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THE EVOLUTION OF INTERNATIONAL LAW

MILENA STERIO*

Abstract: Globalization, characterized by the inter-connectivity of persons, states, and non-state actors on a global plane, has led to the development of binding international law across several legal fields, namely, international human rights, international criminal law, and private international law. This Article explores the proliferation of actors, norms, and organizations, as well as the expansion of international jurisdiction that has underscored the development of international law over the last half century. The Article focuses on the impact of globalized international law on state actors, as well as on individuals, by reshaping their behavior in the international realm. In particular, this Article assesses the role that globalized international law plays in specific legal fields, drawing comparisons and suggesting what the future might hold for such fields of law.

INTRODUCTION

Globalization, a phenomenon that can be described as inter-connectivity between regions, peoples, ethnic, social, cultural, and commercial interests across the globe, has affected different legal fields, including international law.¹ Reshaped by the potent forces of globaliza-

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¹ Many scholars have attempted to define globalization. *See, e.g.*, Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSN'T'L L. 485, 490 n.11 (2005); Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 537-38 (2001); *see also infra* Part II (discussing "globalization" of three areas of international law). Legal scholars also refer to globalization, for example, by calling for a broader frame of analysis entitled "law and globalization." *See* Berman, *supra*, at 490-92.

The term "globalization," moreover, has been used in many different fields besides law, such as anthropology and sociology. For example, anthropologists have argued that we live in the "global cultural ecumene" or a "world of creolization." *See* Robert J. Foster, *Making National Cultures in the Global Ecumene*, 20 ANN. REV. ANTHROPOLOGY 235, 236 (1991); Ulf Hannerz, *Notes on the Global Ecumene*, PUB. CULTURE, Spring 1989, at 66; Ulf Hannerz, *The World in Creolisation*, 57 AFR. 546, 551-52 (1987). Sociologists, similarly, have shifted

tion, international law has transformed itself from a set of legal rules governing inter-state relations, to a complex web of transnational documents, providing a normative framework for all sorts of different actors on the international legal scene.² Phenomena that used to belong to domestic realms are now examined and monitored through the international legal lens.³ Our planet is “shrinking” because issues such as the environment, nuclear weapons, disease, and terrorism have become of global concern, and are thus measured by international law parameters.⁴ Domestic law has lost its omnipotent, “sovereign” power and is now supplemented, corrected, and watched over by international law.⁵ Thus, international law has undergone an evolutionary process over recent decades, transforming itself from an instrument of inter-state conflict resolution, to a powerful global tool, present in everyday life and influential in many state actors’ and non-state entities’ decisions and policies.

This Article examines the evolution of international law brought about by the impact of globalization, as well as the role that globalized international law plays in different legal fields, and the impact that it asserts on state and non-state actors. First, this Article describes the transformation of international law by focusing on four different phenomena: the proliferation of actors, norms, and organizations in international law; and the expansion of jurisdiction in international law. This Article then assesses the role that globalized international law plays in different legal fields, namely, international human rights, international criminal law, and private international law. Finally, this Article focuses on the impact of globalized international law on state actors, as well as on the individual, by reshaping their behavior in the international realm.

I. TRANSFORMATION OF INTERNATIONAL LAW

International law, as studied through a traditional framework, included two types of normative systems: one promulgated by states themselves for their domestic relations, and the other promulgated among states for inter-state relations.⁶ Throughout the twentieth cen-

their emphasis from bounded “societies” to a “starting point that concentrates upon analyzing how social life is ordered across time and space.” ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 64 (1990).

² See *infra* Part II.

³ See *id.*

⁴ See John Alan Cohan, *Sovereignty in a Postsovereign World*, 18 FLA. J. INT’L L. 907, 910 (2006).

⁵ See *id.* at 936, 941.

⁶ See Berman, *supra* note 1, at 487.

ture, such a formal view of international law became inadequate. For one, the creation of individually enforceable norms in the field of international human rights transformed individuals into international law players.⁷ Moreover, nongovernmental organizations (NGOs) came to play a prominent role on the international legal scene, as did various regional organizations, institutions, and judicial bodies.⁸ The proliferation of actors in international law contributed to a proliferation of international legal norms.⁹ Moreover, even classic legal actors, such as courts, changed their role in light of this modernization of international law.¹⁰ For example, judges today seem more willing to “apply international norms transnationally, to engage in a transnational judicial dialogue, and even to adopt conceptions of universal jurisdiction.”¹¹

Thus, as scholars have already noted, international law has transformed itself, changed by the powerful forces of globalization.¹² Globalization refers to a “stretching process” in which “connections have been made between different social contexts or regions and become networked across the earth as a whole.”¹³ For the purposes of international law, globalization means that, in a globalized world, international law recognizes different state interests and finds ways to give effect to them, with the specific consequence that what one state does on a particular matter may be of specific interest to another state.¹⁴ Thus, activities that were treated as local under the traditional conception of international law are now internationalized.¹⁵

Moreover, to add to this globalization puzzle, international legal norms seem no longer to be created mainly by state actors.¹⁶ Rather, today we deal with a world of “transnational law-making [and] cross-border interaction,” where state and non-state actors together “dissemi-

⁷ See *id.* at 488.

⁸ See *id.* at 488–89.

⁹ See *id.* at 489.

¹⁰ See *id.*

¹¹ Berman, *supra* note 1, at 489. For a discussion of universal jurisdiction, see *infra* Part II.D.

¹² See generally Berman, *supra* note 1 (describing transformation of international law into law on globalization); Sands, *supra* note 1 (explaining impact of globalization on field of international law).

¹³ Sands, *supra* note 1, at 537; see GIDDENS, *supra* note 1, at 64. On globalization in general and its effect on the law, see generally RICHARD FALK, PREDATORY GLOBALIZATION: A CRITIQUE (1999); Peter J. Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. INT’L L. & POL. 567 (2000); Brigitte Stern, *How to Regulate Globalization?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 247 (Michael Byers ed., 2000).

¹⁴ See Sands, *supra* note 1, at 537.

¹⁵ *Id.* at 538.

¹⁶ Berman, *supra* note 1, at 492.

nate alternative normative systems across a diffuse and constantly shifting global landscape.”¹⁷ Four phenomena caused by the globalization of international law include the proliferation of actors, norms, and organizations in international law, as well as the expansion of traditional international jurisdictional concepts.

