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I. Introduction: The Phenomenon of Globalisation

Important shifts in the international system — the configuration of states, international organisations, and non-state actors on the international plane — and in international law are not new phenomena.[1] However, since the beginning of the 21st century, fundamental changes have occurred that can no longer be overlooked.

To a great extent, these changes are in the limelight because of their breathtaking speed. The changes impact not only the international system and its legal order, but also the sovereign territorial state. Further, through the omnipresence of the media, the incredible immediacy of these changes impact the individual as well. New information technologies now allow for the almost instant diffusion of news around the world. People are witnessing events in real time, by way of television and the internet, wherever and whenever they occur. Thus, people around the globe are being made aware of political and social developments in an unprecedented manner. This new era, marked by these recent changes, has become known as the era of globalisation.[2]

Before looking more closely into the quality of the new

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1. Jost Delbrück, *Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization*, 11 Schweizerische Zeitschrift für Internationales und Europäisches Recht 1, 3 (2001).

2. For a description of this phenomenon, *see* Delbrück, *supra* note 1, at 13. *See also* Klaus Dicke, *Erscheinungsformen und Wirkungen von Globalisierung auf universaler und regionaler Ebene sowie gegenläufige Renationalisierungstendenzen*, 39 Berichte der Deutschen Gesellschaft für Völkerrecht 13, 14-21 (2000); Ulrich Beck; Was Ist Globalisierung? (1997); Stephan Hobe, *Die Zukunft des Völkerrechts im Zeitalter der Globalisierung*, 37 Archiv des Völkerrechts 253, 256 *passim* (1999).

developments, it is useful to try to define "globalisation." Certainly the foundation upon which the era of globalisation is built is the technological revolution. Symbolised by the internet, the technological revolution allows practically anyone to communicate with anyone else around the globe, at any time. The entire economic sector makes use of the new technological developments. For example, through the use of these technological developments, multinational enterprises have begun to treat the international market as a "one-world" internal market.[3] Furthermore, the interdependency of societies and mobility of the populations of all states is greater than before. So-called global threats like overpopulation, the destruction of the environment, underdevelopment, migration, international terrorism, and global threats from nuclear weapons, as well as their uncontrolled possession and proliferation, demand solutions that transcend single nation-states and require new forms of international co-operation.[4]

In sum, the phenomenon of globalisation can be defined as an increase of transnational actors with political negotiation power, global threats, challenges beyond the capacity of states to regulate, and far-reaching changes in societal and political integration.[5] It is against this background that we now must evaluate the quality and the effects of international law in this new globalised environment.

The capacities of the modern nation-state have been quickly surmounted by problems of new dimension and the need for their regulation. Globalisation seems to be typified by new phenomena that transcend the control capacity of the modern state.[6] For example, mega-mergers of enterprises, transborder flows of capital and stock (as typical developments of financial markets), as well as the exchange of information and other developments via the internet increasingly defy state control. This, however, merely highlights the fact that one must look to international law to provide new solutions.

International law traditionally has been based on the concept of "states." The states were the main actors in international relations,

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3. Mega-mergers by these enterprises, for example, are an expression of this.

4. *See* Hobe, *supra* note 2, at 256.

5. Dicke, *supra* note 2, at 21.

6. *See* Delbrück, *supra* note 1, at 31. For a specific focus on how problems surpass capabilities of states, *see* Stephan Hobe, *Der kooperationsoffene Verfassungsstaat*, 37 DER STAAT 521 (1998); STEPHAN HOBE, DER OFFENE VERFASSSUNGSSTAAT ZWISCHEN SOUVERÄNITÄT UND INTERDEPENDENZ *passim* (1998).

laying down the basis of the international legal order either through bilateral or multilateral agreements or by forming international custom. It is therefore no overstatement to ask whether the era of globalisation marks an end to public international law.[7]

In the first section of this article, I describe the development of public international law since 1648. This brief history is followed by a discussion of the challenges posed by the augmentation of actors on the international scene. I then turn to the question of the existence of new sources of international law and the problem of what globalisation means for the actors. Strengthening enforcement mechanisms and the changing notion of sovereignty are then discussed, leading finally to an answer to the function of modern public international law.

