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Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization

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Undoubtedly, the international system, i.e. the configuration of states, international organizations, and other political and legal

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actors on the international plane¹, is undergoing a major transformation. The very fact of a transformation is nothing new, of course. It is commonplace that the international system as a historic phenomenon is not static and has undergone not only constant changes in parts of it but also as a whole. And yet, it is also evident that some of these changes were of such dimensions that, from hindsight, they were recognized by historians, political scientists and international legal scholars as qualitative leaps in the course of history. They were seen as marking the end of an era or period of time and, by the same token, as the beginning of a new stage in the development of the international system.² Thus, with the end of the Thirty Years War in 1648 by the Peace Treaties of Münster and Osnabrück, a new international system was ushered in what became known as the Westphalian model.³ Likewise, after Napoleon I.'s failure to

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1 For the concept of the "international system" as used here see Stanley Hoffmann, *International Systems and International Law*, in: Klaus Knorr/Sidney Verba (eds.), *The International System -- Theoretical Essays*, Princeton, N.J. 1961, pp. 205 et seq.

2 See Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, *Völkerrecht*, 2nd ed., vol. I/1, Berlin/New York 1989, pp. 2 et seq. with further references.

3 David Held/Anthony McGrew/David Goldblatt/Jonathan Perraton, *Global Transformation*,

establish a new international order under French hegemony, the Vienna Congress of 1815 brought about a fundamental change in the structure of the international system heralding the emergence of international institutional cooperation among the sovereign states hitherto solely constituting the (eurocentric) international system.⁴ The 20th century, as well, has witnessed a dramatic restructuring of the international system. The creation of the League of Nations and that of the United Nations are a clear indication that states have increasingly internationalized the implementation of their once exclusively national obligation to provide for peace and security in international relations as well as for the general well-being of their people. By the end of the 20th century and at the door steps of a new millenium, the international system is subject to yet another process of far-reaching changes. At least to some extent different from earlier shifts in the structure of the international system, the present process is more conspicuous and more clearly in the limelight of the public because of its breath-taking speed. Its impacts are

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not only affecting the international system itself, its legal order, and the role and status of the sovereign territorial state, but its effects are immediately felt by large segments of societies around the globe. This immediacy of the impacts of the present changes in the international system is enhanced by the omnipresence of the media. New information technologies allow for the instant spread of news around the world. By way of television and the internet people are witnessing events in real time wherever and whenever they occur. Thus, people around the globe are made aware of the political and social developments in an unprecedented manner. This new era marked by these recent changes has come to be called the era of globalization.

The present paper intends to recapitulate the sequence of the major stages of the development of the international system and the ensuing impacts on the international legal order. It further intends to highlight the most prominent features that characterized the international system and international law in the various stages as they reflected and reflect the political and social environments of the time (I). Next, the paper shall attempt to explore the meaning of the concept of globalization, to outline the major forces that drive the process of globalization and to analyze the structural effects of globalization on the international system (II). Following this, the paper will address the impact of globalization on the structure and development of international law (III). In a short concluding section, some tentative observations shall be put forward on how international law is already meeting the challenges of the globalizing international system, and how it should be further developed into a transnational legal order, which encompasses different kinds of actors in the international system, supports the positive potential of the process of globalization, and that mitigates its negative impacts on societies around the world.

I. From the Westphalian era to the era of institutionalized international cooperation

1. The Westphalian system until the end of the 18th century

The early days of the international system that emerged from the Westphalian peace treaties of 1648, were characterized more or less

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by an anarchic structure.⁵ The principle of sovereignty was paramount. Sovereignty pertained to the princes, who exercised their sovereign rights at will. Of course, numerous bilateral treaties regulated the day-to-day international transactions. But the *liberum ius ad bellum*, the sovereign right to freely go to war to enforce the rights and

Stanford 1999, p. 37.

4 Dahm/Delbrück/Wolfrum (FN 2), p. 7; Jost Delbrück, "Das Völkerrecht soll auf einem Föderalismus freier Staaten gegründet sein" -- Kant und die Entwicklung internationaler Organisation, in: Klaus Dicke/Klaus-Michael Kodalle (eds.), *Republik und Weltbürgerrecht -- Kantische Anregungen zur Theorie politischer Ordnung nach dem Ende des Ost-West-Konflikts*, Weimar et al. 1998, pp. 185 et seq.

5 See Dahm/Delbrück/Wolfrum (FN 2), p. 5.

interests of the now dominant territorial states overshadowed the fledgling international legal order. In the late 17th and first half of the 18th century common goals and a power substrate that could enforce these common goals were lacking. It is obvious that in view of the individualistic interests of the many sovereignties, combined with their *liberum ius ad bellum*, the need was felt for a set of reliable rules for the conduct of international relations, on the one hand. On the other hand, it was equally obvious that the very factors that gave rise to the desire for a solid legal framework only allowed for modest steps towards an effective legal order. Yet there were international legal rules for the conduct of international relations in the still young international system. Some were of a more formal nature like the rules for diplomatic intercourse. Others were of a fundamental and substantive kind, such as the principle of *pacta sunt servanda*, or the freedom of the Seas, the balance of power principle⁶, or -- basic to all -- the principle of sovereignty.

2. Structural changes in the 19th century international system

a. The culmination of sovereign statehood

This state of affairs still prevailed during the first half of the 19th century. In fact, the Westphalian system came to perfection in this phase of the development of the international system. The principle of state sovereignty replaced the notion of the sovereignty of the princes. Consequently, the sovereign territorial state had secured its status as the sole legal subject within the international legal order.

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Sovereignty as a legal principle served as the basis of the binding force of international law -- unless such binding force was denied altogether⁷ -- in that it was the will of the states to be bound by international law that formed the foundation of the international legal order. But the principle of sovereignty also informed the contents and meaning of the rules of international law in detail. Thus, for instance, the *liberum ius ad bellum*, according to the unanimous opinion of the contemporaries, derived directly and necessarily from the principle of sovereignty, just as the notion that only states could possess the status of international legal subjects. With two marginal exceptions⁸, peoples and individuals were not recognized under international law. The impenetrable mantle of sovereignty prevented peoples and individuals from any participation in international legal transactions. In short, state sovereignty was the leading paradigm of the time, both legally and politically. However, the 19th century, particularly its second half, also witnessed important developments that indicated the forthcoming transcendence of the international system as exclusively formed by the sovereign states. The idea of the sovereign territorial nation state was based on the notions of self-assertion, self-reliance, and self-sufficiency. To live up to this standard of *de iure* and *de facto* independence required a growing amount of financial, economic, and other material resources that states found increasingly more difficult to provide by themselves. Likewise, the process of industrialization and the entailing mass production of goods demanded larger markets, which could not be provided within the often very narrow confines of the territorial nation states. Thus, for a number of strong interlocking reasons, states were forced to seek the cooperation with one another in

⁶ First mentioned in the Treaty of Peace and Friendship between Louis XIV., King of France, and Anne, Queen of the United Kingdom of Great Britain, of 11 April 1713, in: J. Dumont, *Corps Universel Diplomatique du Droit des Gens*, t.VIII, Amsterdam 1731, pp. 339-342; see Ulrich Scheuner, *Die grossen Friedensschlüsse als Grundlage der europäischen Staatenordnung zwischen 1648 und 1815*, in: id., *Schriften zum Völkerrecht*, Berlin 1984, pp. 351 et seq. (at pp. 366 et seq.).

⁷ See F.W. Hegel, *Grundlinien der Philosophie des Rechts*, in: H. Glockner (ed.), *Sämtliche Werke*, vol. 7, 3rd edition, Stuttgart 1952, §§ 330 et seq.; for a detailed discussion of the basis of the binding force of international law see Dahm/Delbrück/Wolfrum (FN 2), pp. 34 et seq.

⁸ These exceptions were the ancient prohibition of piracy that directly obliged individuals, and the obligations of individuals under the rules of the *ius in bello*, see Karl Joseph Partsch, *Individuals in International Law*, in: Rudolf Bernhardt et al. (eds.), *Encyclopedia of Public International Law (EPIL)*, vol. II (1995), pp. 957 et seq.; see also Alfred Rubin, *Piracy*, in: *EPIL*, instalment 11 (1989), pp. 259 et seq.

order to supplement their insufficient domestic capabilities, thereby undermining the very essence of their self-conception as self-reliant, independent entities. One could say that the sovereign territorial nation state, which Hegel had just hypostasized as the "unfolding of the World Spirit"⁹, unwittingly contributed to the emergence of

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new modes of state interaction that, in effect, constituted the negation of the essential characteristics of the Hegelian image of the sovereign nation state. A reorganized international system was in the offing -- the era of the international organization was initiated.

b. Reorganizing the international system in the late 19th century

The changes in the socio-political structures within the states and in the international system that were sketched out above, i.e. the industrial and technological revolution as well as the entailing universal expansion of markets, confronted the states with challenges that they were less and less able to meet individually. For instance, the states' individual capability to provide for national security or their capability to secure the economic and social well-being of their populations diminished. Although still strongly committed to the notion of sovereignty states increasingly recognized that their cherished independence gradually gave way to interdependence. States began to realize that the fulfillment of their public obligations towards their people could not be achieved by "going it alone". It became obvious that from now on in pursuing essentially national tasks and interests, states had to rely on the cooperation of other states.¹⁰ One of many examples may help to illustrate this observation: the cost-efficiency of investments in the development of communication technologies¹¹ that were necessitated by the expanding markets could only be secured by inter- and transnational institutionalized cooperation. The means to implement such cooperation were found in the creation of comprehensive regulatory régimes for transborder communication, for example, the International

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Telegraph Union¹² and the Universal Postal Union (UPU). Besides these intergovernmental organizations, or administrative unions, as they were called at the time, international non-governmental organizations were founded like -- among others -- the International Union of Railways, whose members are public and private railway enterprises.¹³

c. The impact of the emerging international organization on the structure of international law

⁹ Hegel (FN 7), §§ 341 et seq.

