SADDAM ON TRIAL: UNDERSTANDING THE IRAQI HIGH TRIBUNAL} (2006). Note that the Iraqi High Tribunal is not a truly hybrid court, because its seat is in Baghdad, its prosecutor is Iraqi, and its judges are all Iraqi. Rather, the Iraqi High Tribunal has been characterized as an “internationalized” domestic court, since its statute and rules of procedure are modeled on the ICTR, ICTY and the Special Court for Sierra Leone. See \textit{id.} at 2.
\bibitem{113} For a discussion of the Cambodian court, see Ellis, supra note 102, at 125-28; see also Dunoff, Ratner, Wippman, supra note 29, at 656-57.
\bibitem{114} International law has long embraced the notion of \textit{jus in bello}, commonly referred to as the law of war or international humanitarian law, which attempts to shield individuals from certain types of war-time harm, and which regulates the conduct of armed conflict. See Dunoff, Ratner, Wippman, supra note 29, at 527.
\bibitem{115} The “Hague law” refers to a series of conferences held in The Hague, producing a set of declarations and conventions, most notably in 1899 and 1907. \textit{Id.}
\bibitem{116} The four Geneva Conventions of 1949 place numerous obligations on states to protect people in international armed conflict who are not actively engaged in hostilities. These people include the sick and the wounded (Convention I), the sick and the wounded in navies (Convention II), prisoners of war (Convention III), and civilians (Convention IV). In addition, Protocol I to the Geneva Conventions of 1977 includes additional rules covering international conflicts, and Protocol II to the same conventions includes rules covering internal armed conflict. Convention (No. 1) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (No. 2) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of
Additional Protocols,\footnote{Protocol Additional (No. 1) to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977); Protocol Additional (No. 2) to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442 (1977).} represent the bulk of international legal norms specifying codes of behavior during wartime, as they relate to both soldiers and civilians. These norms, crafted to handle traditional warfare where states and state armies fought in clearly delineated battlefields, proved insufficient in the face of modern wars – often brutal civil conflicts, involving para-military groups, guerrillas, civilians, and interference from neighboring states. Recognizing this problem, drafters of the above-mentioned international courts’ statutes sought to criminalize offenses in a manner that would encompass specific conduct taking place in the new type of warfare. Thus, statutes of the ICC, ICTY and the ICTR relied on the Nuremberg Charter to criminalize genocide and war crimes, but they expanded the Nuremberg idea of crimes against humanity,\footnote{Charter of the International Military Tribunal at Nuremberg, 82 U.N.T.S. 279 (1945), article 6.} which criminalized behavior purely during wartime, into the notion of crimes against humanity, which was no longer linked to wartime and applied equally during peacetime, as well as to the new types of warfare.\footnote{Dunoff, Ratner, Wippman, supra note 29, at 628, 538.} Moreover, in the context of specific conflicts, statutes of some of the above tribunals adopted rules borrowed from domestic laws, in order to criminalize conduct that was unique to the given war. Thus, the Special Court for Sierra Leone statute gives prosecutor the possibility to indict individuals accused of not only the most heinous offenses, such as genocide, war crimes and crimes against humanity, but also of offenses specific to the civil war in Sierra Leone, such as offenses related to the abuse of girls and those related to the destruction of property, as well as the use of child soldiers.\footnote{Statute of the Special Court for Sierra Leone, Articles 4 and 5, available at https://www.sc-sl.org/sccsl-statute.html (last visited on December 10, 2007).} Similarly, the Extraordinary Chambers in the Courts of Cambodia criminalizes offenses such as the destruction of cultural property, crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations, as well as the crimes of homicide, torture and religious persecution as defined in Cambodian domestic penal code.\footnote{Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, available at http://www.eccc.gov (last visited on February 1, 2008), articles 3, 7 and 8.}

The field of international criminal law has thus transformed itself over the last two decades, under the evolutionary influence of general international law. The notion of inter-state relations as the governing mode of dialogue in international criminal law is no

longer prevalent, and this field now governs individual criminal responsibility and extends to spheres traditionally left to purely domestic powers.

C) Private International Law

The globalization movement has played a particularly dominant role in the world of commerce. Large and even mid-size commercial operators no longer deal with local or regional partners; today, they frequently engage in cross-border business, dealing with foreign entities. Laws governing such cross-border transactions have changed correspondingly. We no longer deal with purely national commercial laws, but instead, have to look for supra-national legal authority that has the power to regulate cross-border transactions. Thus, we have witnessed a rise of cross-border regulations, aiming to provide a legal framework for the globalized commercial world. Along the same time, we have also witnessed a proliferation of actors. Traditionally, only states could conclude treaties and could, in such state-to-state treaties, choose to protect their national business interests. Nowadays, commercial treaties are being concluded between states and foreign investors directly. This public/private merger in the field of cross-border commercial law epitomizes the entire shift of international law from a body of law governing inter-state relations, to a complex web of regulations concluded between state and non-state actors and governing private entity-state relations.

a. Creation of New Cross-Border Regulations

Over the last few decades, several cross-border regulations have been concluded to provide a legal regime for international transactions involving commercial entities coming from two or more different states. In other words, in today’s inter-connected world, globalization has dictated a harmonization of substantive rules in specific fields. Such a harmonization supersedes national rules and undermines the traditional concept of state sovereignty. It also illustrates the complexity of modern-day international law, in its transformed or globalized version.