II. Developments of International Law Since 1648

The development of modern international law started in the 17th century. The peace instruments of Munster and Osnabruck, which ended the Thirty Years' War, constituted the so-called Westphalian System.[8] The notion of sovereignty was a central conception of the Westphalian System. Sovereignty, at that time, was understood in a rather absolute way. In other words, sovereignty contained the natural right of the prince, which included, *inter alia*, the right to go to war. In this framework, a system of law developed that described the relationship between states as independent actors within the international system. This type of law, that is, a law which basically contained the right to warfare, some rules of international maritime law (e.g., freedom of the High Seas), and some rules of international diplomatic law, can be properly described as a law of coordination, and is distinguished from the type of law that started to develop in the middle of the 19th century and grew with increasing pace in the 20th century.

As early as 1927, the Permanent Court of International Justice described international law in the famous Lotus Case as follows:

> International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in

7. Hobe, *supra* note 2, at 257.

8. *See* Karl-Heinz Ziegler, *Die Bedeutung des Westfälischen Friedens von 1648 für das europäische Völkerrecht*, 37 Archiv Des Völkerrechts 129 (1999) (discussing the importance of the Peace of Westfalia).

> conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed.[9]

In the 19th century, following the Vienna Congress of 1815/1818, new and important developments took shape. A new conception of institutionalised international cooperation started with the creation of the so-called River Commissions (after 1818) for the administration of international rivers. Parallel developments also occurred in the technological sector with the foundation of the International Telecommunication Union (1865).[10] The new conception was that problem areas involving the interests of more than one state should be solved by independent institutions on a permanent basis. For the first time in history, states recognised that their capacity to solve international conflicts was limited, and that some sort of institutionalised solution was needed.

Another development, The Hague Peace Conferences of 1899 and 1907, added to this conception of international state cooperation the idea of peacekeeping within the framework of international institutions. This led to the creation of the League of Nations in 1919. However, the League of Nations was not properly equipped to solve actual inter-state conflicts in the area of peacekeeping. Only the foundation of the United Nations Organisation ("UN") in 1945 finally optimised the conception of institutionalised cooperation. Most significantly, the United Nations Charter prohibited any use of force between member states, thereby transferring any solution to internationally armed conflicts to the UN as an organisation.[11] This represented an important limitation on the traditional notion of sovereignty. Basically, the right to warfare was eliminated as a sovereign right of the state. Moreover, the UN Charter contained provisions for continuous international cooperation in securing international peace. This new "positive notion of peace" gave the UN Charter its decisive feature. The preservation of human rights and specific provisions asking for the support of underdeveloped countries further contributed to the idea of positive peace, and

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9. The Lotus Case (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 18.

10. KLAUS DICKE, EFFIZIENZ UND EFFEKTIVITÄT INTERNATIONALER ORGANIZATIONEN 47 (1994).

11. U.N. CHARTER, art. 2, para. 4.

ushered in a change in the paradigm of international law.[12] The famous American international lawyer of German descent, Wolfgang Friedmann, described this new type of international law as "law of co-operation," thereby highlighting a new quality in the law, different from the ancient public international law.[13]

III. Increase of Actors: Multiplication of Subjects of International Law?

The number of active participants on the international political scene, as well as active contributors to the formation of public international law, augmented considerably due to the emergence of numerous new states during the era of decolonisation. In 1945, fifty-one states founded the United Nations Organisation. By 2001, UN membership grew to more than 190 member states.[14]

Of marked consequence, however, from a doctrinal point of view, is the increasing importance of non-state actors.[15] In former times, those actors were completely neglected by the doctrine of public international law. That is, only *states* were actively involved in the process of formulating rules of international law, either by concluding international agreements or by contributing to the respective *state* practice. However, since the 1970's, we have observed more enterprises acting in more than one, and often numerous, states. The pure economic power of these multi-national enterprises often surmounts the economic capacities of some developing countries to which they extend.[16]

However, to be relevant in international law, an entity must be considered a "subject" of that law. Subjects are actors in the international system that possess the quality of actively developing international law and of being passively addressed by the rules of

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12. Albrecht Randelzhofer, *Der normative Gehalt des Friedensbegriffs im Völkerrecht der Gegenwart*, Völkerrecht und Kriegsverhütung 13 (Jost Delbrück ed., 1979); Stephan Hobe, *Wir, die Völker der Vereinten Nationen, fest entschlossen, Bedingungen zu schaffen . . .*, Die Präambel der UN-Charta im Lichte der aktuellen Völkerrechtsentwicklung 59, 67 (Stephan Hobe ed., 1997).