¹⁰ An early precedent was the establishment of the several river commissions for the internationalized major European rivers like the Rhine or the Danube. These institutions are viewed today as antecedents of present-day supranational organizations because they possessed legislative, administrative and judicial competences that already foreshadowed those, for instance, of the European Community, see Friedrich Meissner, Rhine River, in: EPIL (FN 8), instalment 12 (1990), pp. 310-316 (at pp. 312-313).

¹¹ This term is used here in a relatively narrow sense: it is broader than just connoting modern communication technologies by electronic means and thus includes international or transnational traffic by sea, land and air, but it is narrower in that it does not cover the notion of communication as a form of human interaction; for a more detailed discussion of the term "communication" and its history see Jost Delbrück, International Communications and National Sovereignty -- Means and Scope of National Control over International Communications (Sea, Land and Air Traffic, Telecommunications), Thesaurus Acroasium, vol. XV, 1987, pp. 77 et seq. (pp. 88 et seq.).

¹² Today renamed as "International Telecommunication Union" (ITU), see Alfons Noll, International Telecommunication Union, in: EPIL (FN 8), vol. II, pp. 1379 et seq.

¹³ For a concise overview of these non-governmental and inter-governmental organizations and their activities see G. Mutz, Railway Transport, International Regulation, in: EPIL (FN 8), instalment 5 (1983), pp. 245 et seq.

These developments necessarily had a major impact on the international legal order. First, the creation of the comprehensive regulatory régimes, accompanied by a general trend towards the codification of international law led to a widening of the substantive scope of international law and to more precision in the international legal provisions. Second, the "closed club of international legal subjects", i.e. the states, was opened. The dogma of a *numerus clausus* of international legal subjects faltered. Despite serious doctrinal objections, the recognition of international organizations as functionally limited, derivative subjects of international law gained ground in the late 19th and early 20th century. Of course, the sovereignty of the member states of the newly founded international organizations remained the firm basis of these new legal entities. Untiringly, contemporary doctrine emphasized that the members of the new administrative unions voluntarily undertook the commitments stipulated by the statutes or conventions creating the organizations, and therefore, these commitments were subject to the will of the member states. In particular, it remained the sovereign decision of the states members to end their membership at any time. From a legal point of view, they remained the "masters" of the founding conventions.¹⁴ Membership in these new international organizations

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did, however, bring about considerable limitations on the members' sovereignty. For example, the exigencies that induced states to establish the international organizations and become members rendered the possibility of leaving a particular organization an abstract one. Although legally permissible, withdrawal from an organization would most likely come at a high price, i.e. the loss of the reliable institutionalized cooperation of the members remaining inside the organization. In all likelihood, states would realize that the sovereign right to freely chose between membership or non-membership was, in fact, of little political significance.

The late 19th and early 20th century saw another important structural change in the international system, which also affected the role and status of the sovereign states to the extent that their exclusive position as international legal subjects was increasingly challenged: in some of the large administrative unions (UPU for example), non-state territorial entities were admitted as members in these unions along with the sovereign states.¹⁵ This was a clear deviation from the dogma that only sovereign states could be legal subjects in the international arena. The exclusive role of the sovereign states was also relativized *de facto* by the growing role that international non-governmental organizations played in the provision of "public goods", like the organization and coordination of the transborder railway traffic. In short, international institutionalized cooperation became a significant feature of the modern international system.¹⁶

d. The internationalization of the maintenance of peace and security in 19th and early 20th century

The process of the international organization of states was not confined to the economic and technological sphere. Though much slower in pace, international institutionalized cooperation extended to the maintenance of international peace and security. Like in the fields of international economic and technological cooperation, the roots of the internationalization -- and ultimately the institutionalization --

¹⁴ It is interesting to note that the German Constitutional Court in its Maastricht decision of 1993 had recourse to this notion. Arguing that with increased powers of the European Community/Union provided by the Maastricht Treaty the Federal Republic of Germany did not suffer restrictions of its sovereignty that would be incompatible with the provisions of the Basic Law, the Court observed that the states members of the EC/EU still remained the "masters of the Treaty" and could end their membership unilaterally; see BVerfGE 89, pp. 155 et seq. (pp. 190, 198 et seq.); cf. Stephan Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz*, Berlin 1997, pp. 354 et seq. with further references.

¹⁵ From early on, UPU admitted major British overseas dependent territories to full membership, see Ludwig Weber, *Universal Postal Union*, in: EPIL (FN 8), instalment 5 (1983), pp. 383 et seq. (p. 384).

¹⁶ For a more detailed account of this development see Dahm/Delbrück/Wolfrum (FN 2), pp. 13 et seq.

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of the maintenance of peace and security reach back to the Congress of Vienna.¹⁷ The central task of the Vienna Congress was the creation of a new peace order. The structures of this new peace order cannot be laid out here in detail.¹⁸ On first sight, they appear to represent the traditional type of an alliance of sovereign states as would be expected at that point in time. On a closer look, however, one discovers that the Vienna concept of the Concert of Europe showed a number of innovative elements that inspired Inis Claude to interpret the Concert of Europe as a forerunner of both the League of Nations and the United Nations.¹⁹ For instance, the idea of continuous consultation among the leading powers of the new security system and the regular calling of conferences of all its members signifies a new and unprecedented form of exercising responsibility for the maintenance of peace and security. Until then, maintaining peace was seen as a genuinely national responsibility. The still modest message of the Vienna Congress was, however, that securing peace constituted a matter of international, i.e. public or common concern of the community of states. After the experiences of total warfare in the Italian war of national unity ("Battle of Solferino") and in the American War of Secession, as well as in World War I, the European and the American peace movement gained strong momentum. There was a growing conviction that it was not enough to try to mitigate the disastrous effects of interstate use of force by prohibiting particularly heinous kinds of weapons. Rather, it was necessary to legalize war itself. Plans to achieve this goal were strongly influenced by the large number of historic designs for the international organization of peace²⁰ and the ground breaking work of international legal scholars like Walther Schücking²¹, as well as by political initiatives, particularly that of the United States of America. Within the framework of the Paris Peace Treaty of 1919, the international community undertook the first attempt at the organization and institutionalization of the maintenance of peace by founding the

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League of Nations. After the failure of the League²², it took the experience of the even more devastating World War II to induce the international community to once again attempt to establish firmly the idea of the international responsibility for peace and security. Thus, the United Nations Organization was founded in 1945.²³

e. The general prohibition of the use of force: a fundamental change in the international system and the international legal order

¹⁷ See supra I. 2. 6., p. 6, and FN 9.

¹⁸ For a detailed study of the agenda of the Vienna Congress and the development of the so-called Concert of Europe see Wilhelm Grewe, *Epochen der Völkerrechtsgeschichte*, Baden-Baden 1984, pp. 502 et seq.; also Winfried Baumgart, *Vom Europäischen Konzert zum Völkerbund*, Darmstadt 1974, pp. 1 et seq.

¹⁹ See Inis Claude, *Swords into Plowshares*, 4th edition, New York 1971, pp. 38 et seq.

²⁰ See Kurt v. Raumer, *Ewiger Friede. Friedensrufe und Friedenspläne seit der Renaissance*, Freiburg/Munich 1953.

²¹ See Walther Schücking, *Die Organisation der Welt*, Leipzig 1909; Karl Joseph Partsch, *Die Ideen Walther Schückings zur Friedenssicherung*, Walther-Schücking-Kolleg, No. 3, Bonn 1985; Frank Bodendiek, *Walther Schückings Konzeption der internationalen Ordnung -- Dogmatische Strukturen und ideengeschichtliche Bedeutung* (forthcoming).

²² The failure of the League to a substantial degree was due to the fact that the United States did not join the League although it was one of its main protagonists. The rejection of the Peace Treaty of Versailles (1919) -- of which the League Covenant was a part -- by the US Senate resulted from the farsighted critique of the Peace Treaty that was considered to be politically unwise and prone to generate new conflicts between Germany and its neighbors, see G.A. Finch, *The Treaty of Peace with Germany in the United States Senate*, *American Journal of International Law (AJIL)* 1920, pp. 155 et seq.

²³ For a detailed study of the background and motives of the creation of the UNO see Ruth B. Russel/Jeanette E. Muther, *A History of the United Nations Charter*, Washington D.C. 1958.