In the law of sales, the United Nations Convention on the International Sale of Goods (“CISG”) was negotiated, representing a set of default rules that contracting parties are referred to, should their international sale contract be silent on certain issues. Under the CISG, transacting parties may opt out of any nation-state law and

122 Sterio, Clash of the Titans, supra note 56, at 97 (2007).
123 Hannah L. Buxbaum, Conflict of Economic Laws: From Sovereignty to Substance, 42 V A. J. INT’L L. 931, 942-54 (2002) (discussing ways in which “regulatory power traditionally enjoyed by sovereign states has shifted” to the supranational level, to private actors, and to “informal networks constituted among sub-state-level agencies in different countries.”).
125 See Dunoff, Ratner, Wippman, supra note 29, at 216-217 (discussing corporations and businesses as international actors).
126 Berman, supra note 1, at 550 (noting that private parties today exercise forms of governmentally authorized power).
127 Id. at 520-23 (discussing the undermining of the public/private law distinction in the field of private international law).
instead choose a sort of *lex mercatoria* to govern their interactions, dispensing altogether with the need to consult any state laws.\(^{129}\)

In the field of international trade, the WTO already plays a hugely significant role, providing not only a body of substantive rules, but a dispute settlement mechanism as well, that encompasses state commercial interests.\(^{130}\) Under this mechanism, states act against each other like private commercial entities would in a typical private arbitration. Moreover, the WTO appellate tribunals seem to be creating an international common law of trade and amassing a body of legal rules that challenge traditional conceptions of state sovereignty and override domestic court decisions.\(^{131}\) Finally, NGO’s and international civil society groups have become active in the WTO process, attempting to use the appellate panels to further their specific goals, particularly in the fields of environmental and labor law.\(^{132}\)

Also in the field of transnational trade, NAFTA plays a dominant role in the North American continent. Under NAFTA, private investors can challenge a NAFTA government’s regulatory decision directly within the NAFTA dispute resolution system, thereby again challenging the notion of state sovereignty.\(^{133}\) In the field of intellectual property, WIPO functions similarly to the WTO.\(^{134}\) Moreover, numerous cross-border regulations exist in the securities and tax fields, which are particularly impacted by the globalization movement.\(^{135}\) Finally, international trade association groups and their standard-setting organs have tremendous influence in creating voluntary guidelines that become industry norms and often have strong public policy ramifications.\(^{136}\)


\(^{131}\) See, e.g., Bhal, *supra* note 24, at 850 (“In brief, there is a body of international common law on trade emerging as a result of adjudication by the WTO’s Appellate Body.”); Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA and International Harmonization of Standards*, 50 U. KAN. L. REV. 823, 825 (2002) (“Expansive international rules strongly enforced through international dispute resolution bodies have significant implications for the laws and policies domestic governments may establish, as well as for the processes domestic governments use to make policy.”); CLAUDE E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* 9 (2001) (expressing concern that significant judicial lawmaking by the WTO might diminish U.S. sovereignty).


\(^{134}\) Lt. Col. Jeffrey K. Walker, *The Demise of the Nation-State, the Dawn of New Paradigm Welfare, a Future for the Profession of Arms*, 51 A.F. L. REV. 323, 327 (2001) (discussing the fact that organizations like the WTO and WIPO have encroached on state sovereignty, and that the latter sets and enforces international trademark and patent policy).


\(^{136}\) For example, in the chemical industry, groups such as the Canadian Chemical Manufacturers Association and the International Counsel of Chemical Associations (ICCA) have set industry standards in
All of the above involve cross-border regulatory rules in the form of treaties. All of the above were negotiated by state parties, but were heavily influenced by private commercial interests, epitomizing again the private/public merger and the complexity of today’s globalized international law. According to Michael Reisman, the term “private” in “private international law” is a “misnomer, for what is transpiring is a fundamental interstate competition for power that falls squarely within the province of public international law.”

b. Expanded Role of Non-State Commercial Actors

Following the rise of cross-border regulations, typically negotiated and concluded among states, private actors became more involved in international commerce, attempting to exercise a direct influence on states and to obtain favorable treatment in their business endeavors. Thus, private investors started lobbying their own governments to conclude so-called bilateral investment treaties (“BITs”) with developing countries where such investors were interested in conducting business. While BITs represent a traditional form of international lawmaking – they are treaties negotiated among states – they do signal a shift in the type of actors present on the international scene. BITs truly are about investors’ interests and their power to lobby and persuade their governments to conclude favorable treaties with foreign nations. They demonstrate that powerful private interests can act and influence the international treaty process, and that non-state actors have gained an important seat in the world of international relations.