13. Wolfgang Friedmann, The Changing Structure of International Law *passim* (1964).

14. Furthermore, the number of international inter-governmental organisations has increased considerably since 1945.

15. *See generally* Non-State Actors as New Subjects of International Law (Rainer Hofmann ed., Berlin, 1999).

16. For a general assessment of their importance, *see* Peter T. Muchlinski, Multinational Enterprises and the Law *passim* (1995).

international law.[17] If one looks, for example, to the "global compact," one becomes aware of the fact that even rules of public international law touch upon the conduct of such multinational corporations.[18]

Even more evident is the increasing importance of non-governmental organisations ("NGO's").[19] Until recently, NGO's (with few exceptions) played a negligible role in international law-making. Now, however, they are present at virtually all international conferences, and pressing for greater participatory rights.[20] Although defining what constitutes an NGO is difficult to formulate, the following elements are agreed, in principle, to be necessary elements of an NGO.[21] An NGO must be: founded by private individuals; independent of states; oriented toward the rule of law; pursuing public rather than private interests as an objective; demonstrating a transnational scope of activities; and possessing a minimum of organisational structure. Often, NGO's are established to represent interests that the founders consider to be inadequately represented by nation-states. Indeed, the under-representation of certain fields of interests demonstrates the growing need for the inclusion of NGO's in the international law making process.

Developments showing NGO's playing an increasingly significant role in international economic organisations can be observed in the area of international economic law.[22] The Inspection Panel at the World Bank, the International Monetary Fund ("IMF") cooperation procedures,[23] and in particular, the World Trade Organisation

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17. *See* OTTO KIMMINICH AND STEPHAN HOBE, EINFÜHRUNG IN DAS VÖLKERRECHT 71 (7th ed., 2000).

18. *See* Andreas Blüthner, *Ein Globalisierungspakt über Werte und Effizienz*, KOOPERATION ODER KONKURRENZ INTERNATIONALER ORGANISATIONEN, 72 (Stephan Hobe ed., 2001). A "global compact" is a kind of informal agreement between the United Nations and some multinational corporations aiming to impose some legal obligations, such as the prohibition of child work or slavery, upon these multinational corporations. *Id.*

19. For a discussion of the role of NGO's, *see* Stephan Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 INDIANA J. GLOBAL LEGAL STUD. 191 (1997); Stephan Hobe, *Der Rechtsstatus der Nichtregierungsorgansationen nach gegenwärtigem Völkerrecht*, 37 ARCHIV DES VÖLKERRECHTS 37, 152 (1999).

20. NGO's are active in various fields. Consider, for example, Amnesty International, Greenpeace, the International Pen Club, the International Olympic Committee, and the International Chamber of Commerce.

21. For such definition, *see OECD, Voluntary Aid for Development. The Role of Non-governmental Organisations*, G.A. Res. 1296, U.N. ECOSOC (XVIV) (May 23, 1968).

22. *See* Wolfgang Benedek, *Developing the Constitutional Order of the WTO — The Role of NGO's*, LIBER AMICORUM FOR KONRAD GINTHER 228 (1999).

23. INTERNATIONAL MONETARY FUND CHARTER, art. 10.

("WTO") Agreement[24] that permits the WTO to enter into agreements with NGO's, are all expression of this new direction. Most of these provisions, however, still fall short of establishing direct entitlements for NGO's. Nevertheless, the WTO Appellate Body Decision in *Shrimps Turtle*[25] interpreted Article 13 of the Dispute Settlement Understanding ("DSU") to permit amicus curiae briefs to be submitted by NGO's. This action clearly strengthened the position of NGO's. Therefore, it appears to be only a matter of time before more serious discussions regarding the "subject" status of at least certain NGO's in international law will be required.