There is no need to give a detailed outline of the structure and functions of the United Nations Organization at this point. Only some of the primary features of the UN will be highlighted. The Organization is not only charged with the task to maintain international peace and security, it is also empowered to enforce decisions of the Security Council according to chapter VII of the UN Charter (UNCh). In addition, the Charter provides for the competence of the Council, under certain conditions, to intervene in the domestic affairs of the states members (art. 2 (7), last half sentence/chapter VII UNCh) -- a competence the Council made use of several times in recent years in order to protect fundamental human rights of oppressed peoples within certain member states.²⁴ The central feature of the United Nations Charter is, of course, the comprehensive prohibition of the use or threat of use of force. According to art. 2 (4) UNCh "(a)ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". Thereby, the core right of the sovereign state to freely go to

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war -- the *liberum ius ad bellum* -- was abandoned. On a closer look, it appears that even the right to self-defence is no longer understood by the Charter as a genuine right to go to war. Rather it is conceived in terms of a right to exercise self-defence only insofar and as long as the Security Council does not or cannot intervene in order to restore peace and security. The use of force in self-defence is still considered to be illegal, in principle, but is justified because of the existing state of self-defence.²⁵

With regard to the principle of sovereignty, one cannot but conclude from the foregoing observations that a fundamental change of the dominant paradigm has occurred, which for centuries characterized the international system and its legal order, i.e. that the use of force by the sovereign states to pursue their rights and interests, was considered legal and legitimate. However, this is not the whole story. Besides illegalizing the international use of force the United Nations Charter also provides for the obligation of the member states to respect and promote human rights that are understood to be the cornerstones of a genuine peace order. Thus, in addition to the maintenance of international peace and security, the promotion and enforcement of human rights has become an international responsibility of the international community of states, as well. Consequently, the United Nations and its Specialized Agencies are not only concerned with the elaboration and codification of binding human rights conventions; the United Nations is also empowered to monitor the implementation of these human rights instruments. In this task, the United Nations is increasingly supported by subsidiary organs established by the United Nations or by monitoring bodies created under the respective human

²⁴ See, for instance, Heike Gading, *Der Schutz grundlegender Menschenrechte durch militärische Maßnahmen des Sicherheitsrates -- das Ende staatlicher Souveränität?*, Berlin 1996; also Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, *Fordham International Law Journal* 1995, p. 794; Jost Delbrück, *A Fresh Look at Humanitarian Intervention*, *Indiana Law Journal* 1992, pp. 871-901.

²⁵ For a more detailed discussion see Jost Delbrück/Klaus Dicke, *The Christian Peace Ethic and the Doctrine of Just War from the Point of View of International Law*, *German Yearbook of International Law (GYIL)*, vol. 28 (1985), pp. 194 et seq. with further references. In the course of time and particularly most recently, the question has been raised as to whether the strict prohibition of the use of force needs some modification in view of the obvious inability or unwillingness of the Security Council to exercise its functions under chapter VII UNCh. Thus, the Council, acting under art. 39 of chapter VII UNCh did decide (S/Res. 1999 of September 23, 1998, and S/Res. 1203 of October 24, 1998) that the oppression and forcible displacement of the ethnic group of the Albanians in the Kosovo Province of the Federal Republic of Yugoslavia (Serbia/Montenegro) constituted a threat to international peace, but for political interests external to the actual case before the Council two permanent members, Russia and the PR China, declined to support enforcement measures against the Serbia/Montenegro. For a detailed discussion of this problem see Jost Delbrück (ed.), *The Future of International Law Enforcement. New Scenarios -- New Law*, Berlin 1993; id., *Effektivität des Gewaltverbotes -- Bedarf es einer Modifikation der Reichweite des Art. 2 (4) UN-Charta?*, *Die Friedens-Warte* 1999, pp. 139-158 with further references.

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rights conventions. In recent decades, even non-governmental organizations (NGO's) play a growing role in promoting compliance with international human rights obligations.²⁶

The monitoring and enforcement competencies of the organized international community represent further significant inroads into state sovereignty; in earlier times, the observance or non-observance of human rights by states vis-à-vis their citizens was held to be an exclusively internal matter. In pursuing a rather vigorous human rights enforcement policy, the Security Council even went so far as to determine that grave and persistent human rights violations by some states constituted a threat to international peace and reacted to these violations by applying sanctions according to chapter VII UNCh.²⁷ And finally, the UN Charter obliges the member states (there are 185 states members today) to cooperate in the effort to provide for economic and social conditions that are essential for international peace and security.²⁸ Peace in this sense is not only conceived of as the absence of the use of physical force, but also as a just international order based on the rule of law in which human rights and economic and social justice are heeded and promoted.²⁹

The foregoing findings may suggest the conclusion that the dominance of the dogma of sovereignty as it was cherished in the earlier stages of the development of international law has become obsolete from a legal point of view in the era of international organization. However, one must remember that the UN Charter as a constitution

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of the community of states is still clearly committed to the respect and the protection of the "sovereign equality" of all the members of the United Nations Organization (art. 2 (1) UNCh). Thus, the period of international institutional cooperation shows some ambivalence: on the one hand, there are substantial changes in the distribution of responsibilities between states and the organized community of states which entails considerable restrictions of state sovereignty. On the other hand, the respect and protection of state sovereignty remains a major factor in international relations. The international legal order has opened to new structures and forms of international cooperation, accepted new subjects of international law as actors on the international plane, and developed norms that are concerned with matters hitherto considered to be exclusively domestic. However, the transfer of the regulation of formerly domestic matters to the international plane does not mean that international law as an interstate legal order has been transformed already into a legal order of peoples and individuals in the era of international institutional cooperation.³⁰ Institutionalized international

²⁶ Examples where the participation of NGO's is provided by law are the human rights monitoring system of UNESCO, see the rules of procedure of the UNESCO Committee on Conventions and Recommendations, Doc. 104 EX/3.3, reproduced in Maxim E. Tardu (ed.), *The International Petition System*, vol. 3, New York, Loose leaf 1979 et seq., part 2.7; for a more detailed discussion of the UNESCO system see Jost Delbrück, *Non-Judicial Procedures of Enforcement of Internationally Protected Rights with Special Emphasis on the Human Rights Procedures of UNESCO*, in: Jost Delbrück/Dietrich Rauschning/Theodor Schweisfurth (eds.), *Der internationale und nationale Schutz der Menschenrechte -- Neuntes deutsch-polnisches Juristen-Kolloquium*, Baden-Baden 1992, pp. 34 et seq.

²⁷ See Gading (FN 24); also Jost Delbrück, *A More Effective International Law or a New "World Law"?* Some Aspects of the Development of International Law in a Changing International System, *Indiana Law Journal* 1993, pp. 705-725 (at pp. 707-711) with further references.

²⁸ See art. 1 (3) UNCh: "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ...".

²⁹ In this regard, Knut Ipsen with reference to the term "(military) collective security" speaks of a system of "collective economic security", Knut Ipsen, *Entwicklung zur "economic collective security" im Rahmen der Vereinten Nationen?*, in: Wilhelm A. Kewenig (ed.), *Vereinte Nationen im Wandel*, Berlin 1975, pp. 11-33.

³⁰ See Jost Delbrück (FN 27).

cooperation remained state-centered.³¹ With the emergence of the phenomenon of globalization, however, a new stage in the development of the international system and its legal order seems to have been reached.

II. The concept of globalization and its structural impact on the international system

1. The concept of globalization

As a preliminary remark it is necessary to observe that the concept of globalization is not to be confused with or understood as a synonym for internationalization. Internationalization refers to cooperative activities of national actors on a level beyond the nation state but in the

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last resort under its control.³² Globalization is of a different kind. It is a multifaceted phenomenon that escapes easy definition. In fact, the seeming elusiveness of the concept has led some authors to more or less deny the very existence of such a phenomenon called globalization.³³ However, the bulk of the mushrooming research on globalization supports the position that globalization -- complex and hard to define as it may be -- is real and substantially affects the international system, its various actors, and its structure, including international law.³⁴ Among those who accept that globalization is real, there is no consensus with regard to whether globalization is a completely new phenomenon or whether it is deeply rooted in the history of the international system.³⁵ This debate cannot and need not be elaborated upon here. For the present purpose it is sufficient to observe that it is in the present stage of development of the international system that globalization has been fully recognized as a specific feature of international relations, which impacts the political, economic, ecological, social and cultural life of societies around the globe in an unprecedented manner.³⁶ This is so whether or not globalization was also present in one form or another in earlier times.

Most authors are in agreement that globalization is not a fixed state of affairs but that it is a process or rather a set of processes.³⁷ This is an important insight, but it does not reduce the complex problem of defining the concept of globalization more concretely. The complexity of the concept is due to the fact that it is in part an objective phenomenon and in part a deliberate strategy of various inter- and transnational actors within and beyond the territorial nation state. In addition, globalization is a new perception of the political process that used to be state-centered but is now transforming into an understanding of politics as a multilayered process involving states, international,

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supranational, and non-governmental organizations, and multinational enterprises.³⁸

Globalization is an empirical concept in so far as it relates to objective factors of global dimension regardless of whether we as human beings recognize their global character or not. Thus, climate change, destruction of the ozone layer, underdevelopment, mass migration and massive human rights violations, nuclear proliferation, international terrorism, and other similar challenges are inherently beyond the problem-solving

³² See Jost Delbrück, *Globalization of Law, Politics, and Markets -- Implications for Domestic Law -- A European Perspective*, *Indiana Journal of Global Legal Studies (IJGLS)* 1993, pp. 9-36 (at pp. 10 et seq.).

³³ Representatives are referred as the "sceptics" who argue that globalization is a myth and rely on a "wholly economic conception of globalization, equating it primarily with a perfectly integrated global market", see Held/McGrew/Goldblatt/Perraton (FN 3), pp. 5 et seq.

³⁴ For detailed discussion of the recent research see Held/McGrew/Goldblatt/Perraton (FN 3), pp. 2 et seq.

³⁵ See Held/McGrew/Goldblatt/Perraton (FN 3), pp. 16 et seq., pp. 77 et seq.; Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, Munich 1999, pp. 20 et seq.

³⁶ For a comprehensive analysis of globalization and its impacts in the fields named above see Held/McGrew/Goldblatt/Perraton (FN 3), chapters 1, 3-5.