Following the proliferation of BITs, private investors began working directly with foreign nations, on various financing projects, typically linked to building infra-structure in developing countries. Thus, private investors started concluding commercial contracts directly with foreign governments, which specify the investors’ role in the particular

137 W. MICHAEL REISMAN, INTRODUCTION TO JURISDICTION IN INTERNATIONAL LAW, at I (W. Michael Reisman ed. 1999).
138 Dunoff, Ratner, Wippman, supra note 29, at 860 (noting that most of the growth in international production over the past decade has come from cross-border mergers and acquisitions).
139 Id. at 861 (noting that several European states starting entering into BIT’s with the developing world, and that the United States launched its own BIT program in 1977 and then began to enter into BIT’s with developing states in the 1980’s).
140 As noted above, traditionally only states could be subject to international law; whoever wronged a person indirectly harmed his state; finally, the harmed individual had to persuade his state to adopt his grievance on the international level against the offending state. However, the pursuit of such claims by states in the commercial world is problematic for political, diplomatic and foreign policy reasons. Thus, with the rise of foreign investment, pressures built for alternative mechanisms, and BIT’s, which provide strong investor protection as well as a dispute settlement procedure, are one of the provided responses. Id. at 869.
141 Private investors also have important protection, besides BIT’s, under the ICSID Convention, operating within the International Centre for the Settlement of Investment Disputes, an institution closely associated with the World Bank. Under the ICSID Convention, private parties have direct access to an international arbitral forum to pursue claims against host states. Id. at 870.
This phenomenon, typically referred to as “project finance,” demonstrates that everything about traditional commercial law has changed. For one, commercial agreements are no longer negotiated simply by states, but they also involve private entities as direct contracting partners. Additionally, the subject-matter of treaties has shifted from detailing particular state interests and trade-offs, to focusing on investment relations and the rights and liabilities of private investors. Finally, these project finance agreements signal that states are willing to relinquish a tremendous amount of their sovereign power to private entities. For example, states will allow private operators to run their roads, dams, factories, plants, etc. Globalization, in this context, has impacted state behavior in a powerful way, by transferring sovereign-type powers to non-state actors and by involving the latter heavily in the commercial negotiation process.

IV. The Impact of Globalized International Law

As described above, international law has transformed itself over the past few decades and now represents a complex body of global rules and regulations that apply to a vast field of state, as well as non-state actors. While the latter phenomenon is relatively non-controversial and has already deserved significant scholarly attention, the relevant question for the purposes of this Article is whether such globalized international law has had a significant impact on international legal actors. First, has, and how, globalized international law affected state behavior; and, second, has, and how, globalized international law affected individual behavior?

A) State Behavior

International law now displays a globalized shape: it covers a wide variety of legal fields, it encompass a myriad of different rules and regulations, and it governs state as well as non-state behavior. In light of such a radical transformation, the relevant inquiry focuses on understanding how such transformation has affected state actors, and whether their behavior on the international scene has changed in considerable ways. Thus, I will examine two different phenomena in this part of my Article: first, whether states comply with globalized international law more willingly than they did decades ago, when international law exhibited a more traditional form, and second, the fact that states may be more prone to incorporating globalized international law into their own domestic

---


143 Brealey, Cooper and Habib, supra note 142, at 25 (describing the fact that in recent years, private funding of large infrastructure investments has increasingly taken the form of project finance, and describing the main characteristics of such financings.).

144 Berman, supra note 1, at 550 (noting that states are increasing delegating authority to private actors).

145 See generally Berman, supra note 1, Berman, A Pluralist Approach, supra note 18, Sands, supra note 1.

146 See Cohan, supra note 3, at 954 (“Today there is a veritable panoply of treaties, regional agreements, U.N. Declarations, and other protocols that globalization is pushing toward an orderless world so that domestic actions in one state can have rippling effects that impact other states.”).
laws and to relying on globalized international law in their international relations. All these observations can be simplistically explained by the fact that lines between international and domestic legal domains have become so blurred that states no longer view international law as the ‘enemy.’

a. Willing Compliance Phenomenon

Because international law is omni-present in state life, it seems that it no longer meets the same resentment that it did in some legal cultures throughout the past century. Moreover, it seems that Louis Henkin’s famed observation, that most states obey their international legal obligations most of the time, is becoming truer by the day. Particularly relevant, however, is the reason behind such state compliance, and I argue here that the profound evolution of international law, into a globalized force majeure, has instilled a legal sense of obligation in states toward this new globalized international law. Because international law no longer entails mainly state relations, any state behavior on the international scene today necessarily affects a wide range of actors. Thus, states, when they (mis)behave, have to account for a variety of consequences that their (mis)behavior will produce: they have to envision the impacted state, as well as non-state actors, they have to calculate whether any of their international legal obligations under the myriad of international treaties that they may be party to will be triggered, they have to fear any grievances that may be asserted against them in a variety of possible jurisdictions, inter alia. When such a complicated calculus must be performed before any state action, I argue that states are likely more willing to at least take international law into account, or to at least try not to disrespect it in a blatant manner.