A. *New Actors in International Law*

Traditionally, international law involved state actors and inter-state relations.¹⁸ Individuals, organizations, regional bodies, non-governmental institutions, and the like were left outside the reach of international law.¹⁹ The United Nations (U.N.) was a forum open exclusively to state parties. The International Court of Justice (ICJ), as well as its predecessor, the Permanent Court of International Justice (PCIJ), were reserved for state grievances.²⁰ It was inconceivable that an individual would come before such tribunals, or that international law would govern anything but relations among state parties.²¹

Today, the converse is true.²² International law, in its transformed or globalized version, governs all sorts of relations, including those implicating states, regional bodies, NGOs, trade organizations, commercial actors, and private individuals.²³ It spreads into legal fields such as environmental law, labor law, trade regulations, antitrust, health, and insurance law.²⁴ Non-state actors play increasingly important roles in

¹⁷ *Id.*

¹⁸ *Id.* (observing that traditional international law scholars “located international law in the acts of official governmental bureaucratic entities, such as the treaties and agreements entered into by nation-states, the declarations and protocols of the United Nations . . . or other affiliated bodies, and the rulings of international courts and tribunals”) (citing BARRY E. CARTER & PHILIP R. TRIMBLE, *INTERNATIONAL LAW* 2 (3d ed. 1999)).

¹⁹ See BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 14 (5th ed. 2007) (noting that traditional concept of international law “was generally one of law between nation states”).

²⁰ See *id.* at 298 (stating that main function of ICJ “is to decide legal disputes between states”) (emphasis added).

²¹ See Berman, *supra* note 1, at 487 (noting that “[i]n an earlier generation,” the study of international law focused only on norms “promulgated by nation-states and . . . among nation-states”).

²² See Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 *YALE J. INT’L L.* 301, 312 (2007).

²³ See *id.* (concluding that we need “a more fine-grained, nuanced understanding of the way legal norms are passed on” from such different groups, to begin to study law and globalization).

²⁴ See *id.*

such fields, including regional organizations, specialized bodies such as trade organizations, NGOs, and private individuals.²⁵

Regional organizations play dominant roles within their “jurisdictions.” The North American Free Trade Agreement (NAFTA) is such a prominent regional power that it acts as a sovereign in matters of trade within the continent.²⁶ In Europe, the European Union (EU) undertakes a sovereign role in matters such as labor law, consumer regulations, antitrust, and environmental law.²⁷ Moreover, NGOs play a hugely important role on the international scene. They challenge traditional models of state sovereignty with regard to different areas of law, and in particular human rights norms; they formulate global standards of corporate behavior; and they generally claim to represent some sort of a global interest.²⁸ Another example, the World Trade Organization (WTO), dictates the terms of global trade by creating norms, establishing an entirely new jurisdiction to handle disputes, and tying state and non-state interest in a global web of trade relationships embodied in the organization’s structure and processes.²⁹ Finally, private individuals exercise increasing influence in the international legal field.³⁰ Private par-

²⁵ See *id.* (noting the “wide variety of non-state actors engaged in the establishment of norms that operate internationally and transnationally”); see also *id.* at 321 (observing that states themselves are “increasingly delegating power to private actors who exist in a shadow world of quasi-public/quasi-private authority”).

²⁶ See Berman, *supra* note 1, at 535 (discussing authority of NAFTA’s ad hoc tribunals over national courts as an example of NAFTA’s power to articulate jurisdictional norms).

²⁷ See Cohan, *supra* note 4, at 940 (considering EU role in modern world and noting both its active participation in many substantive conferences and membership in several international organizations).

²⁸ See, e.g., Berman, *supra* note 1, at 546 (stating that NGOs are “an important normative force on the international scene”); *id.* at 547 (noting that “[NGOs] formulate global standards of corporate behavior” in the fields of human rights, environmental protection, and fair labor standards); *id.* at 548 (“NGOs often claim to represent a global polity.”); see also Chandler H. Udo, Note, *Nongovernmental Organizations and African Governments: Seeking an Effective International Legal Framework in a New Era of Health and Development Aid*, 31 B.C. INT’L & COMP. L. REV. 371 (2008) (evaluating status of NGOs in international law). Some, however, view NGOs more as interest groups focused on particular issues than as representatives of general constituencies. See Kenneth Anderson, *The Ottawa Convention Banning Landmines: The Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT’L L. 91, 119 (2000).

²⁹ Many commentators have noted the increasing role of the WTO in developing a global common law of international trade. See, e.g., Berman, *supra* note 1, at 521; Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT’L L. REV. 845, 850 (1999).

³⁰ See Ralph G. Steinhardt, *The Privatization of Public International Law*, 25 GEO. WASH. J. INT’L L. & ECON. 523, 544 (1991) (“[T]he concerns, the actors, and the processes of ‘public’ international law have been expanded—‘privatized’—in this century.”); see also Berman, *supra* note 1, at 520 (“[C]onflicts law and international business transactions have

ties can now enter into investment treaties with state parties; moreover, they can sue state parties in specific tribunals for breaches of such investment relations.³¹ Private parties can also rely on international law to obtain certain guarantees, particularly in the field of human rights, and they can sue state parties for violations of such international standards.³²

Thus, it is no longer true that international law represents a body of law that solely governs relations among states; on the contrary, it is a complex web of treaties, regulations, customary norms, and codes of conduct that shapes relationships among state as well as non-state actors along horizontal and vertical axes of power.³³

B. *Proliferation of Norms in International Law*

International law today encompasses many different norms.³⁴ These include: multiple conventions and treaties in several of areas of law; a significant number of customary norms ranging from fields such as human rights to foreign direct investment, a vast number of international legal decisions stemming from various international tribunals; numerous international legal doctrines emanating from scholars and publicists writing in a broad range of fields; and soft law instruments

become a staple of state-to-state relations, and non-state or private actors have taken an increasingly important role in the articulation and enforcement of international standards.”).

³¹ See ARON BROCHES, *SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 198 (1995) (noting that under Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), private creditors may sue debtor states in an international forum); see also IGNAZ SEIDL-HOHENVELDERN, *COLLECTED ESSAYS ON INTERNATIONAL INVESTMENTS AND ON INTERNATIONAL ORGANIZATIONS* 374 (1998) (describing different dispute resolution systems that protect investors’ rights); G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 25 PA. J. INT’L ECON. L. 703, 715 (2004) (examining WTO’s dispute settlement mechanism).