³⁷ See Held/McGrew/Goldblatt/Perraton (FN 3), p. 27.

³⁸ See Held/McGrew/Goldblatt/Perraton (FN 3), pp. 74 et seq.; Hobe (FN 14), pp. 390 et seq.

capacity of the territorial nation state and at the same time affect humankind as a whole, regardless of borders and territorial jurisdictions.³⁹ While the result of human creativity, the revolutionary new means of electronic communication constitute an objective factor in the globalization process in so far as they are one of the most important prerequisites of this process.⁴⁰ However those new electronic media are also instruments in the hands of those transnational strategists who are committed to enhance the cause of globalization. The electronic media have brought about an unprecedented interconnectedness of private individuals worldwide, which to a large extent escapes the control of the territorial nation states.⁴¹

Globalization is a strategic concept in the sense that it is a process resulting from a deliberate effort on the part of governmental and non-governmental actors to liberalize or deregulate the world markets. Such efforts were made in earlier times, as well. However, presently, these efforts have become qualitatively different in so far as the new electronic means of communication allow for transnational financial and commercial transactions within minimum time and regardless of national boundaries. Particularly, multinational enterprises may instantly relocate their production plants to places with the most favorable environment in terms of labor costs, taxes and other factors relevant for cost-effective investments. Transactions in the stock-markets can be effected literally around the clock, and the effects of

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economic crises can be felt and reacted to instantaneously.⁴² Though government interference with these truly global transactions is not totally impossible, their capabilities to control capital flows or the policies of multinational enterprises is substantially reduced.⁴³

Finally, globalization is, in part, a subjective phenomenon. It signifies a new perception of past and present political, economic, ecological, social and especially legal processes. An important element of this new global perception is that it is less state-centered. In the era when international institutionalized cooperation was dominant, this cooperation was perceived as necessary to supplement states' national efforts to solve problems that required measures surpassing their capabilities. Thus, these institutionalized cooperative efforts -- while international in character -- basically remained efforts in the national or state interest. Today, there is a growing realization that challenges like threats to the human environment have to be met in the common interest of humankind. As political, economic and social activities, in view of the inherently transnational character of the problems to be solved, "are increasingly "stretched" across the globe, they become in a significant sense no longer primarily or solely organized according to a territorial principle. They may be rooted in particular locales but territorially disembedded".⁴⁴ In a sense, one may conclude that, at least in part, politics in the economic, social and legal fields become denationalized ("entstaatlicht"). In socio-psychological terms, states, politicians and non-governmental actors of all kinds as well as societies in general must learn to perceive politics as a matter of transnational concern. The political process outgrows the narrow confines of the territorial state and becomes a network of supraterritorial governances.

³⁹ See Jost Delbrück (FN 32), pp. 14 et seq.

⁴⁰ See Peter Pernthaler, *Die Globalisierung als Herausforderung an eine moderne Staatslehre*, in: Heinz Schäfer (ed.), *Festschrift für Friedrich Koja*, Wien 1998, p. 69 et seq., who calls the new information technologies "the basis of globalization". On globalization and telecommunications see Joseph N. Pelton, *The Globalization of Universal Telecommunications Services*, in: Peter Dicken, *Global Shift*, 3rd edition, London 1998, pp. 141 et seq.

⁴¹ See the most recent elaborate study by Christoph Engel, *Das Internet und der Nationalstaat*, *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 39, Heidelberg 2000, pp. 325-425.

⁴² See Held/McGrew/Goldblatt/Perraton (FN 3), pp. 149 et seq.

⁴³ Alfred C. Aman (FN 30), pp. 780 et seq.; Jost Delbrück (FN 32), pp. 16 et seq.; Held/McGrew/Goldblatt/Perraton (FN 3), pp. 177 et seq.

⁴⁴ Cited from Held/McGrew/Goldblatt/Perraton (FN 3), p. 28.

After all, in the present context and with special regard for the international systemic and legal implications, globalization can be defined as the process or the processes of denationalization/deterritorialization of politics, markets, and laws or, more specifically, process of denationalization/deterritorialization of clusters of political, economic and social transactions involving national and international actors, public and private, leading to a global interconnectedness of these actors in time and space⁴⁵ including individuals. The diminishing state-centeredness of the transnational actors enables them to recognize -- not necessarily to actively pursue -- the common or public interest

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of humankind. In this sense, globalization can also be conceived of as a normative concept since it is related to a value judgement, i.e. that the common good is to be served by measures that are to be subsumed under the notion of globalization.⁴⁶ On the other hand, globalization does not mean that it creates or leads to a kind of world government, or that it is a universal phenomenon. At least as of now, the processes of globalization are different in impact and intensity in different regions of the world and fields of human activities. Although potentially affecting all areas of social life, the main impact of globalization is felt in the economic field, i.e. among the community of the World Trade Organization members⁴⁷ and among those states and societies that are technologically so far advanced that they can fully share the opportunities of the new electronic media. The different levels of economic, social and technological development in various parts of the world result in or reinforce the stratification of the peoples and nations of the world in terms of wealth, power, and participatory capabilities.⁴⁸ Thus, globalization in these areas is largely confined to the "sunny side" of the globe.⁴⁹ In other areas such as the endangered environment, social standards, and culture, globalization comes close to being truly universal even though largely as a side effect.

2. The impacts of globalization on the international system

As mentioned earlier, the international system became more diversified during the era of international organization. Next to the still dominant nation states, intergovernmental organizations entered the international arena as increasingly important political actors and were ultimately recognized as legal subjects under international law, as well.

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Also, international non-governmental organizations (NGO's) grew in number and began to play an important de facto role in international relations. But for a few exceptions⁵⁰, NGO's were not recognized as subjects of international law. In contrast, the human person did emerge as a limited, derivative legal subject within the framework of international human rights law and international humanitarian law. This process of diversification of the international system in terms of the relevant actors accelerates and intensifies in the present globalizing international system.

⁴⁵ See Held/McGrew/Goldblatt/Perraton (FN 3), pp. 15 et seq.; for an earlier largely similar definition of globalization see Delbrück (FN 32), p. 11.

⁴⁶ This normative aspect of the concept of globalization was more closely integrated into the earlier definition of globalization by the author but is modified here because the earlier definition was too exclusive with regard to the normative aspect, see Delbrück (FN 32), p. 11, for the earlier approach.

⁴⁷ The EU/EC constitutes a special case: it probably shows the most intensive regional process of denationalization of markets, laws and politics, see Delbrück (FN 32), pp. 25 et seq. But at the same time, the formation of the EU/EC can also be seen as a process of regionalization in reaction to the forces of globalization, see Höffe (FN 35), p. 20.

⁴⁸ See Held/McGrew/Goldblatt/Perraton (FN 3), p. 27.

⁴⁹ See Delbrück (FN 32), p. 17.

⁵⁰ One such exception is the International Committee of the Red Cross that enjoys the status as a functional (limited) subject of international law, see Denise Bindschedler-Robert, Red Cross, in: EPIL (FN 8), instalment 5 (1983), pp. 248-254 (at p. 251).

First, the exercise of non-territorial public authority by international governmental organizations is increasing. One example is -- not surprisingly -- the strengthening of the world economic order by the transition from the GATT-based system to the World Trade Organization (WTO). With the WTO a unified legal framework for the world economy is established and given an institutional foundation. This world economic order clearly reflects not only the individual rights and interests of the WTO members, but also their common collective interest in promoting the general welfare. For this very reason, WTO possesses the powers to enforce the legal principles constituting the world economic order by an efficient law-directed dispute settlement mechanism that can be invoked by all members whether directly affected or not, in case of a breach of the fundamental legal principles.⁵¹ In other words, these principles appear to possess *erga omnes* effect. Another aspect of the exercise of non-territorial public authority is related to the ongoing process of harmonization of domestic and international legal regimes and laws that is initiated particularly by regional, international and supranational organizations (e.g. NAFTA, EU/EC) but strongly furthered by private global actors (for example, multinational enterprises) that are affected by these laws.⁵²

Second, an important structural element of the globalizing international system is signified by the increasing role of universal (or near universal) international fora like the 1992 Rio Earth Summit in the international policy and law making process. Convening the community of states and non-state actors in large conferences reaches back into the 1970's when the Stockholm Conference on Environment was called under the auspices of the United Nations. Other such conventions

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were held on issues such as world population growth (Cairo), human rights protection (Teheran, Vienna), and women's rights (Beijing). These international fora provide the stage for an intensive world-wide discourse that has the potential to build a general consensus on strategies to meet the various global challenges mentioned earlier.

A special feature of these international fora that is of particular relevance in the present context, is the fact that these events are not only attended by state delegates. Representatives of a large number of NGO's are also participating either as officially admitted observers or as delegates to separately organized conferences held parallelly to the state meetings, at the same place, and with the same subject on their agenda. The active presence of numerous NGO's results in an intensive interaction between the state delegates and the NGO representatives. In fact, in many instances it can be shown that the NGO's make significant contributions to the deliberations of the state delegates and thus strongly influence the decisions made within these universal fora.⁵³ The reason for the influential role of NGO's is due, on the one hand, to their specialized expertise that many times exceeds that of a considerable number of state delegates.⁵⁴ On the other hand, it is the NGO's' professional use of the new communication media that permits them to disseminate their views to the state delegates as well as to the general public most effectively. In their own perception, NGO's see themselves as advocates of the "public interest".⁵⁵ While it is conceptionally misleading to characterise the increasing

⁵¹ See Christian Tietje, *Normative Grundstrukturen der Behandlung nichttarifärer Handelshemmnisse in der WTO/GATT-Rechtsordnung*, Berlin 1998, pp. 112 et seq.