I recognize that it may be difficult to call “willing” such state compliance with international law, when any mis-compliance may result in serious sanctions, and when the “willingness” may in fact stem from the fear of sanctions and consequences. I argue, however, that the repetition of compliance with international law, although caused at first by a threat of sanctions, may ultimately result in a new norm or custom of state behavior, whereby states would truly obey international law from a sense of legal obligation and from a tradition of long-standing and uniform practice to do so.

147 For example, the United States was overtly hostile to international law at the beginning of the 20th century, as exemplified in its isolationist doctrine, which dominated American foreign policy between the two world wars, and resulted in the United States’ refusal to join the League of Nations. See, e.g., M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Court, 10 Harv. Hum. Rts. J. 11, 20 (1997) (“By then, the United States was in the throes of isolationism, with its rejection of President Woodrow Wilson’s internationalist views, evidenced by Congress’ refusal to have the United States become part of the League of Nations.”); U.S. Foreign Policy, 1776-2001, available at http://www.wbur.org/special/specialcoverage/feature_isolation.asp (last visited on Jan. 16, 2008).


149 Of course, there are many theories of compliance with international law. The major ones include institutionalism, constructivism, the New Haven School, a Kantian model, and a managerial model. See Dunoff, Ratner, and Wippman, supra note 29, at 30-31; see also Koh, “New” New Haven School, supra note 30; see generally Berman, A Pluralist Approach, supra note 18; Harold Hongju Koh, Filartiga v. Pena-Irala: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture, in INTERNATIONAL LAW STORIES 67-73 (John E. Noyes, Laura A. Dickinson and Mark W. Janis eds. 2007) [hereinafter “Koh, Filartiga”].
For example, after the terrorist attacks on the United States on September 11, 2001, the Bush administration chose to detain so-called enemy combatants at the Guantanamo military base in Cuba. Under a traditional version of international law, the United States would, if at all, be concerned only about the impact this detention had on states whose nationals the detainees were. Other than those states, the United States would be free to domestically treat the detainees as it wished, within the purview of its domestic law evidently. The globalization movement that has transformed international law brings a major change in the above analysis.

First, the United States must now consider not only the relevant state actors, but also a number of non-state and supra-state ones. In addition to concerns raised by home states of the detained individuals, the United States has gotten a vast number of complaints about the Guantanamo detention facility from a variety of NGO’s, regional state organizations, as well as human rights protection bodies. Moreover, the United States can no longer consider only whether the detention program is legal under its domestic law; it must also consider all relevant international conventions that it is a member of. Thus, the United States could very well interpret the detention program as legal under its Constitution and Bill of Rights, but the same conclusion may not hold true under, for example, the four Geneva Conventions or the Hague Conventions or the Torture Convention. To complicate things further, the evolutionary process of international law has elevated certain legal principles to the status of customary norms, that bind all states in a conclusory manner, without room for derogations or reservations, even if states are not parties to specific treaties codifying such legal norms. Thus, if something in the United States’ treatment of Guantanamo detainees were to violate a customary norm of international law, such treatment would again, although legal under domestic law, account to a violation of international law. Finally, the United States, in addition to the proliferation of relevant actors impacted by its behavior and to the legal norms it has to consider, must also account for a number of jurisdictions which may choose to challenge the United States as a country, or some of its leaders, if the United States’ behavior becomes so offensive as to warrant a judicial proceeding. States may

---


151 *See supra* Part II for a general discussion of the difference between the traditional version of international law, and the globalized or evolutionary version of international law.

152 Hathaway, *supra* note 150, at 235-37 (describing the criticism that the Bush Administration received because of the alleged abuse of Guantanamo detainees).

153 The Bush Administration effectively claimed that the Geneva Conventions did not apply to the conflict with al Qaeda members. *Id.* at 235. This shows that the Bush Administration, although adamant about its desire to continue the Guantanamo detention program, saw the need to justify its actions internationally, and to prove that they were in compliance with United States’ international legal obligations. It is worth noting also that the United States Supreme Court – possibly because of criticism of the Bush Administration from domestic as well as international sources – ultimately held that the military commissions designed to try al Qaeda detainees violated Common Article 3 of the 1949 Geneva Conventions. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

154 For a general discussion of international custom, *see* Dunoff, Ratner, Wippman, *supra* note 29, at 78-81. Note however that states can choose to “opt out” of an emerging customary norm by objecting to the rule as it develops. Once a norm reaches the status of international custom, however, all states are bound by it. *Id.* at 78.
assert grievances against the United States in the ICJ, in a traditional form of state-to-state complaint procedure. Additionally, state and non-state actors may complain about the United States to committees or judicial bodies set up under various international conventions, regional organizations, or other human rights protection mechanisms. Such state and non-state actors may target some of the United States’ top political leaders directly, through criminal complaints brought in foreign domestic courts, or possibly even international courts, under expansive jurisdiction statutes that have grown under the evolutionary wing of international law to allow for such a possibility.

Thus, I argue that a country like the United States may at least think twice before instituting a program as Guantanamo, in light of all the legal challenges such a program may face on the international level.