³² See, e.g., Claudio Grossman, *The Velasquez Rodriguez Case: The Development of the Inter-American Human Rights System*, in *INTERNATIONAL LAW STORIES* 77, 82 (John E. Noyes et al. eds., 2007) (stating that individuals can bring complaints against state parties in Inter-American Court of Human Rights); Sands, *supra* note 1, at 546–47 (describing how individuals can bring claims against state parties in European Court of Human Rights); see also Berman, *supra* note 1, at 521 (noting a “proliferation of international tribunals” in human rights area); *infra* Part III.A.

³³ See Berman, *supra* note 22, at 311–12 (challenging the “top-down” conception of international law and calling for the need “to approach the multifaceted ways in which legal norms develop”).

³⁴ See Sands, *supra* note 1, at 548 (noting a great increase in norms of international law).

such as codes of conduct, gentlemen's agreements, and governmental statements.³⁵

Such a proliferation of international legal norms stems from several factors. First, the latter half of the twentieth century has witnessed an increase in the number of international legal bodies—organizations, institutions, conferences, and tribunals—which all, as one of their roles, draft and issue international law instruments.³⁶ Second, also over the course of the last century, international law has expanded into a variety of fields that were traditionally left to state sovereign reign.³⁷ There are now more international laws and regulations in health law, consumer law, labor law, and antitrust law.³⁸ Third, and most important, international law now plays a different role in today's globalized world. While a century ago, international law was only meant to govern relations among states, this is no longer true.³⁹ International law aims to influence a variety of state and non-state actors in many different legal fields and along different normative axes.⁴⁰ It influences national legislative bodies,⁴¹ supreme judicial organs,⁴² individual expectations,⁴³ diplo-

³⁵ See, e.g., JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTION, PROCESS* 28 (2d ed. 2006).

³⁶ See Sands, *supra* note 1, at 553 (noting that today there are over twenty-five permanent international courts and tribunals); see also CARTER ET AL., *supra* note 19, at 11–13 (describing different international norm-creating institutions that have developed since World War II); Harold Hongju Koh, *Is There a "New" New Haven School of International Law*, 32 *YALE J. INT'L L.* 559, 564 (2007) (remarking that today we live in a world where "non-state actors are capable of serving as transnational decisionmakers").

³⁷ Sands, *supra* note 1, at 548 ("International laws now address a broad and growing range of economic, political, and social matters."); *id.* at 548–49 (explaining that same proliferation of international law erodes state sovereignty).

³⁸ DUNOFF ET AL., *supra* note 35, at 29 (noting that both breadth and depth of international law have increased "as the law regulates more areas than ever before").

³⁹ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287 (3d ed. 1979); Sands, *supra* note 1, at 527 (stating that international law traditionally was seen as a "set of rules with the object of preserving the peace and harmony of nations").

⁴⁰ *See id.* (noting that international law today "serves a broader range of societal interests, and that it now connects with a wider range of actors and subjects").

⁴¹ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993) (Scalia, J., dissenting) (stating, in his infamous dissent, that one of the outstanding canons of statutory interpretation is the presumption that Congress, when it passes a law, acts in accordance with the law of nations).

⁴² See generally *Torres v. State*, No. PCD-04-442, 2004 WL 3711623, (Okla. Crim. App. May 13, 2004). In *Torres*, the Oklahoma Court of Criminal Appeals commuted the death sentence of a foreign national in light of an ICJ ruling directing the United States not to execute foreign nationals whose rights under the Vienna Convention on Consular Relations had not been respected. See *id.* at *6.

⁴³ See *infra* Part III.B.

matic concerns, foreign policy issues, and a vast number of domestic legal areas on a substantive level.

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

C. *Proliferation of Organizations in International Law*

International law has not only witnessed a proliferation of legal norms, but also an expansion in the number of international legal organizations.⁴⁴ At the end of World War I, the victorious states created the League of Nations, a body charged with preventing of another bloody war and the U.N.'s predecessor organization.⁴⁵ At the same time, states realized that an international arbitrator may be needed in other substantive areas, such as health, labor, or communications law.⁴⁶ In other words, states seemed to realize that if they achieved coordination in substantive areas of law, they would then be less likely to engage in violent conflict in general.⁴⁷ Thus, the League of Nations was outfitted with special offices, such as the International Telecommunication Union and the International Labour Office, charged with the task of studying and promoting international cooperation on various issues of international interest.⁴⁸ Along the same lines, the PCIJ was created, leading at least some to believe that the peaceful settlement of disputes through international law was possible.⁴⁹ Although these developments

⁴⁴ See DUNOFF ET AL., *supra* note 35, at 27 (“[T]he institutionalization of international law that began in significant part with the League of Nations accelerated in the post-war era.”).

⁴⁵ *Id.* at 16 (noting that League of Nations was created to address questions of war and peace).

⁴⁶ *Id.*

⁴⁷ See *id.*

⁴⁸ *Id.* (“The result was a shift in the way much international law was made, as the League took the lead in preparing multilateral treaties on many subjects, encouraged states to reach bilateral agreements, and drafted many nontreaty instruments that came to be influential among states.”).

⁴⁹ DUNOFF ET AL., *supra* note 35, at 16.

proved inefficient in preventing World War II, they at least geared states toward joint organizational efforts as a method of preventing conflict.⁵⁰

The end of World War II saw the creation of the U.N.—the supreme international organization. The U.N. was charged with many tasks but most importantly, was conceived as a global peacekeeper that would replace any unilateral use of force with joint decision-making and acting on the international legal scene.⁵¹ In the wake of the establishment of the U.N., other regional bodies, assuming the roles of regional peacekeepers, were born. In Europe, the North Atlantic Treaty Organization (NATO) was established. With mostly Western European nations and the United States as its members, NATO countered the threatening power of the former Union of Soviet Socialist Republics during the Cold War.⁵² In Africa, the Economic Community of West African States (ECOWAS) was created as a mixed organization: its mission was economic, but it encompassed mercenary forces charged with keeping peace in West Africa.⁵³

Embracing the post-World War I notions of preventing conflict by transferring substantive decision-making in different areas to international bodies, international actors engaged in negotiation to create international monetary, trade, economic, insurance, investment, and other types of organizations.⁵⁴ Thus, a multitude of international organizations were created in the latter half of the twentieth century, including the International Monetary Fund, the WTO, the World Bank, the International Center for the Settlement of Insurance Disputes (ICSID), and the World Intellectual Property Organization (WIPO).⁵⁵ Similarly, states within the same regions acted to create regional organizations charged with similar objectives.⁵⁶ The Organization for Security and Cooperation in Europe, the Association of Southeast Asian

⁵⁰ *Id.*

⁵¹ *Id.* at 25 (noting U.N. formed in 1945 as a multilateral body designed to address a diverse set of issues while its Security Council maintains international peace and security).