⁵² See Aman (FN 30), p. 818.

⁵³ For an informative survey of NGO participation in the drafting process of a number of very important human rights and environmental protection conventions see Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law*, IJGLS 1999, pp. 579-645 (at pp. 590 et seq.); Stephan Hobe, *Der Rechtsstatus der Nichtregierungsorganisationen nach gegenwärtigem Völkerrecht*, Archiv des Völkerrechts (AVR) 1999, pp. 152-176 (at pp. 164 et seq.).

⁵⁴ See Nowrot (FN 53), pp. 590 et seq.; Kal Raustiala, *The "Participatory Revolution" in International Environmental Law*, Harvard Environmental Law Review 1997, pp. 537-586, (at p. 559).

⁵⁵ For a more detailed discussion of the new role of NGO's see Abram Chayes/Antonia Handler Chayes, *The New Sovereignty*, Cambridge 1995, pp. 251 et seq.; Nowrot (FN 53), pp. 586 et seq.; Stephan Hobe (FN 14), 309 et seq.; Jost Delbrück, *The Role of the United Nations in Dealing with Global Problems*, IJGLS 1997, pp. 277-296 (at p. 291/292).

participation of NGO's in the discourse taking place at the various international fora as a process of "democratization" of the international decision-making process, it can hardly be denied that NGO participation enhances the quality of the international discourse by providing a greater pluralism of views.

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Third, there is another aspect to the growing role of NGO's in the international system. NGO's provide unprecedented access for private individuals to the international political process. As mentioned before, individuals have so far received only limited recognition as international actors, not to speak of their still very limited international legal status. However, since NGO's are usually private associations with or without legal status under domestic law that are open to membership by individuals who share their views and goals, they are instrumental for individuals gaining some de facto participatory status on the international plane that hitherto was foreclosed to them. Thus, domestic grass root movements and the individuals within them become interconnected with the otherwise far remote level of international politics. The thrust of this new development becomes even more forceful since NGO's have engaged for quite some time in building international networks by forming institutionalized coordination committees or platforms that allow NGO's of similar leanings to exert even stronger pressures on the international decision-making process.⁵⁶ In sum, the international system today is structurally characterized by horizontal and vertical networks of non-state actors.

Yet, another set of non-state actors has emerged or re-emerged in the international system, i.e. ethnic minorities and indigenous peoples. Since the recognition of an international responsibility for the protection and enforcement of human rights, the permeability of the sovereign state has considerably increased. Consequently, ethnic minorities and indigenous peoples are enabled to voice their interests and concerns internationally as entities that are still widely discriminated against and often subject to living conditions below internationally recognized human rights standards. On the international plane, minorities and indigenous peoples have succeeded in organizing various international fora and in forming permanent international NGO's representing their member groups vis-à-vis international organizations

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like the United Nations and the International Labour Organization.⁵⁷ Some of these NGO's have achieved consultative status under art. 71 UNCh with the United Nations Economic and Social Council. The formation of these NGO's claiming international legal recognition for indigenous peoples numbering between 100 to 200 million, has introduced another important structural element into the international system.

III. The impact of globalization on international law

As pointed out before, globalization affects a wide spectrum of political, economic, social, and cultural activities on the international, transnational, and supranational level, as well as on the domestic level. Consequently, international law is widely affected by the process of globalization, as well. In the present context, only the most prominent effects of globalization on international law can be taken up. These relate to

⁵⁶ On network building by NGO's see Waldemar Hummer, *Internationale nichtstaatliche Organisationen im Zeitalter der Globalisierung -- Abgrenzung, Handlungsbefugnisse, Rechtsnatur*, *Berichte der Deutschen Gesellschaft für Völkerrecht (FN 41)*, pp. 45-230; Leon Gordenker/Thomas G. Weiss, *Pluralizing Global Governance: Analytical Approaches and Dimensions*, in: id. (eds.), *NGO's, the UN, and Global Governance*, Boulder, Col. 1996, pp. 17-47 (at pp. 25 et seq.); Kathryn Sikkink, *Nongovernmental Organizations and Transnational Issue Networks in International Politics*, *American Society of International Law (ASIL) Proceedings*, 1995, pp. 413-415; Ann Marie Clark, *Non-Governmental Organizations and their Influence on International Society*, *Journal of International Affairs*, vol. 48 (1995), pp. 507-525 (at p. 518); Kjell Skjelsbaek, *The Growth of International Non-Governmental Organizations in the Twentieth Century*, *International Organization* 1971, pp. 420-442 (at p. 428).

⁵⁷ For a short overview on the activities of NGO's representing indigenous peoples see Gudmundur Alfredsson, *Indigenous Populations, Protection*, in: *EPIL (FN 8)*, vol II., pp. 946 et seq. (at p. 948).

the legal consequences of the increased role and relevance of non-state actors in the international system, the changing modes of international lawmaking, and the changing status and role of the state. These items shall be taken up, in turn.

1. Recognition of new subjects of international law

Entering the era of globalization, it is safe to state that besides the still at least relatively sovereign states and traditionally recognized subjects of international law like the Holy See, the Order of St. John's of Jerusalem and Malta (commonly called the Maltese Order)⁵⁸, international intergovernmental organizations are well established as derivative functional legal subjects under international law.⁵⁹ Also,

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according to a great majority of international legal authors and in state practice individuals enjoy a limited derivative legal status directly under international law. Recognition of these derivative, functional new legal subjects finds its sociological foundation in the fact that international intergovernmental organizations have developed into relatively independent institutionalized centers of political decision-making. Of course, the international intergovernmental organizations were and still are the creation by hitherto fully sovereign states and clearly influenced by the individual political will of the member states.⁶⁰ Yet, international intergovernmental organizations -- acting through their organs -- are characterized today by an inherent dynamic of self-assertion vis-à-vis the individual members. Decisions of these types of organizations -- whether binding or not -- are not merely the sum total of the individual votes of their members but are legal acts directly attributable to the organizations as institutionalized entities and as such can well turn against those member states that did not support any such decision. Recognition of individuals as limited derivative subjects of international law finds its sociological foundation in the fact that a very large majority of states and their citizenry accept the notion of human rights based on the dignity of the human person⁶¹, and view as indispensable international protection of human rights without or even against the will of individual states. This stance, which is taken by

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the great majority of states and peoples, necessarily entails the recognition of an independent legal status of individuals and enables those individuals to pursue their fundamental rights.

⁵⁸ For a summary of the legal status of the Holy See Heribert F. Köck, Holy See, in: EPIL (FN 8), vol. II (1995), pp. 866 et seq.; for the Order of Malta, see John J. Cremona, Malta, Order of, in: EPIL, vol. III (1997), pp. 280 et seq.

⁵⁹ See Rudolf Bindschedler, International Organizations, General Aspects, in: EPIL (FN 8), vol. II (1995), pp. 1289 et seq. (at p. 1299).

⁶⁰ Protagonists of the realist international relations theory base their rejection of the notion of international intergovernmental organizations as independent political actors on this argument maintaining that these organizations are nothing but instruments in the hands of the powerful nations to pursue their national power interests, see, for example, Werner Link, *Die Neuordnung der Weltpolitik. Grundprobleme globaler Politik an der Schwelle zum 21. Jahrhundert*, Munich 1998, pp. 108 et seq. (at p. 114). See also the founder of the "realist school" Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, New York 1948; id., *Political Limitations of the United Nations*, in: George A. Lipsky, *Law and Politics in the World Community*, Berkeley-Los Angeles 1953, pp. 143 et seq. (at p. 150): "... There is no such thing as the policy of an organization, international and domestic, apart from the policy of its most influential member or members". For a critique of the realist stance, see i.a. Klaus Dicke, *Effizienz und Effektivität internationaler Organisationen. Darstellung und kritische Analyse eines Topos im Reformprozeß der Vereinten Nationen*, Berlin 1994, pp. 340 et seq.; also Volker Rittberger, *International Organizations. Theory of*, in: Rüdiger Wolfrum (ed.), *United Nations -- Law, Policies and Practice*, Munich/Dordrecht 1995, pp. 760 et seq. (at p. 763 para. 12 et seq.).

⁶¹ See Klaus Dicke, *Die der Person innewohnende Würde und die Frage der Universalität der Menschenrechte*, in: H. Bielefeldt/W. Brugger/K. Dicke (eds.), *Würde und Recht des Menschen -- Festschrift für Johannes Schwartländer zum 70. Geburtstag*, Würzburg 1992, pp. 161-182 (at p. 165 et seq.); Jost Delbrück, *Die Universalisierung des Menschenrechtsschutzes: Aspekte der Begründung und Durchsetzbarkeit*, in: Albrecht Zunker (ed.), *Weltordnung oder Chaos? Beiträge zur internationalen Politik*, Baden-Baden 1993, pp. 551-566, both with further references.

In legal terms, recognition of international intergovernmental organizations and individuals as however limited or not so limited subjects of international law finds its doctrinal foundation in those positive rules of international law that the community of states created with the intent to empower the new international actors.⁶² The once well accepted dogma that only states could be subjects of international law has been abandoned.