In the specific case of the United States, international law has not necessarily changed the Guantanamo policy at stake; however, international law has certainly provoked a vigorous public debate at both the international as well as the national levels on the legality of the said policy. The existence of such a debate signals the erosion of state sovereignty brought about by the evolutionary process that has been transforming international law. Such erosion of state sovereignty translates itself into a heightened level of compliance with international law. While the compliance might be a direct product of a pragmatic calculus, whereby states realize that it may be more strategically advantageous for them to obey an international rule, I argue that it nonetheless signals a phenomenon of willing legal obedience. Continuous repetition of such state practice of willing compliance with international law may instill a profound sense of legal obligation in states’ behavior in the years to come.

b. State Reliance on International Law Domestically and in International Relations

Of course, ICJ jurisdiction is based on state consent, so that any exercise of jurisdiction by this tribunal would have to be based on a treaty or on ad hoc consent. See Statute of the International Court of Justice, article 36.

The European Convention on Human Rights has a procedure whereby individuals can bring claims against states; the American Convention on Human Rights has a similar complaints procedure, and so do other committees established within multilateral conventions, such as the Torture Convention. David Seymour and Jennifer Tooze, The Soering Case: The Long Reach of the European Convention on Human Rights, in INTERNATIONAL LAW STORIES 120 (John E. Noyes, Laura A. Dickinson, Mark W. Janis eds. 2007), [hereinafter “Seymour and Tooze”] (describing the European Convention’s complaints procedure); Grossman, International Law Stories 81-83 (describing the American Convention’s complaints procedure); Dunoff, Ratner, Wippman, supra note 29, at 450 (describing the Torture Convention mechanism).

For example, a U.S.-based NGO and several Iraqi citizens filed a criminal complaint with the German Federal Prosecutor’s Office, alleging that U.S. Secretary of Defense Donald Rumsfeld, as well as other U.S. government officials, were responsible for unlawful acts committed against detainees at the Abu Ghraib prison and elsewhere. Dunoff, Ratner, Wippman, supra note 29, at 383. The complaint was brought under the German universal jurisdiction statute. Id. Although this complaint was ultimately dismissed by the German Prosecuting Attorney, id., it signals nonetheless the possibility that U.S. leaders may face prosecution in a foreign domestic court.

See supra Part II.D for a discussion of universal jurisdiction statutes.

Cohan, supra note 3, at 942 (“Subsequently, human rights and civil liberties organizations, politicians, and newspapers brought further pressure upon the Bush Administration to close the [Guantanamo] detention center”); see also Hathaway, supra note 150, at 236.
The above described phenomenon of willing compliance with international law has already shaped state behavior in two different ways. First, states seem willing to comply with international law on another level – by relying on it directly in their domestic legal arenas. Second, states seem eager to rely on international law in justifying specific actions undertaken in their international relations with other international entities.

Traditionally, international law is part of domestic law only in a monist system; in a dualist system, a particular international legal norm must first be incorporated into domestic law by a specific statute. Similarly, in a traditional system, national jurisdictions are independent of the ICJ and the ICJ is not supposed to function as a supra-national jurisdiction. Yet, the globalization of international law has blurred these lines as well. Because international law touches on so many aspects of every-day life and now pertains to issues that had been traditionally left to the realm of domestic law, domestic courts, when asked to resolve such issues, are increasingly faced with international norms or international rulings on such norms by the ICJ or by other supra-national courts. This is particularly true in the human rights legal field.

To name a few examples, litigation under the Alien Tort Statute in the United States, revived since the Filartiga case, centers around violations of the law of nations. Thus, U.S. domestic courts are called to pronounce themselves on when there has been a violation of international law that would warrant damages in the domestic legal system. General Augusto Pinochet extradition proceedings instituted between the United Kingdom and Spain had domestic courts, particularly in the United Kingdom, interpreting the Torture Convention, a multilateral international convention, on the issue of diplomatic immunity and how diplomatic immunity under the Torture Convention would affect Great Britain’s legal obligations vis-à-vis the relevant parties. More recently, an Oklahoma criminal court specifically relied on an ICJ ruling in a case involving the claim that the United States had violated the Vienna Convention on

---

160 Dunoff, Ratner, Wippman, supra note 29, at 267-68.
161 A good example of this kind of line-blurring is the Soering case, where the European Court of Human Rights held that extradition of a British person by the United Kingdom to the United States, where he was accused of murder, would breach Article 3 of the European Convention on Human Rights, banning torture or inhuman or degrading treatment or punishment, because there was a risk of exposure of the defendant to the death penalty and death row phenomenon in the United States. Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).
162 Filartiga v. Pena Irala, 630 F.2d 876 (2d Cir. 1980).
163 Koh, Filartiga, supra note 149, at 65-66 (describing an era of “’transnational public law litigation,’ a novel and expanding effort by state and individual plaintiffs to fuse international legal rights with domestic legal remedies.”).
165 Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 1 (Mar. 31). The ICJ held in this case that the United States had breached its obligation under Article 36(1)(a) of the Vienna Convention on Consular Relations to ensure that Mexican consular officials can communicate with their nationals and can, under Article 36(1)(c), have the right to visit their nationals in detention. The ICJ held that “the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases by the United States courts… with a view to ascertaining whether in each case the violation of Article 36… caused actual prejudice to the defendant in the process of administration of criminal justice.” Id. at para. 121.
Consular Relations ("Vienna Convention"),\(^{166}\) giving specific deference to the ICJ holding interpreting the Vienna Convention and holding the United States bound by the Vienna Convention, and more importantly, by the ICJ interpretation thereof.\(^{167}\) Thus, on a judicial level, states and their judges in particular, seem to be more willing to rely on international law in reaching every-day decisions, simply because international law now governs and influences all sorts of legal areas.\(^{168}\)