⁵² *Id.* at 26.

⁵³ CARTER ET AL., *supra* note 19, at 1070 (noting that ECOWAS “began peacekeeping operations in Liberia” and that “its forces have since operated in Sierra Leone and the Ivory Coast”); Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. Rev. 235, 256 (1997) (describing dual economic and peacekeeping roles of ECOWAS).

⁵⁴ DUNOFF ET AL., *supra* note 35, at 16 (describing a “shift” in how international law was made post-World War I because League of Nation “took the lead in preparing multilateral treaties . . . , engaging states to negotiate bilateral treaties, and in drafting many non-treaty instruments”).

⁵⁵ *Id.* at 26.

⁵⁶ *Id.*

Nations, the Organization of American States, and the Organization of African Unity are examples of such regional bodies.⁵⁷

The higher level of interaction among international law actors in the twentieth century seems to have produced a myriad of international and regional bodies charged with resolving state, and non-state actors' differences on substantive levels as well as providing an institutional forum where such actors can assert their grievances.⁵⁸

D. *Expansion of Jurisdiction in International Law*

It seems logical that the recent higher level of international interaction would produce more friction. To resolve disputes and allocate international responsibility, international law has developed and expanded its traditional notion of jurisdiction.⁵⁹ Historically, jurisdiction was conceived as the sovereign's power within a defined territory to impose and enforce its laws on its subjects and in its judicial organs.⁶⁰ Today, however, jurisdiction in international law is mostly extra-territorial.⁶¹

First, the development of human rights norms has contributed to the idea that some crimes are so heinous that any nation in the world, acting on behalf of the entire international community, can punish an offender.⁶² The concept of universal jurisdiction was thus born, defined as the power of any state to punish offenders of universal crimes, such as piracy, war crimes, slave trade, or genocide, without requiring any

⁵⁷ *Id.*

⁵⁸ See *supra* Part I.C.

⁵⁹ Berman, *supra* note 1, at 530–31 (discussing how traditional concepts of jurisdiction “have had difficulty adapting” with challenges caused by globalization).

⁶⁰ *Id.* at 530 (noting that traditionally, questions of jurisdiction were analyzed by reference to physical location).

⁶¹ *Id.* at 531 (noting existence of extra-territorial regulation in field of trademark rules, tort law, criminal investigations, internet transactions, and human rights violations).

⁶² See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987). The development of the human rights movement implied, first, that what a state did to its own citizens was of international concern and that government officials could be held responsible and prosecuted for abuses against their own population. See CARTER ET AL., *supra* note 19, at 779 (noting that Nuremberg trials after World War II were “important precedents in establishing the responsibility of government officials for human rights abuses, even abuses committed against their own population”). The development of human rights norms then came to encompass the idea that some crimes are so horrific that any state can punish offenders in the name of the world community. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of *universal concern*.”) (emphasis added).

territorial or substantive links to the prosecuting forum.⁶³ Adolf Eichmann, for example, a German citizen living in Argentina, was tried in Israel, under the theory of universal jurisdiction, for crimes against humanity that he committed during World War II in Germany, before Israel even became a state.⁶⁴ General Augusto Pinochet was indicted in Spain on charges of crimes against humanity for acts committed against Spanish victims during his dictatorship of Chile.⁶⁵ Hisssein Habré, who ruled Chad in the 1980s, was recently subject to an international arrest warrant in Belgium, under Belgium's universal jurisdiction law.⁶⁶

Moreover, states have been willing to grant access to their domestic courts to victims of human rights violations, even where such victims are foreign, or when such violations occurred in foreign countries, or were committed by foreign defendants. The U.S. Supreme Court has interpreted the Alien Tort Statute⁶⁷ to provide jurisdiction—and possibly a cause of action—to foreign plaintiffs suing foreign defendants for violations of the laws of nations.⁶⁸ Similarly, U.S. federal courts have entertained judicial challenges to the system of military commissions President Bush established to try al Qaeda detainees.⁶⁹ This exemplifies

⁶³ DUNOFF ET AL., *supra* note 35, at 380 (“The traditional rationale for universal jurisdiction is that the prohibited acts are of an international character and are of serious concern to the international community as a whole.”).

⁶⁴ See generally Attorney-General of the State of Israel v. Adolf Eichmann, 36 I.L.R. 277 (1962).

⁶⁵ Berman, *supra* note 1, at 534–35; David Sugeriman, *From Unimaginable to Possible: Spain, Pinochet, and the Judicialization of Power*, 3 J. SPANISH CULTURAL STUDS. 107, 116 (2002).

⁶⁶ DUNOFF ET AL., *supra* note 35, at 383.

⁶⁷ 28 U.S.C. § 1350 (2000).

⁶⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–18 (2004). The Court held that the Alien Tort Statute is a jurisdictional statute and that it was not intended to create a new cause of action for torts in violation of international law. *Id.* at 712–15. The first Congress, instead, understood that the Alien Tort Statute would provide a cause of action for a limited number of violations of the law of nations, such as violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 724. Today, “[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [eighteenth] century paradigms we have recognized.” *Id.* at 725; see also *Filartiga v. Pena Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (holding that Alien Tort Statute provides jurisdiction to a foreign plaintiff for a violation of law of nations).

⁶⁹ In *Hamdan v. Rumsfeld*, a five-justice majority of the Court held that the military commission system set up by the Bush Administration to try al Qaeda detainees did not satisfy the requirements of Common Article 3 of the 1949 Geneva Conventions. See 126 S. Ct. 2749 (2006). Although the Court did not decide whether these Conventions gave rise to judicially enforceable private rights in domestic courts, the majority struck down the military commissions because the Uniform Code of Military Justice, the statutory authority

once more the expanded role of domestic courts in litigation centering on human rights abuses and implying violations of international legal obligations.