The analysis of the globalizing international system has shown yet another diversification of the number of actors. The most powerful actors are the Multinational Enterprises (MNE's), but international NGO's play an important role in international relations, in part because of their sheer numbers, but also because at least some of these organizations wield considerable political power.⁶³ In recent decades, other non-state actors such as minorities and indigenous people have entered or, more precisely, re-entered the international political arena, as well.⁶⁴ This raises the question as to whether these non-state actors have also gained an internationally recognized legal status. Aside from the circular argument that NGO's could not become subjects of international law because international law is a law among states and NGO's are not states⁶⁵, a still widely held opinion maintains that no particular

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advantage would result from granting an international legal status to NGO's. On the contrary, it is argued that the very fact that NGO's are not legally recognized members of the international legal community enables them to fulfill their independent critical role in the international discourse on which policies are or are not conducive to the common good.⁶⁶ This argument may have some merit with regard to a limited number of NGO's such as Amnesty International, other human rights NGO's or Greenpeace. It certainly cannot be extended to other non-state actors like MNE's. There seems to be a growing consensus that these entities need to be subjected to some basic rules of conduct regarding the observance of human rights and other principles embodying

⁶² See Danzig Railworkers case, Permanent Court of International Justice (PCIJ), Ser. B no. 15 (1928); ICJ Reparations for Injuries Case, ICJ Reports 1949, p. 186.

⁶³ See supra II. 2., p. 17, and accompanying references.

⁶⁴ While the question of a special protective regime for minorities figured prominently in the League of Nations era, this approach was largely abandoned after World War II. Politically, it was argued that the previously favored special status for minorities had triggered and strengthened ethnic conflicts within many states that ultimately contributed to the outbreak of World War II. Legally, it was thought that the protection of human rights of all people without discrimination as to race, ethnicity, religion etc. would actually serve to also protect members of minorities. In recent decades, this strategy was to some extent reversed. The re-emergence of indigenous peoples -- in the 18th and 19th centuries, at least some of them like the North American Indians were accorded a limited legal status by accepting them as parties to treaties between the host governments and Indian tribes -- is due to the general impact of the human rights movement and of the decolonization process; see Gudmundur Alfredsson (FN 57), and id., *Indigenous Populations, Treaties with*, in: EPIL, vol. II (FN 8), pp. 952 et seq.

⁶⁵ The view that NGO's do not possess international legal personality -- however limited -- is still held widely, see, for example, the recent international law treatise by Karl Doehring, *Völkerrecht*, Heidelberg 1999, paras. 196 et seq., who categorically denies that NGO's are subjects of international law in general. However, that is not the question at issue which is whether NGO's per definitionem cannot be accorded legal personality under international law, i.e. that their very nature as private associations excludes them from the spectrum of entities that could become subjects of international law even if states would want to treat them as such. In this respect, Doehring differs from other authors who also deny the legal personality of NGO's under international law -- like Volker Epping, in: Knut Ipsen, *Völkerrecht*, 4th edition, Munich 1999, § 6 para. 20 -- in that he concedes that states are actually free to accord international legal personality to NGO's, for instance, by specific treaties. As an example, he cites the case of the ICRC. But as pointed out, there are quite a number of other examples today.

⁶⁶ See Sonja Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts* (forthcoming).

basic elements of social responsibility.⁶⁷ But as humankind is heading towards a global civil society under the rule of law it is hardly a tenable position to accept that often very powerful NGO's should be treated differently from MNE's. Thus, once the transformation of the traditional international system into a global transnational system is accepted as a reality, a good many reasons speak in favor of including at least the most important non-state actors as functionally limited legal subjects in the already expanded globalizing international legal community. As mentioned earlier, there are no principal legal objections to a further expansion of the number of subjects of international law as the concept of a *numerus clausus* of subjects of international law is no longer valid.

Apart from these considerations of legal policy, the fact is that positive international law has in some instances already recognized international NGO's and MNE's as bearers of rights (and in some instances

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of obligations) directly under international law. As early as 1962 Hermann Mosler has argued that international NGO's participating in the work of international governmental organizations, e.g. as observers, possess a legal status under the secondary rules of international law, i.e. under rules of procedure promulgated under the authority of the respective international governmental organizations. But recent studies have shown that some international NGO's have been granted a functional legal status under primary rules of international law, as well. In some instances, international NGO's have been accorded standing in their own right before international human rights tribunals or non-judicial monitoring bodies established under international human rights conventions.⁶⁸ Furthermore, in some instances international NGO's themselves have been granted substantive rights under international treaties. Thus, NGO's are entitled to the right of freedom of assembly and association under art. 11 of the European Convention of Human Rights.⁶⁹ And under the provisions of the Desertification Convention⁷⁰ NGO's are accorded participatory rights and obligations in the implementation of this treaty.

In some instances, MNE's have been accorded international legal status in international arbitration proceedings.⁷¹ Furthermore, MNE's were subjected to a kind of sanction in cases where they violated economic embargos proclaimed by the UN General Assembly and the UN Security Council. Thus, tankers owned by international oil companies were included in "black lists" and publicly denounced, because they transported oil to the Republic of South Africa in violation of the oil embargo declared by the UN Security Council as an enforcement measure to combat the apartheid policies of South Africa.⁷² These measures amounted to nothing less than recognizing the ship owners

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(MNE's) as bearers of obligations under international law. One could argue, of course, that these "sanctions" were simply a matter of fact. However, it can hardly be accepted that the United Nations in proclaiming an embargo and enforcing it vis-à-vis a non-state actor considered the same as a legal non-entity.⁷³

⁶⁸ Examples are the 1503-procedure before the Human Rights Committee of the Economic and Social Council and the complaint procedure within the framework of UNESCO, see Michael Hempel, *Die Völkerrechtssubjektivität internationaler nichtstaatlicher Organisationen*, Berlin 1999, pp. 127 et seq. with further references.

⁶⁹ See Hempel (FN 68), pp. 88 et seq.

⁷⁰ United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, U.N. Doc.A/AaC.241/27 (1994), *International Legal Materials (I.L.M.)* 33 (1994), p. 1328; see Kyle W. Danish, *International Environmental Law and the "Bottom-Up" Approach, a Review of the Desertification Convention*, *Indiana Journal of Global Legal Studies* 3 (1995), pp. 133-176.

⁷¹ See Peter Fischer, *Transnational Enterprises*, in: *EPIL* (FN 8), instalment 8, pp. 515-519 (at p. 518).

⁷² See Jost Delbrück, *Apartheid*, in: Rüdiger Wolfrum (ed.), *United Nations: Law, Policies and Practice*, New Revised English Edition, Munich et al. 1995, vol. 1, pp. 27-38 (at p. 38).

⁷³ One may note here that in the history of the international system it happened time and again that large internationally acting commercial corporations were treated as international legal subjects.

If the widely accepted definition of a subject of international law as the capacity to bear rights and duties directly under international law is still valid, then it can hardly be denied that some NGO's and some MNE's were elevated to a limited functional status of international legal subjects. This development is fully in line with the at least partial transformation of international law from an exclusively interstate legal order to a transnational legal order of the globalizing international system.

2. New trends in international lawmaking

International law still does not know an institutionalized central law-making authority. According to traditional doctrine and law, recognized ways for the creation of new principles and rules of international law are bilateral, plurinational and multilateral treaties, on the one hand, and international customary law formed by state practice and *opinio iuris*, on the other hand. An intrinsic feature of the traditional decentralized lawmaking process was that the principles and rules of international law thus created were considered to be binding only upon those states that were directly involved in the lawmaking process. Such direct involvement formed the very basis of international treaty law, as is evidenced by the respective international customary and conventional rules on the conclusion of treaties. Whether and to what extent there are new trends in international lawmaking by treaties shall be discussed first, followed by a look into possible new trends in lawmaking on the level of international customary law.

a. International treaties are defined as agreements concluded by two or more subjects of international law governed by international law.⁷⁴ From the very nature of treaties concluded by specific parties,

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doctrine and the law of ancient times inferred that treaties could not bind third parties unless they gave their consent.⁷⁵ Seen from this perspective, international law not only lacks an institutionalized central lawmaking authority, but by its very nature it does not seem to invite the idea of international "legislation" proper, which would imply that such international legislation -- like domestic legislation -- would become binding upon everyone subject to its terms, whether directly or indirectly involved in the legislative process or not. However, the doctrine that treaties become exclusively binding upon the states parties does not appear to have been strictly applied at all times and seems to have been increasingly modified in recent decades. A closer analysis of state practice reveals that under particular circumstances, comprehensive multilateral treaties that intend to regulate matters of general concern for the international community as a whole or for specific segments, could become binding upon states not parties to such treaties. Several factors have contributed to this development. With increased international interaction and transborder communication, states realized the need for stable legal regulations or territorialized, "objective" regimes, like the international status of important natural or artificial waterways that would be binding upon third states as well.⁷⁶ Multilateral treaties, and sometimes even plurinational treaties, were found to serve states' interests best. Such treaties were to function as a surrogate for the lacking international legislation proper. But in recent times, particularly under the impact of globalization and the ensuing realization of the various global challenges (environmental protection, etc.)⁷⁷, comprehensive conventions became even more important as a means of international "legislation" in the common or public interest of

Examples are the British and Dutch East India Companies during the seventeenth and eighteenth centuries, see Peter Fischer (FN 71), pp. 516 et seq.

⁷⁴ According to the Vienna Convention on the Law of Treaties (VCLT) such agreement must be concluded by states and in written form (Art. 2 (1) lit. a), but under international customary law could also be concluded by states and other subjects of international law with treaty making capacity and agreements could be done orally, see, e.g., Ian Brownlie, *Principles of Public International Law*, 5th ed., Oxford/New York et al. 1998, pp. 603 et seq.