In addition, states seem more willing to rely on international law on a diplomatic level. Thus, in their international relations, states like to have the international law "clutch" and to be able to pronounce the legality of their actions under international law. Again, because international law now touches upon so many different legal areas, states seem to be relying on it in many more aspects of their diplomatic behavior. International law experts have taken up predominant positions in states’ governments, and virtually every foreign policy or diplomacy decision is scrutinized for its coherence under international law.

For example, when NATO countries decided to launch air strikes on the territory of the former Yugoslavia, because of then-President Milosevic’s oppressive rule of the province of Kosovo, they considered seeking United Nations Security Council approval for their use of force.\(^{169}\) Even when the United Nations fell short of approving such use of force, NATO countries still sought to justify their actions on an international necessity ground,\(^{170}\) although, at least arguably, NATO members were acting within their

---


\(^{167}\) Torres v. State, No. PCD-04-442 (Okla. Crim. Ap. May 13, 2004), reprinted in 43 I.L.M. 1227 (2004). Judge Chapel, concurring, stated that his court was, without any doubt, bound by the Vienna Convention, and that because his court is so bound by this treaty, it is also bound to give full faith and credit to the ICJ’s Avena decision. Dunoff, Ratner, Wippman, supra note 29, at 302.

\(^{168}\) The United States Supreme Court has shown a particular willingness to consider international law. In Thompson v. Oklahoma, the Supreme Court determined that the Eighth Amendment Cruel and Unusual Punishment Clause prohibited the execution of any offender under the age of 16 at the time that the crime was committed, holding that this view was consistent with views expressed by “other nations that share our Anglo-American heritage, and by the leading members of the Western European Community.” Thompson v. Oklahoma, 487 U.S. 815, 830 (1988). In Roper v. Simmons, another case interpreting the Eighth Amendment in connection with a juvenile offender, the Supreme Court wrote that it was appropriate to refer “to the laws of other countries and to international authorities.” Roper v. Simmons, 543 U.S. 551, 575 (2005). The Supreme Court specifically took into consideration the U.N. Convention on the Rights of the Child, which the United States has not ratified, and which bans capital punishment for crimes committed by juveniles under 18. Id. at 576. The Supreme Court further stated that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” Id. at 578. Even Justice O’Connor in her dissent acknowledged that “[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.” Id. at 504 (O’Connor, J., dissenting).

\(^{169}\) NATO member countries ultimately decided not to seek U.N. Security Council approval for their action in Kosovo because of the threatened veto by Russia. Dunoff, Ratner, Wippman, supra note 29, at 940.

\(^{170}\) NATO Secretary-General Javier Solana, in his statement announcing the start of the air strikes on the territory of the Federal Republic of Yugoslavia, referred to “military action intended to support the political aims of the international community,” “humanitarian catastrophe,” “instability spreading in the region,” without evoking a specific legal ground to justify the invasion. Press Statement of Javier Solana, NATO Press Release 040 (1999).
jurisdiction and had at least regional authority to act.\footnote{NATO has jurisdiction in Europe and is charged with maintaining peace and security on that continent by enabling member countries to exercise collective self-defense if one or more of such member countries are under an armed attack. The North Atlantic Treaty, April 4, 1949, article 5, \textit{available at} http://www.nato.int/docu/basictxt/treaty.htm (last visited on Jan. 16, 2008); \textit{see also} Carter, Trimble and Weiner, \textit{supra} note 15, at 549 (describing the role of NATO).} This signifies that international law truly matters and that powerful organizations like NATO would rather comply with international law, only taking action that is not authorized internationally when deemed truly necessary. For example, the United States government sought United Nations Security Council approval for both Gulf Wars, although the United States had the military capacity to act unilaterally and although the United States also invoked self-defense grounds, which would have justified the use of force in Iraq even without such Security Council approval.\footnote{Dunoff, Ratner, Wippman, \textit{supra} note 29, at 891 (noting that the U.N. Security Council authorization to use force in the First Gulf War had been sought by the United State); \textit{id.} at 894-5 (discussing the issue of whether the United States could have used force in the First Gulf War legally in the absence of Security Council authorization, on the ground of self-defense); \textit{id.} at 905-08 (describing the United States’ efforts to obtain Security Council authorization to use force in the Second Gulf War, and, once those efforts failed, its ultimate decision to use force without Security Council approval). Note also that the United States, as well as its allies in the Second Gulf War, attempted to legally justify their decision to use force on various Security Council resolutions. \textit{Id.} at 908-09. This exemplifies the importance of international legal justification for controversial actions on the international level, even for powerful countries like the United States.} It can be argued that the United States certainly sought United Nations affirmation for strategic or diplomatic reasons, but it can be equally argued that part of the affirmation process included a belief into the necessity of compliance with international law.