Finally, because state and non-state actors interact frequently on the international commercial scene, states have been willing to assert extra-territorial jurisdiction to regulate commercial conduct occurring abroad but having an effect on domestic markets.⁷⁰ For example, the United States relies on the so-called “effects doctrine” to establish the extra-territorial reach of the Sherman Act, which U.S. courts have held to regulate conduct occurring abroad.⁷¹ Similarly, U.S. courts rely on a variation of the “effects doctrine” to regulate securities markets and to reach fraudulent conduct that took place abroad.⁷² European market authorities, although initially critical of the U.S. approach, seem to have adopted similar jurisdictional tests that strive for the imposition of extra-territorial regulation of foreign conduct having effects on the European market.⁷³

Related issues have arisen in connection with the regulation of Internet activities.⁷⁴ Recently, a French court ordered Yahoo! to block

for the President to establish military commissions, is conditioned on compliance with the law of war, including the Geneva Conventions. *Id.* at 2786, 2794.

⁷⁰ Berman, *supra* note 1, at 531 (noting problems caused by cross-border activity and desire by local communities to apply their norms to extra-territorial activities). Such extra-territorial regulation has already occurred in fields such as antitrust, securities, tax, and trademark protection. See Milena Sterio, *Clash of the Titans: Collisions of Economic Regulations and the Need to Harmonize Prescriptive Jurisdiction Rules*, 13 U.C. DAVIS J. INT’L L. & POL’Y 95, 100–04 (2007).

⁷¹ See generally *LaRoche v. Empagran*, 542 U.S. 155 (2004) (recognizing extra-territorial reach of Sherman Act, but holding that exercise of such jurisdiction would not be reasonable where a foreign plaintiff’s claim is based wholly on foreign harm because it “creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs”); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). But see *Timberlane Lumber Co. v. Bank of Am. N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) (tempering extra-territorial application of Sherman Act with considerations of “international comity”).

⁷² *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968); DUNOFF ET AL., *supra* note 35, at 373; see also *Consol. Gold Fields v. Minorco*, 871 F.2d 252, 261–62 (2d Cir. 1989).

⁷³ See Case 89/95, *Ahlstrom v. Comm’n.* (Wood Pulp Cartel), 1988 E.C.R. 5193 (upholding extra-territorial assertion of European Community competition law where conduct occurred abroad but was “implemented” within European market). Note that the European Court of Justice never adopted the infamous “effects” test, but that in practice, its “implementation” test operates very similarly to the effects test. See DUNOFF ET AL., *supra* note 35, at 375.

⁷⁴ Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, Ordonnance de référé (Fr.), available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm>. For a discussion of the case, see Joel R. Reidenberg, *Yahoo*

access in France to a Yahoo! auction site selling Nazi memorabilia, as the sale of such items was illegal under French law.⁷⁵ Yahoo! immediately moved for a U.S. court order declaring the French court order unenforceable, provoking a judicial battle.⁷⁶ Ultimately, Yahoo! capitulated by deciding to comply with the French order,⁷⁷ but this judicial controversy highlights particularly well a type of extraterritorial problem linked to the assertion of jurisdiction in today's globalized world.⁷⁸

Thus, jurisdiction in modern globalized international law recognizes interaction among all sorts of international state and non-state actors and provides not only access to more tribunals, but also a basis for imposing substantive laws in an extra-territorial manner.⁷⁹

II. THE ROLE OF INTERNATIONAL LAW IN DIFFERENT FIELDS

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

and Democracy on the Internet, 42 JURIMETRICS J. 261 (2002). For a discussion of internet jurisdiction, see generally Kevin A. Meehan, Note, *The Continuing Conundrum of International Internet Jurisdiction*, 31 B.C. INT'L & COMP. L. REV. 345 (2008).

⁷⁵ See *Ordonnance de référé*, *supra* note 74.

⁷⁶ *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'antisemitisme*, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001). The Ninth Circuit reversed this decision on the ground that the district court could not obtain personal jurisdiction over the original French plaintiffs until they actually sought to enforce the judgment or otherwise engaged in activity in California. *Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme*, 379 F.3d 1120, 1126–27 (9th Cir. 2004).

⁷⁷ See Press Release, Yahoo!, Yahoo! Enhances Commerce Sites for Higher Quality Online Experience (Jan. 2, 2001), available at <http://docs.yahoo.com/docs/pr/release/675.html> (announcing new product guidelines for its auction sites that prohibit “items that are associated with groups which promote or glorify hatred and violence”).

⁷⁸ See DUNOFF ET AL., *supra* note 35, at 349. For an example of similar extra-territorial attempts to regulate commercial activity provoking cross-Atlantic tension, consider the August 2001 EU Statement of Objections accusing Microsoft of illegally tying its Windows Media Player software into its Windows 2000 desktop software. See Case No. T-201/04, *Microsoft Corp. v. Comm'n of Eur. Cmty.*, 2004 E.C.R., available at <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf>.

⁷⁹ See Berman, *supra* note 1, at 537 (“This more fluid model of multiple affiliations, multiple jurisdictional assertions, and multiple normative statements captures more accurately than the classical model of territoriality and sovereignty the way legal rules are being formed and applied in today's world.”).

A. *International Human Rights*

International law in its proliferated, or globalized version has played an important role in human rights law, where the evolutionary trend on the international scene has had a major impact.

1. Creation of International Norms

The evolution of international law has created many new human rights norms.⁸⁰ Throughout the twentieth century, several human rights conventions have been negotiated, and many customary human rights norms have emerged.⁸¹ These new human rights norms are significant not only because of their expanded number, but also because of their evolutionary nature. Because international law is no longer limited to governing purely state relations, but also encompasses the relationship of non-state actors *vis-à-vis* states, a different set of norms has emerged to cover these new relations.⁸²

For example, the prohibition on torture arising out of the 1984 Torture Convention⁸³ and other treaties and international customary norms,⁸⁴ necessarily implies several things. Parties to the Torture Con-

⁸⁰ See DUNOFF ET AL., *supra* note 35, at 17 (“[T]he human tragedy of World War II led governments . . . to devote significant resources to the creation of a corpus of law aimed at protecting individuals from their own governments.”).

⁸¹ See *id.* (“States prepared and signed onto treaties covering genocide, civil and political rights, economic rights, racial discrimination, women’s rights, apartheid, torture, and children’s rights.”). For examples of the major documents in the human rights field negotiated after World War II, see generally Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 44; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention]; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

⁸² See *supra* Part I.B.