⁷⁵ See art. 34 VCLT which provides that treaties do not create rights or duties for third states -- a rule that is based on the ancient principle of "*pacta tertiis nec nocent nec prosunt*".

⁷⁶ On these so-called status treaties see Eckart Klein, *Statusverträge im Völkerrecht*, Berlin/Heidelberg 1980.

⁷⁷ See supra, II. 1., p. 13 et seq.

the international community. Although such conventional law cannot be considered binding on non-party states in every detail, there seems to be a growing consensus that third party states are bound by the basic principles codified in public interest related

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universal conventions.⁷⁸ The underlying philosophy of this extension of the legal effects of such conventions is that multilateral treaties of this kind are serving vital interests of humankind. Consequently, individual states cannot be permitted to stay outside and act contrary to the agreed common interest. In other words, today international law recognizes an erga omnes effect of certain basic principles "legislated" by the international community through multilateral treaties in order to protect specific public interests.

b. With regard to international customary law, the picture appears to be different. Once a specific universal state practice by many states, particularly by those most interested in the subject matter, but not by all states, is established and accompanied by a respective sense of obligation, a rule of international customary law has emerged and becomes binding upon all states. However, a controversial, but at times widely accepted exception was made with regard to the so-called "persistent objector". A state that persistently objected to the state practice, tending to become a rule of customary international law, was not considered to be bound by such rule once it became legally binding. This exception was made because state sovereignty could trump the binding effect of a new rule of customary law with regard to the persistent objector. This approach in a way parallels the pacta tertiis principle of the international law of treaties. Neither under international customary law nor under the law of treaties could states be bound by a rule of international law against their sovereign will.

But like in the case of the international law of treaties, the sovereignty-oriented legal doctrine on customary international law was modified over time. With the emergence and finally the acceptance of the existence of international ius cogens, the persistent objector rule, which was never fully accepted in the first place, lost further ground. Since international norms with ius cogens effect cannot be derogated unless replaced by new ius cogens, the notion of the persistent objector was increasingly found to be unacceptable. The reason for this deviation from the earlier doctrine is that norms with ius cogens effect are embodying fundamental principles of international law that represent the general public interest of the international community of states.

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Thus, these peremptory principles of international law do not permit any deviation by individual states at their (sovereign) will.⁷⁹

Except for the important influence of the notion of a common or public interest on the modification of the persistent objector rule, this development is not directly attributable to the impact of globalization on present day international law. However, there are other developments in the legal doctrine with regard to customary international law that more clearly show the impact of globalization as understood in the present context. According to traditional international legal doctrine, a new rule of international customary law develops in two stages: first, there is a particular state practice that over the course of time is more or less uniformly followed by other states. Second, in so following such practice states become convinced that they follow such practice as matter of law -- the developing state practice is accompanied by opinio iuris and turns into a binding rule of law.

⁷⁸ Cf. Christian Tomuschat, *Obligations Arising for States without or against Their Will*, *Recueil des Cours (RdC)*, vol. 241 (1993/IV), pp. 195 et seq. (at p. 271); Jost Delbrück, "Laws in the Public Interest" -- Some Observations on the Foundations and Identification of erga omnes Norms in International Law, in: Volkmar Götz/Peter Selmer/Rüdiger Wolfrum (eds.), *Liber amicorum Günther Jaenicke -- Zum 85. Geburtstag*, Berlin et al. 1998, pp. 17 et seq.; both with further references.

⁷⁹ For a discussion of the notion of persistent objector and ius cogens, see Jonathan Charney, *Universal International Law*, *AJIL* 87 (1993), pp. 529-551 (at pp. 538 et seq.).

The question as to whether state practice, and particularly the jurisprudence of international courts and tribunals in establishing the existence of a rule of customary law, always followed this idealized standard of customary lawmaking has increasingly become the subject of critical debate.⁸⁰ This interesting critique of the traditional approach to the explanation of the emergence of rules of customary international law cannot be pursued any further here. However, if one looks at post World War II state practice and treatises on international law, it becomes apparent that at least the sequence of steps in the process of customary lawmaking has been liberalized. Given the numerous international or rather universal fora where states are meeting frequently today (the General Assembly of the United Nations, the plenary organs of other international organizations, and the state conferences on specific treaty projects, to name but a few), more often than not *opinio iuris* is formed first, followed by state practice. This reverse order of the steps towards establishing a new rule of international customary law, at first glance, seems to be merely a formal change and as such of marginal importance. However, on closer analysis, the process of customary lawmaking that begins with the formation of *opinio iuris* by the international community of states assembled in universal fora tends to resemble an international legislative act. The states represented at widely attended universal fora pronounce their views -- often by consensus procedures -- on how particular matters of common

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concern should be regulated. Of course, as such, respective resolutions or solemn declarations cannot claim normative force in strictly legal terms. In order to become customary law, state practice following the public pronouncements is needed. However, such state practice differs from state practice that initiates the formation of new rule of customary law in the traditional way. While according to the traditional mode of customary lawmaking state practice starts without a sense of obligation and only over time becomes the basis for an emerging *opinio iuris*, state practice following the pronouncement of a universal forum conforms to the normative aspiration of the international community -- much like newly enacted laws are abided by.

In the widely recognized article "Universal International Law"⁸¹ Jonathan Charney has rightly argued that the process of creating customary international law in cases where the regulation of matters of common concern are at issue has fundamentally changed, inasmuch as respective new rules or principles become binding customary law almost instantly, provided that certain conditions are met: first, the necessary *opinio iuris* must be declared by universal fora after due public debate; second, all states must have had the opportunity to participate in such fora (actual participation is not required), and third, the declaration based on broad consensus must be followed by at least a few instances of state practice. Indeed, this mode of customary international law creation rather resembles a "legislative" procedure than the traditional way of developing customary international law. This deviation from the respective classical doctrine, according to Charney, finds its justification in the obvious need for speedy and efficient lawmaking in areas of vital interest to humankind -- an efficiency and speed that can be achieved neither through the elaboration of comprehensive multilateral treaties nor by the protracted traditional way of creating customary international law. Charney's view is not only convincing *de lege ferenda* but finds substantial support in state practice. For example, after much debate, a consensus emerged during the United Nations Conference on the Law of the Sea with regard to recognizing an "Exclusive Economic Zone" (EEZ) off the shores of the coastal states. There was instant follow-up state practice in declaring the establishment of EEZ's. Legal doctrine and governments overwhelmingly accepted this practice as matter of customary international law long

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⁸⁰ See e.g. David Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, GYIL, vol. 39 (1996), pp. 198-248.

⁸¹ Charney (FN 79), pp. 543 et seq.; see id., *International Lawmaking -- Art. 38 of the Statute of the ICJ*, in: Jost Delbrück (ed.), *New Trends in International Lawmaking -- International "Legislation" in the Public Interest?*, Berlin 1997, pp. 171-191.

before the Law of the Sea Convention providing for EEZ's entered into force.⁸²

The new mode of customary lawmaking as well as the recognition by international legal doctrine and state practice of an erga omnes effect not only of ius cogens but also of the basic principles codified in comprehensive lawmaking treaties (traités lois) adopted in the common interest of humankind, indicate that international law is gradually changing into an objective legal order and the binding force is no longer rooted in the sovereign will of states but rather is based on the recognition that international law, like all law, is necessary in the sense that it is the means to safeguard basic values, which are ultimately related to the survival of humankind and the protection of human dignity. It is not surprising that this process has become clearly visible only in recent decades: caused by the impact of globalization, the decline of the dominant role of the sovereign state and its preoccupation with narrow national interests has enabled the international community to be more aware of the global challenges and the common or public interest in meeting these challenges in a cooperative effort.

3. The impact of globalization on international law with regard to the changing role and status of the state

From the days of the inception of the international system, the notion of the territorial nation state was inherently linked to the principle of sovereignty, which is a complex concept. In an absolute sense, it signifies that the state is supreme, i.e. not subject to any other authority in terms of political, military and economic power on the one hand, and in terms of international law, on the other hand. As mentioned earlier⁸³, sovereignty as a legal principle was the leading paradigm of international law and international relations. As state independence increasingly gave way to interdependence, the perception of sovereignty as de facto supremacy and a de iure absolute legal right of states came to be seen as being in stark contrast with the de facto imbalance of the distribution of power and with the requirements of effective and reliable international cooperation that asked for the imposition

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of de facto and de iure restrictions on state sovereignty. From an international legal point of view, this development meant that the principle of sovereignty as a legal concept could no longer be understood as an absolute one. In legal terms, sovereignty now appeared as a relative concept that finds its legal limitation in the sovereignty of the other states entitled to the same rights and respect⁸⁴, as well as in the legal restrictions imposed by the basic international legal principles protecting the common interests of the international community of states and humankind as a whole. The process of an increasing relativity of the concept of sovereignty today⁸⁵ is accelerated under the impact of globalization. There are first indications that international legal doctrine is reacting to this development by introducing a new understanding of the concept of sovereignty altogether. Thus, it has been proposed to re-conceptualize sovereignty as "membership in reasonably good standing in the regimes that make up the substance of international life ... Sovereignty, in the end, is status -- the vindication of the state's existence as a member of the international system."⁸⁶

The modification or re-conceptualization of the meaning and scope of the principle of sovereignty has major consequences for the international law relating to the status and role of the state, particularly for the territorial dimension of the modern state. The principle of the territorial integrity of states is probably the most basic one and the one intrinsically connected with state sovereignty. However, on a closer examination, this principle has experienced a number of modifications just like the principle of

⁸² See Rudolf Bernhardt, *Der Einfluss der UN-Seerechtskonvention auf das geltende und künftige internationale Seerecht*, in: Jost Delbrück (ed.), *Das neue Seerecht*, Berlin 1984, pp. 213 et seq.