**B) Individual Behavior**

The above-described calculus that states perform nowadays, when faced with assessing the validity of their behavior in light of globalized international law, pertains as well to individuals. In other words, in the same manner that states’ behavior seems curtailed by the evolving and expanding forces of international law, individual rights appear to be more squarely protected from state intrusion. Thus, the evolution and globalization of international law that have eroded state sovereignty have provided a sphere of protection to the individual, a sort of a buffer zone between individual rights and states’ prerogatives to regulate individual behavior. Individuals, in this new spectrum of protection stemming from globalized international law, now have different expectations about what states can do to them, as well as newly created rights enforceable in various courts of law.

**a. Expanded Individual Expectations In the Face of Globalized International Law**

Just as states’ expectations have changed in the face of globalized international law, individuals’ expectations have experienced a similar shift. Individuals today expect more protection from international law. Because international law has become omni-present in every-day life, individuals today can find a protectionist international legal norm in
almost every aspect of their lives. For example, international human rights norms protect
the individual from undue state interference with basic rights, such as the right to be free
of torture, to have one’s human dignity respected, to have a right to counsel, a right to
vote, and a right to a general education. For example, international labor laws protect
individual workers and place limits on the rights of their employers. For example,
international environmental laws provide the individual with a basic healthy living
environment. For example, international tax laws ensure that individuals do not have
to pay their taxes multiple times if they are involved in international transactions.

Such a protectionist structure directly affects individuals by providing a shield, a web
of rules and regulations that ensure that the individual is not unnecessarily burdened by
the state. Unsurprisingly, individual expectations have changed. Individuals no longer
believe in absolute state sovereignty. Individuals today easily consult international law
on many different aspects of their lives. When faced with a question of state powers – in
other words, can my state do this to me? – individuals are likely to look to international
law as a shield and to invoke international legal norms to curb state behavior. Most
importantly, individuals are likely to invoke specific international legal norms as
bestowing certain rights on them, and as taking away such rights from their home
states.

173 Many of these basic human rights stem from the so-called International Bill of Rights, consisting of the
Universal Declaration, the International Covenant on Civil and Political Rights, and the International
Covenant on Social, Economic and Cultural Rights. See Universal Declaration, supra note 66, ICCPR,
supra note 66, ICSECR, supra note 66.
174 International labor standards have been maintained and developed by the International Labour
Organization. For a complete database of conventions and recommendations setting forth international
labor standards, see http://www.ilo.org/ilolex/english/convdisp1.htm (last visited on Jan. 16, 2008) and
175 Major environmental law documents include the 1972 Stockholm Declaration, and the 1992 United
Nations Conference on Environment and Development (the Earth Summit). Dunoff, Ratner, Wippman,
supra note 29, at 718.
176 Numerous countries have concluded bilateral taxation treaties, exempting their citizens or residents from
being subject of double taxation, which occurs when two or more taxes may need to be paid for the same
asset, financial transaction and/or income, arising due to an overlap between different countries’ tax laws
and jurisdictions. In the European Union, member states have concluded a multilateral agreement on
information exchange. This means that they will each report (to their counterparts in each other
jurisdiction) a list of those savers who have claimed exemption from local taxation on grounds of not being
a resident of the state where the income arises. These savers should have declared that foreign income in
their own country of residence, so any difference suggests tax evasion. See Double Taxation, available at
177 As a corollary to this protectionist nature of globalized international law, it is important to note that the
evolution of certain international legal fields, such as international criminal law, has expanded individual
liability, thus imposing additional limitations on individual behavior. For example, the concept of
international criminal responsibility evolved over the latter half of the 20th century, and was implemented
particularly in the 1990’s in the judicial proceedings that have taken place in the ICTY and the ICTR. See
supra, Part III.B; see also Yusuf Aksar, IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM THE
Ad Hoc TRIBUNALS TO A PERMANENT INTERNATIONAL CRIMINAL COURT 84-112 (2004) (discussing the
different types of individual criminal responsibility as they exist in the ICTY and ICTR, as well as under the
ICC statute). For literature on the work of the ICTY and the ICTR and their role in implementing the
notion of individual criminal responsibility, see Theodor Meron, Centennial Essay: Reflections on the
Prosecution of War Crimes by International Tribunals, 100 A.J.I.L. 551 (2006); Dermot Groome, Recent
b. Newly Created Individual Rights In Light of Globalized International Law

The globalization forces that have transformed international law and that have, as described above, confined state behavior and expanded individual expectations, have also affected specific individual rights. Individual rights are typically created by a domestic legal system. In other words, the individual relies on a specific domestic legal norm, which works to protect his or her rights, in a domestic court of law. We typically refer to private judicially enforceable rights. In a dualist legal system, international law needs to be specifically incorporated into domestic law by the passage of specific statutes; thus, an international legal norm may only protect private, individual rights to the extent that the incorporating domestic statute allows for such an outcome.\(^\text{178}\) However, this result seems to have been somewhat undermined by recent litigation challenging this traditionalist conception and seeking to establish that the individual can sometimes rely on international law directly to have his or her individual rights protected in a domestic court of law.