⁸³ See generally Torture Convention, *supra* note 81, art. 2 (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

⁸⁴ See, e.g., Organization of American States, Inter-American Convention to Prevent and Punish Torture art. 4, Dec. 9, 1985, O.A.S. T.S., No. 67; Organization of American States, American Convention on Human Rights art. 27(2), Nov. 22, 1969, O.A.S. T.S., No.

vention may not institute torture as an official governmental policy in their international relations with other states.⁸⁵ Moreover, states may not treat individuals in ways that amount to torture, even when such individuals are their own citizens.⁸⁶ Officials of one state may even attempt to prosecute officials of another state for acts that constitute torture.⁸⁷

As the Torture Convention illustrates, these new types of international human rights norms differ from other, more traditional types of international norms.⁸⁸ Under traditional international law norms, State A may not do certain things to State B, State C, or any other State. Conversely, States B, C, or any other state may not do the same thing to State A. States A, B, and C, however, may do whatever they wish within their own borders. New human rights norms vary strikingly from this traditional model. For one, they are not limited to the regulation of the behavior of State A *vis-à-vis* other states; rather, they are able to regulate what State A does to its own citizens and residents within its borders, as well as requiring State A to justify its behavior before States B and C, at

36; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(2), Nov. 4, 1950, 312 U.N.T.S. 221.

⁸⁵ See Torture Convention, *supra* note 81, art. 1. The Torture Convention specifically defines “torture” in its main article as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” *Id.* (emphasis added). The Torture Convention specifically prohibits state-sponsored torture. See *id.* For a discussion of the workings of the Torture Convention, see Edwin Odhiambo-Abuya, *Reinforcing Refugee Protection in the Wake of the War on Terror*, 30 B.C. INT’L & COMP. L. REV. 227, 281–94 (2007).

⁸⁶ See Torture Convention, *supra* note 81, art. 2. The Torture Convention strengthens existing norms against torture in many ways: it requires state parties to present reports focused explicitly on torture; it creates an expert committee to review those reports; and it provides for an optional individual complaints procedure. DUNOFF ET AL., *supra* note 35, at 450. Israel, for example, has been criticized by the Committee Against Torture, a special committee of experts established by the Torture Convention, because of its controversial interrogation techniques. See Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Israel, U.N. Doc. A/49/44 (1994). This criticism exemplifies the notion that under modern international law, states may no longer do whatever they wish within their jurisdiction. See *id.* Similarly, the United States has faced significant international criticism in light of its own more aggressive interrogation techniques in the “Global War on Terror.” See DUNOFF ET AL., *supra* note 35, at 465–66.

⁸⁷ The concept of universal jurisdiction allows a forum to prosecute an individual when that individual’s alleged crimes have absolutely no territorial nexus with the prosecuting state. See DUNOFF ET AL., *supra* note 35, at 380. The leader of State A, who tortured people within State A, could theoretically be subject to criminal prosecution in State B, if State B has an expansive universal jurisdiction statute, even though State B has no other connection to the acts of torture that took place within State A. See *id.*

⁸⁸ See *supra* notes 85–87 and accompanying text.

the risk of seeing its leaders indicted for violations of such human rights norms in States B and C.⁸⁹

These new types of human rights norms are coupled with other changes in international law in a manner that strengthens their role in state behavior.⁹⁰ As mentioned above, states traditionally exercised their jurisdictional powers territorially.⁹¹ The evolutionary trend of international law has led states to rely more and more on extra-territorial jurisdiction.⁹² Such a powerful application of state judicial powers has been particularly important in the human rights field. New human rights norms are often accompanied by the notion of universal jurisdiction, meaning they can be enforced by any state, anywhere in the world, against any offenders. The Torture Convention has a provision providing for universal jurisdiction for possible prosecutions of offenders.⁹³ New human rights norms sometimes go beyond simply prohibiting states from doing something; some impose certain duties on states, such as the duty to either prosecute or extradite offenders.⁹⁴

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

[I]ndividual states, the United Nations, and various regional organizations, including the Council of Europe, the Organization of American States, and the Organization of African Unity, working with countless non-governmental human rights organizations, scholars, and lawyers, have developed an extensive body of human rights treaties, declarations, and related in-

⁸⁹ States today are, therefore, obligated to cede sovereignty to the international community, which “imposes standards of good governance and human rights norms” on all states. Cohan, *supra* note 4, at 941.

⁹⁰ See *supra* Part I (discussing overall transformation of international law).

⁹¹ See Berman, *supra* note 1, at 530.

⁹² For a discussion of extra-territorial jurisdiction, see *supra* Part II.D.

⁹³ Torture Convention, *supra* note 81, art. 5. Article 5 of the Torture Convention provides for different bases of jurisdiction, including territorial jurisdiction, passive personality, and nationality principles. *Id.* art. 5(1)–(3). Article 5 goes on to specify that “[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction.” *Id.* art. 5(2).

⁹⁴ See *id.* art. 7 (containing an “extradite or prosecute” provision); Genocide Convention, *supra* note 81, art. 5 (containing a provision requiring member states to “give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III”).

struments in an effort to develop and clarify international human rights norms. These same actors have also developed a complex system of institutions designed to monitor and to some extent to implement existing norms. These institutions include regional human rights courts, treaty bodies, groups of experts, and more.⁹⁵

State and non-state actors thus work together to promote, implement, and monitor the myriad of human rights norms, creating a powerful regime of human rights protection and regulations.

2. Limitations on State Sovereignty

Because of their powerful reach and impact on state behavior, new human rights norms impose severe limitations on state sovereignty.⁹⁶ They dictate that State A may no longer act however it wishes within its own borders—contrary to centuries of customary international law. Precisely because the globalized version of international law takes into account individual interests, it affords individuals more protection from state intrusion into their affairs by limiting state sovereign powers.

It had long been the role of domestic law to define what a sovereign may do to its subjects.⁹⁷ For example, nobody would dispute that the U.S. Constitution grants the President numerous powers: to enter into agreements with other nations; to nominate judges to the Supreme Court; and to approve the congressional budget.⁹⁸ Nor would anyone dispute that Congress has the power to draft laws that criminalize certain individual behaviors, or require citizens to pay taxes, or mandate

⁹⁵ DUNOFF ET AL., *supra* note 35, at 443.