⁸³ See supra I. 2. a., p. 5.

⁸⁴ See Dahm/Delbrück/Wolfrum (FN 2), pp. 214 et seq.

⁸⁵ See also Christoph Schreuer, *The Waning Sovereign State: Towards a New Paradigm of International Law?*, *European Journal of International Law*, vol. 4, 1993, pp. 447-471.

⁸⁶ See Chayes/Handler Chayes (FN 55), p. 27.

sovereignty itself. In art. 2 (4) UNCh the principle of the territorial integrity of states is recognized as an essential element of an international peace order, based on the prohibition of the use or threat of use of force in international relations. Yet, art. 2 (4) UNCh modifies the principle of territorial integrity by also stating that it is guaranteed only with regard to infringements "incompatible with the Purposes and Principles of the United Nations".⁸⁷ Thus, United Nations members have to tolerate infringements of their territorial integrity that are compatible with the Principles and Purposes of the United Nations, i.e. by way of enforcement measures undertaken or authorized by the UN Security Council in order to fend off violations of basic principles of international law also protected by the UN Charter such as basic human rights. With the growing international

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concern for the protection of human rights and its recognition as a common interest of humankind, this modification of the principle of territorial integrity of states has acquired a prominent place in modern international law, probably unforeseen by the founders of the United Nations.⁸⁸

Another example of the modification of a hitherto well recognized principle of international law relating to the territorial dimension of the state is that of the principle of territoriality, which defines the territorial scope of state jurisdiction. That jurisdiction extends to the territory defined by state boundaries, but is also limited by these boundaries.⁸⁹ However, since the rising impact of transnational transactions by multinational corporations, for instance, over the last twenty years or more, state practice has shown an increasing tendency to extend their jurisdiction beyond state boundaries. At first, attempts at giving domestic laws an extraterritorial effect met with stiff opposition. Thus, for instance, when the United States tried to extend their jurisdiction to commercial enterprises established under foreign jurisdictions but linked to United States corporations, European countries objected and pointed out that such extension of the United States jurisdiction was a violation of the principle of territoriality.⁹⁰ However, under the impact of the deterritorialization of commercial transactions, particularly via the internet, there appears to be a growing consensus that states need to create new regulatory régimes that are not territorially based.⁹¹ More generally speaking, state boundaries are becoming less relevant with respect to the exercise of regulatory power by individual states as politics, markets and law become more globalized.⁹² Even in the field of using military force for purposes other than strict national self-defence, the limits of territorial jurisdiction appear to matter less.⁹³

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Finally, the deterritorialization of the exercise of state jurisdiction is clearly evidenced by the increasing inter- and supranationalization and interpenetration of domestic and inter- and supranational administrations⁹⁴ as well as the growing interconnectedness

⁸⁷ See Delbrück, Die Friedens-Warte (FN 25), pp. 144 et seq.

⁸⁸ See Albert Bleckmann, in: Bruno Simma et al. (eds.), *The United Nations Charter -- A Commentary*, Oxford 1995, Article 2, para. 30.

⁸⁹ See Dahm/Delbrück/Wolfrum (FN 2), pp. 316 et seq.

⁹⁰ For a detailed account of the Gas Pipeline dispute, see Klaus Bockslaff, *The Pipeline Affair 1981/82 -- A Case Study*, GYIL, vol. 27 (1984), pp. 28-37; Detlev F. Vagts, *The Pipeline Controversy: An American Viewpoint*, *ibid.*, pp. 38-53; A.V. Lowe, *International Law Issues Arising in the "Pipeline" Dispute: the British Position*, *ibid.*, pp. 54-71; Karl M. Meessen, *Extraterritoriality of Export Control: A German Lawyer's Analysis of the Pipeline Case*, *ibid.*, pp. 97-108, all with further references.

⁹¹ For example, there was a call for international/global regulatory measures for the global financial markets at the summit meeting of G 7 in Denver (Colorado) in June 1997, see *Die Welt*, 23 June 1997.

⁹² See Delbrück (FN 32), pp. 9 et seq.; Held/McGrew/Goldblatt/Perraton (FN 3), pp. 49 et seq.

⁹³ See Hobe (FN 14), pp. 207 et seq.

⁹⁴ For an indepth analysis of the internationalization of administrative law and its implementation see Christian Tietje, *Internationalisierung der Verwaltung* (forthcoming).

and integration of the constitutional structures of states and inter- and supranational organizations.⁹⁵ In short, the modern territorial state as it has evolved over the last three centuries is undergoing fundamental changes. It is becoming a part of a multi-layered system in which legislative, administrative, and judicial functions are attributed to domestic, supranational, and international institutions, depending on which of these institutions can perform their functions most efficiently and in the best interest of the people. It cannot be overlooked, however, that this re-structuring of the political organization of nations or societies raises serious questions about how the exercise of public authority by the non-state institutions in this multi-layered system can be legitimated -- democratically or otherwise. Most likely, the traditional -- and hard fought for -- democratic legitimation of the exercise of public authority will not remain the only approach. At a minimum, the modes of democratic legitimation will have to be re-considered⁹⁶, which will be a great challenge for politicians, international legal scholars, and political scientists alike.

Concluding remarks

As shown in the course of this paper, the process of globalization has considerably transformed the international system. It has expanded horizontally by integrating non-state actors such as NGO's and other private corporate entities, as well as individuals. The international system has expanded vertically by interconnecting with the domestic political and legal systems. And finally, these structural changes in the international system entailed an expansion of the substantive matters that international relations are concerned with. Practically all

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aspects of political, economic and social transactions have become internationalized and/or globalized to a greater or lesser degree.

International law is only gradually responding to the new socio-political setting. It is opening up to accepting new, if only partial subjects of international law, thereby rendering the once cherished dogma of the *numerus clausus* of international legal subjects obsolete. Thus international law transforms from a purely interstate legal order to a more comprehensive transnational legal order. This development, in turn, has a major impact on the nature and substance of international law. The international body of law becomes more differentiated in that the basic principles protecting fundamental values shared by the international community gradually acquire the character of constitutional principles⁹⁷, while the bulk of international legal rules become more detailed and are forming sectoral legal régimes that often are institutionalized, like in the case of ITU, WHO, and other international organizations, but that could also remain non-institutionalized. In some instances, these non-institutionalized régimes are transnational in character as they include non-state actors as participants in the implementation of the goals of the régimes.

As international law undergoes a process of constitutionalization, it increasingly interconnects with domestic constitutional systems. This is not to say that the international -- and the supranational -- constitutional principles establish a new hierarchical order in which the principles of the higher level trump those of the lower levels. Rather, as the term "interconnect" indicates, the constitutional principles of every level are complementing and -- to some extent -- are also penetrating each other⁹⁸, thus forming a multi-layered constitutional framework within which states, international governmental organizations, supranational organizations, and non-state actors perform their respective functions.

⁹⁵ For a detailed doctrinal analysis of the process of constitutional integration of domestic and supranational legal orders based on the example of the European Union/European Community see Anne Peters, *Elemente einer Theorie der Europäischen Verfassung* (forthcoming).

⁹⁶ For an intriguing study and analysis of the problem see Peters (FN 95), part 5.

⁹⁷ On the process of the constitutionalization of international law see Jochen A. Frowein, *Konstitutionalisierung des Völkerrechts*, *Berichte der Deutschen Gesellschaft für Völkerrecht* (FN 41), pp. 427 et seq.

⁹⁸ With regard to the case of the EU/EC see Peters (FN 95), part 3. II. 4.

The mushrooming international operative legal régimes result in a similar process of interconnecting the international, supranational and domestic levels as far as the institutionalized cooperation of rule-making (legislative), administrative, and judicial agencies on all levels is concerned. It is particularly in the administrative field that the

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interconnectedness of the one time impermeable, sovereign state with the supra- and international level becomes clearly visible.⁹⁹

International law is responding to the structural changes of the international system and to the increasing need for swift and effective lawmaking to meet the various challenges posed by the process of globalization by modifying the modes of international customary lawmaking and by modifying the traditional rule that international treaties become binding on the parties to the treaties. As international treaty law increasingly must deal with the regulation of matters of essential importance to the international community as a whole, attributing erga omnes effect to the basic principles codified in such treaties, international law shows considerable adaptability to the new regulatory demands.

Of course, these are still modest steps in the development and transformation of international law considering the major tasks ahead. The greatest challenge appears to be how international law as a constitutional as well as transnational legal order can contribute to bringing the process of globalization under the rule of law without destroying the creative forces it has unleashed. It goes without saying that the arenas of globalized commerce and communications and related transactions cannot remain, so to speak, "law free zones". On the other hand, the negative effects of earlier domestic over-regulation should not be repeated on the global level. To cut the optimal compromises between deregulation and regulation in the global arena is a formidable task that requires imagination and realism: imagination because we are facing a new economic, political, and social terrain; realism because it is highly necessary to face up to the ongoing process of globalization and its effects. Denying the existence of this process with a "déjà vue" attitude is probably the most inadequate approach to the problems humankind has to solve.

⁹⁹ For the empirical data and their detailed analysis of the internationalization of administrative law and institutions see Tietje (FN 94).