Finally, it is beyond doubt that individuals have already achieved the status of "partial subjects" under international law.[26] The growing codification of human rights after 1945 and the tools available to individuals to reach *independent* international protection[27] are clear indicia that the previous exclusive representation of the individual by his or her home state on the international level is no longer an appropriate description of today's international scene. Modern international criminal law also foresees the imposition of personal liability on the individual via direct regulation.

From this perspective, the "subject" quality of internationally active terrorist groups can also be seriously addressed. Arguably terrorism is an international crime.[28] For example, under the United Nations Security Council Resolution 1373, terrorism can be considered a threat or even a breach of international peace.[29] Thus, securing international peace requires answers from the international community. In view of the difficulties associated with fighting international terrorism — in particular, because a link is needed between the terrorist groups and all states sponsoring terrorism — addressing these groups directly as (partial) subjects of international law should be seriously discussed. One could even

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24. WORLD TRADE ORGANISATION AGREEMENT, art. 5, para. 2.

25. United States – Import Prohibition of Certain Shrimp Products: Report of the World Trade Organization Appellate Body, WT/DS58/AB/R (Nov. 6, 1998).

26. Stephan Hobe, *Individuals and Groups as Global Actors: The Denationalization of International Transactions*, *in* Hofmann, *supra* note 15, at 115.

27. Consider, for example, the European Convention on Human Rights of the Council of Europe.

28. Terrorism is not yet included in the list of international crimes as contained in Articles 6-8 of the Statute of the International Criminal Court, but arguably has all the qualities of such crime. *See* Stefan Oeter, *Terrorismus — ein völkerrechtliches Verbrechen?*, 76 DIE FRIEDENSWARTE 11 (2001).

29. *Threats to International Peace and Security Caused by Terrorist Acts*, G.A. Res. 1373, U.N.S.C. (Sept. 28, 2001) *available at* 40 I.L.M. 1278.

go so far as to regard Resolution 1373 of the United Nations Security Council as an implicit recognition of a passive personality of terrorist groups under international law.[30]

The aforementioned examples demonstrate that the globalised world of today is characterised by two interrelated tendencies: (1) the diminishing control capacity of the sovereign nation; and (2) the increasing capacity of non-state actors.[31]

IV. New or Other Sources of International Law?

We can now address whether the structural changes of the international system must necessarily lead to a new type of international law. In other words, one can ask whether the description of the sources of international law, given in the Statute of the International Court of Justice, which refers to the traditional sources of public international law, still adequately describes those sources.[32]

In terms of international treaty law, the involvement of new actors could escort in a new quality of international law. The crucial question is whether the international community will allow non-state actors, like multinational corporations or NGO's, to participate actively in the formation of public international law. As previously mentioned, tendencies to exist to allow such participation, which could considerably change the quality of treaty law.[33]

The same is true for the second source of public international law, international customary law. For a few years, widespread discussions have ensued about the accuracy of the description of the formation of customary international law. Increasingly, scholars have begun to discover inadequacies in the traditional conception of customary law, consisting of state practice accompanied and supported by *opinio juris*.[34] The question has been asked whether, in the framework of an international conference with adequate

30. For such argument, *see* Thomas Bruha and Matthias Bortfeld, *Terrorismus und Selbstverteidigung*, 49 Zeitschrift Vereinte Nationen 161, 163 (2001).

31. An example of this hypothesis is the current problem in finding adequate answers to fight international terrorism.

32. I.C.J. Statute, art. 38, para. 1.

33. *See* Hobe, *supra* note 2, at 266; Delbrück, *supra* note 2, at 28.

34. Maurice Mendelsson, *The Subjective Element in Customary International Law*, 66 British Y.B. Int'l Law 177 (1995). *Opinio juris* refers to a country's belief that international law, rather than any moral obligation, mandates its conduct, a conception necessary for the conduct to be considered international customary law. Black's Law Dictionary 1119 (7th ed. 1999).

state representation, an *immediate* formation of customary international law is possible (so-called instant customary law). This question cannot be answered here, but the very fact that such a question is asked more frequently than it was twenty years ago is a significant indicator of the prevalent inadequacies in the current descriptions of this source of international law.