⁹⁶ In fact, many scholars have noted that the traditional nineteenth century model of state sovereignty became outdated in the twentieth century. *See, e.g.*, KENICHI OHMAE, *THE END OF THE NATION STATE*, at viii (1995); MATTHEW HORSMAN & ANDREW MARSHALL, *AFTER THE NATION-STATE: CITIZENS, TRIBALISM AND THE NEW WORLD DISORDER*, at ix (1994) (“The traditional nation-state, the fruit of centuries of political, social and economic evolution, is under threat.”); George J. Demko & William B. Wood, *Introduction: International Relations Through the Prism of Geography*, in *REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY* 3, 10 (George J. Demko & William B. Wood eds., 1994) (“Once sacrosanct, the concept of a state’s sovereignty—the immutability of its international boundaries—is now under serious threat.”); *see also* Berman, *supra* note 1, at 523.

⁹⁷ *See, e.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (“[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.”) (citing JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS*, ch. 2 (1869)).

⁹⁸ U.S. CONST. art. II, § 2 (giving President power to “make treaties”); *id.* art. I, § 7 (describing checks and balances procedure under which President may veto a bill originating in Congress, thereby giving President power to override proposed congressional budget).

licenses to engage in certain professional activities.⁹⁹ We accept the notion that our sovereign, domestically, can require us to do certain things or to refrain from doing certain things. We also respect the idea that if another individual, or our sovereign, does something that offends our rights, we can seek redress through judicial institutions.

The evolutionary version of international law attempts to play a similar role by creating important human rights norms that function somewhat like domestic law. New human rights norms require sovereigns, as well as individuals, to refrain from engaging in certain types of behavior, and as a corollary, to perform certain actions.¹⁰⁰ For example, a sovereign may not condone torture as an official state practice; if it finds out that someone in its territory has engaged in torture, it must punish such groups or individuals accordingly.¹⁰¹ Because new human rights norms sometimes create judicially enforceable private rights,¹⁰² individuals can seek redress from domestic or international judicial bodies for violations thereof, either by other individuals or by their own sovereign.¹⁰³ The latter idea—that one may sue their own sovereign for violations of supra-national norms that transcend and limit the sover-

⁹⁹ *Id.* art. I (giving Congress general power to legislate).

¹⁰⁰ DUNOFF ET AL., *supra* note 35, at 17 (“[T]he growth of the human rights movement fundamentally challenged the notion that states were free to do what they wanted within their own border.”).

¹⁰¹ Torture Convention, *supra* note 81, arts. 1 & 7. Other international conventions, moreover, impose affirmative duties on states to punish violators of norms that such conventions seek to protect. *See, e.g.*, Convention (No. 4) Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention No. 4]; Convention (No. 3) Relative to the Treatment of Prisoners of War art. 130, Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention No. 3]; Convention (No. 2) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention No. 2]; Convention (No. 1) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 311 [hereinafter Geneva Convention No. 1]; Genocide Convention, *supra* note 81, art. 4.

¹⁰² In the United States, for example, there has been significant debate over whether certain provisions of the Vienna Convention on Consular Relations grant individuals private judicially enforceable rights in U.S. courts. *See* Bruno Simma & Carsten Hoppe, *The LaGrand Case: A Story of Many Miscommunications*, in INTERNATIONAL LAW STORIES, *supra* note 32, at 371, 371–405. The debate centers on whether an international treaty creates individual rights that may be enforced in a domestic court of law against a domestic sovereign. *Id.*

¹⁰³ *See* DUNOFF ET AL., *supra* note 35, at 443. As noted above, individuals today are provided with numerous complaint procedures through international and regional organizations, committees, tribunals, and other judicial bodies. *See id.*

ign's powers—is particularly revolutionary and had no place in traditional international law.¹⁰⁴

The field of human rights law, in itself, represents a stark departure from traditional international law models. In its modern, evolutionary version, human rights law places limits on state sovereignty and establishes norms that govern inter-state and intra-state behavior.¹⁰⁵ Thus, the “new” state sovereignty actually requires states to participate in a complex web of transnational regimes, institutions, and networks to accomplish what they could once do on their own, within their specific jurisdiction.¹⁰⁶

Globalized international law has imposed so-called “vertical constraints” on states, whereby external human rights norms are imposed on states “by diplomatic and public persuasion, coercion, shaming, economic sanctions, isolation, and in more egregious cases, by humanitarian intervention.”¹⁰⁷ A direct result of this phenomenon is that a sovereign state must now answer not only to its own nationals, but also to the international community as a whole.¹⁰⁸ A state may no longer reject a norm based on a claim of exclusive sovereignty, as such a notion no longer exists.¹⁰⁹ Sovereignty will no longer operate as an excuse for violations of human rights norms against slavery, genocide, torture, or arbitrary confiscation of property. Moreover, human rights norms have evolved to encompass claims of indigenous populations, special needs of the disabled, health care, and education.¹¹⁰

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

¹⁰⁴ EU citizens may sue their own states in the European Court of Human Rights for particular human rights violations. Sands, *supra* note 1, at 546–47. Similarly, citizens of Central and South American countries may bring complaints against their states in the Inter-American Court of Human Rights. Grossman, *supra* note 32, 81–83; *see infra* Part II.A (discussing individual expectations under globalized international law).

¹⁰⁵ Berman, *supra* note 1, at 527 (“While nation-states may not disappear, their sovereignty may well become diffused in order to accommodate various international, transnational, or non-territorial norms.”).

¹⁰⁶ *See generally* ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) (addressing concept of “new” sovereignty).

¹⁰⁷ Cohan, *supra* note 4, at 941.

¹⁰⁸ *See id.* at 942.

¹⁰⁹ *See* DAVID P. FORSYTHE, *HUMAN RIGHTS AND WORLD POLITICS* 6, 7 (1983).

¹¹⁰ *See* Cohan, *supra* note 4, at 943.

*sovereignty—that is, that a state can do as it pleases in its own jurisdiction.*¹¹¹

An influential report issued in December 2001 by the International Commission on Intervention and State Sovereignty (ICISS) supports this revolutionary view of human rights norms that operate as a vertical constraint on state sovereignty.¹¹² The ICISS report, entitled “The Responsibility to Protect,” highlighted the need to update the U.N. Charter to incorporate this new understanding of state sovereignty.¹¹³ The report noted a shift from the traditional concept of “sovereignty as control” toward “sovereignty as responsibility in both internal functions and external duties.”¹¹⁴ According to the ICISS Report, if a population is suffering and its state is unwilling or unable to halt the suffering, then the principle of non-intervention yields to the international responsibility to protect.¹¹⁵ The revolutionary version of human rights law, imposed on states through the general evolutionary trend in international law, has imposed additional restrictions on states, thereby eroding the traditional notion of exclusive state sovereignty.¹¹⁶

B. *International Criminal Law*

The evolutionary movement in the international legal field has exercised tremendous influence in the area of international criminal law. The field itself is less revolutionary than international human rights law, as the idea of individual international responsibility for criminal acts was accepted several centuries ago.¹¹⁷ Early on, states recognized piracy as the first international crime, and sought to punish individuals who engaged in piracy, irrespective of such individuals’ state affiliation.¹¹⁸ Moreover, states held trials for war crimes as early as the fifteenth century, and enacted various legal codes prohibiting war

¹¹¹ FORSYTHE, *supra* note 109, at 6, 7 (emphasis added).