One example of such litigation occurred in the United States, a dualist legal system. There had been significant judicial debate over the issue of whether the Vienna Convention, in its article 36, creates a private judicially enforceable right.\(^\text{179}\) In other words, litigation in the United States centered around the question of whether private plaintiffs could directly rely on this international convention to have their private rights enforced and protected by American courts.\(^\text{180}\) While the majority of the Supreme Court chose not to directly answer this question in the latest case that it heard on the issue,\(^\text{181}\) the dissent strongly pointed out that the Vienna Convention is deemed to be a self-executing treaty, and that its provisions are such that “they are intended to set forth standards that are judicially enforceable.”\(^\text{182}\) Thus, while the majority left the issue unanswered, the dissent seemed to suggest that it would be prudent to let the individual rely on this international treaty directly, possibly indicating a trend toward recognizing the importance of international protectionist norms on the rights of the individual.\(^\text{183}\)

In Europe, such a shift has already occurred during the second half of the 20\(^{th}\) century. There, individual rights are specifically protected under the European

---

\(^{178}\) Dunoff, Ratner, Wippman, supra note 29, at 268.

\(^{179}\) Article 36 of the Vienna Convention states that “if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner...[t]he said authorities shall inform the person concerned without delay of his rights under this subparagraph.” Vienna Convention, article 36(1)(b).


\(^{182}\) Id. at 2695 (Breyer J., dissenting).

\(^{183}\) The dissent noted that “the language, the nature of the right, and the ICJ’s interpretation of the treaty taken separately or together so strongly point to an intent to confer enforceable rights.” Id. at 2698 (Breyer, J., dissenting).
Convention on Human Rights, and individuals can bring specific grievances against their home countries in the European Court of Human Rights. Thus, individuals in Europe can rely on this multilateral treaty to have their rights protected and enforced in an international tribunal, and subsequently, in domestic tribunals which follow the European Court’s directive.

Also in Europe, individuals and other corporate non-state actors have other newly created rights stemming from a variety of European Union Regulations and Directives, which offer protection on many levels, including antitrust laws, labor laws, insurance laws, health laws, *inter alia*. Thus, the globalization trend in international law that has been transforming the world seems to have particularly embedded itself in Europe. In the United States, the trend seems weaker; nonetheless, American courts seem at least more willing to consider international protectionist norms and their impact on individual rights.

Thus, individual expectations and behavior have changed across the globe in light of the powerful influence of globalized international law, which has eroded state sovereignty in significant ways and which has granted the individual certain quasi-absolute rights and protections. The degree of protection afforded to the individual by modern-day international law may vary from region to region and country to country, but a core group of individual rights seem to have been firmly embedded in almost every nation’s legal culture, a phenomenon brought about by the potent forces of globalized international law.

V. Conclusion

The powerful forces of globalization have transformed international law, through a process of evolution, which has had significant consequences on this legal field. Besides the proliferation of actors, processes, and sources in international law, the above-described evolution has heavily impacted several legal fields, in particular human rights law, international criminal law, and private international law. The evolutionary process has also magnified the impact of international law, in its globalized shape and form, on state behavior and on individual expectations. While state powers and sovereignty seem to have been curtailed by this evolutionary process, by the same token, individual powers have been reinforced and reinvented through new transnational judicial norms and processes. How far the evolution of international law will take us remains uncertain, but it seems likely that international law will play a crucial role in the future life of both state and non-state entities, and that its study will require a truly elaborate approach.

---

184 See Sands *supra* note 1, at 546-47.
185 Seymour and Tooze, *supra* note 156, at 119 (noting that the judgments of the European Court of Human Rights are binding on states as a matter of international law).
186 For a general discussion on the vast European Union regulatory powers, see Peter L. Strauss, *Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice Versa*, 12 COLUM. J. EUR. L. 645 (2006); see also Carter, Trimble, Weiner, *supra* note 15, at 520-549; see also *id.* at 531-532 (discussing the different kinds of legislative acts that can be adopted by the European Community, including regulations and directives, *inter alia*); see also Cohan, *supra* note 3, at 940 (describing the expansive role of the European Union and the fact that it has gained “legal supremacy over Member States”).
187 Scholars of the so-called “New” New Haven School of International Law have already started exploring the problematic of finding the proper approach to the study of such a complex field as the modern-day international law, while recommending the use of a pluralist approach, an inter-disciplinary focus, as well
as a commitment to the study of transnational law, inter alia. See, e.g., Laura A. Dickinson, *Toward a “New” New Haven School of International Law?*, 32 YALE J. INT’L L. 547 (2007); Koh, “New” New Haven School; *supra* note 30; Berman, *A Pluralist Approach*, *supra* note 18. However, this Article focuses on the evolution of international law in light of globalization, and will leave the question of how to study such globalized international law to future endeavors.