Finally, the third major source of public international law, i.e., the general principles of law that refer to national rules of law accepted by a sufficient number of states of different legal cultures, could become increasingly more important. If, in fact, non-state actors are becoming more active in international law-making, nation-states must resort to national legislation to determine what consensus, if any, exists in certain areas — for example, in the area of human rights.

In sum, one can make a fairly conservative prediction that all of the sources of international law will need to undergo some readjustment in the foreseeable future.

V. Conclusion

What conclusion can be drawn from this picture of a globalised international system? There are strong indications for yet another change of paradigm, this time from an international law of cooperation and into the international law of the globalised world.[35] The consequence of this change need not necessarily be the abolition of cooperative international law, because even in the future, the nation-state will remain one of the major pillars of the international system. To the contrary, it has become evident that states will not be abolished; instead their function will be fundamentally changed. States will become more permeable: they will act more and more as "*pouvoir intermédiaire*" between different legal orders — the national legal order, (in Europe) the supra-national legal order, and the international legal order.[36] However, it will always remain the function of the state to transport values from the domestic order to the supra-national and international legal orders, as well as to be open to input from the international orders to the domestic scene.

35. *See* Hobe, *supra* note 2, at 279 for a more detailed development of these ideas.

36. *See* Hobe, *supra* note 6, at 409; Peter Saladin, Wozu noch Staaten? *passim* (1995).

The international legal system is undergoing a process of constitutionalisation.[37] We see more clearly and frequently that basic principles, like the respect for the rule of law and for human rights and their protection and democratic governance, are also basic pillars on the international scale. Obviously, it is much more difficult to implement these basic legal principles in the international order, but if one takes, for example, the WTO, we can notice a fundamental shift toward an observation of the rule of law and a willingness to become more transparent. This, in turn, allows non-state actors to provide input into the formation of international economic law.

If one looks into the human rights catalogues, we can observe three basic stages of human rights' protection. In the domestic sphere, we have constitutional catalogues of human rights. On the European, supra-national level, the European Convention on Human Rights supplies a growing discussion within the European Union of implementing a separate catalogue on human rights. Finally, on the international plane, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights of 1966 enjoy widespread acceptance among states. The globalised international system will more frequently ask for transparent solutions, for example, human rights protection, depending on the area where presumed human rights' violations are committed. Therefore, for the future, the task is to harmonise the different protection schemes at the domestic, supra-national, and international levels.[38]

Clearly, even in the globalised international system a certain kind of legal regulation is necessary. Thus, fundamental legal values, like provisions regarding of the use of force, non-intervention, and the principle of "*pacta sunt servanda*," must be honoured as basic rules of *jus cogens*.[39] Every actor, be it a nation-state or a non-state actor, must be bound by these fundamental values of the international community. Apart from this basic set of rules,

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37. Jochen A. Frowein, *Konstitutionalisierung des Völkerrechts*, BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT, *supra* note 2, at 427.

38. *See* Stephan Hobe, *Deutsches Recht, Europarecht, Völkerrecht — Gedanken zum Verhältnis dreier Rechtsordnungen in Zeiten sich verstärkender Europäisierung und Globalisierung*, LIBER AMICORUM FOR GEORG BRUNNER 523 (Baden-Baden, 2001) (developing this argument).

39. *Pacta sunt servanda* requires that agreements and stipulations contained in treaties be observed. BLACK'S LAW DICTIONARY 1133 (7th ed. 1999). *Jus cogens* is a norm of international law, which must be followed, preventing no two or more nations from exempting themselves or releasing one another. *Id.* at 864.

differentiated legal orders might exist, e.g., an international communication order, an international human rights order, an international economic order, etc., which — grounded on the basic values just outlined — would permit the required flexibility for state as well as non-state actors to achieve their respective aims. Therefore, it is premature to talk about the end of public international law. Rather the opposite is true: public international law will become very important in the future, but it will undergo many fundamental structural changes.