¹¹² INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INT’L COMM. ON INTERVENTION AND STATE SOVEREIGNTY (2001), available at <http://iciss.ca/pdf/commission-Report.pdf> (last visited May 9, 2008) [hereinafter ICISS REPORT]; see also Max W. Mathews, Note, *Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur*, 31 B.C. INT’L & COMP. L. REV. 137 (2008) (analyzing responsibility to protect).

¹¹³ See ICISS REPORT, *supra* note 112 §§ 2.16–.27.

¹¹⁴ *Id.* § 2.14.

¹¹⁵ *Id.* §§ 2.14–.15.

¹¹⁶ See *id.*

¹¹⁷ DUNOFF ET AL., *supra* note 35, at 607.

¹¹⁸ *Id.*

crimes in subsequent years.¹¹⁹ During the nineteenth century, states negotiated several treaties criminalizing trading in slaves, an act committed by individuals, not states.¹²⁰

With the rise of human rights norms, the field of international criminal law came to encompass additional international violations having to do with attacks on human dignity.¹²¹ Atrocities committed in civil wars became criminalized on an international level.¹²² To this end, throughout the 1990s, the linkage of human rights protection with international criminal responsibility contributed to the creation of several international criminal courts charged with prosecuting individuals accused of specific crimes.¹²³ Moreover, specific criminal offenses have been affirmatively recognized as contrary to international law, and as providing substantive jurisdiction for prosecution in one of the newly created international criminal tribunals.¹²⁴ The globalization forces behind the transformation of international law exercised an expansive influence on the field of international criminal law by broadening its horizons and enlarging the idea of global accountability for heinous individual crimes.¹²⁵

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (noting that state and non-state actors have accepted, over last several centuries, that individuals may be responsible under international law for acts against human dignity).

¹²² Protocol Additional (No. 2) to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II] (creating rules governing internal armed conflicts).

¹²³ See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Court*, 10 HARV. HUM. RTS. J. 11, 39–50 (1997) (discussing creation of new international tribunals in 1990s).

¹²⁴ DUNOFF ET AL., *supra* note 35, at 653. The ICTY, for example, specifically recognized that states had accepted that certain violations of customary international humanitarian law created individual responsibility. See *Prosecutor v. Tadic*, Case No. IT-94-I-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 128–134 (Oct. 2, 1995).

¹²⁵ The globalization movement also influenced the idea of international criminal responsibility by providing more alternatives to domestic criminal prosecution of human rights offenders. In today's globalized world, actors outside the relevant state may provide support to the offender's home state; foreign states may consider prosecuting the offender themselves under various extra-territorial jurisdictional principles; and states may act to set up international tribunals to try such offenders. DUNOFF ET AL., *supra* note 35, at 608.

1. Creation of New International Courts

Although the idea of international criminal prosecutions gained popularity in the wake of World War II and the Nuremberg Tribunal,¹²⁶ a very limited number of such trials actually took place during the second half of the twentieth century.¹²⁷ The 1990s, however, witnessed a rebirth of the idea, beginning with the creation of several new international criminal tribunals.

Following the bloody civil wars in the former Yugoslavia and Rwanda, the U.N. utilized its Chapter VII powers to create the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹²⁸ These tribunals were charged with a specific mandate: to prosecute individuals accused of specific heinous offenses, such as genocide, war crimes, and crimes against humanity, that took place in the territory of the former Yugoslavia and Rwanda during a specific time period.¹²⁹ The creation of the International Criminal Court (ICC) in 1998 followed the same evolutionary trend of prosecuting individuals accused of extraordinarily heinous crimes in an international forum.¹³⁰

Although the jurisdictional mandates of these tribunals were strictly limited temporally, territorially, and substantively,¹³¹ they nonetheless represent a giant step toward solidifying the idea of individual international criminal responsibility, born in Nuremberg but put aside during the second half of the twentieth century.¹³² Under the tradi-

¹²⁶ The Nuremberg trials took place as part of the International Military Tribunal, established through the London Charter. *Id.* at 609.

¹²⁷ Bassiouni, *supra* note 123, at 38–39 (noting that because of Cold War, very few international prosecutions took place despite existence of many conflicts because “[j]ustice was the Cold War’s casualty”).

¹²⁸ DUNOFF ET AL., *supra* note 35, at 652–53 (discussing creation of ICTY and ICTR); Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability—The Role of International War Crimes Tribunals*, 2 J. NAT’L SEC. L. & POL’Y 111, 118–19 (2006); *see also* Davis B. Tyner, *Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia’s Folly in Tadic*, 18 FLA. J. INT’L L. 843, 853 (2006) (discussing creation of ICTY).

¹²⁹ DUNOFF ET AL., *supra* note 35, at 653.

¹³⁰ *See* Milena Sterio, *Seeking the Best Forum to Prosecute International War Crimes: Proposed Paradigms and Solutions*, 18 FLA. J. INT’L L. 887, 895 (2006) (discussing creation of ICC).

¹³¹ The ICTY and ICTR can prosecute individuals accused of genocide, crimes against humanity, and war crimes. The ICTY can consider any crimes committed in the former Yugoslavia after 1991, up to the present; whereas, the ICTR is confined to crimes in Rwanda in 1994. Both tribunals are to “wind down” and complete their work by 2010. DUNOFF ET AL., *supra* note 35, at 653, 656.

¹³² *See* Bassiouni, *supra* note 123, at 112 (“[S]ince 1948, there have been few criminal investigations or prosecutions.”).

tional notion of international law, most types of individual criminal responsibility would be handled domestically under domestic law.¹³³ For example, suppose a Canadian was murdered by a Swedish killer.¹³⁴ Historically, the only recourse for the family of the Canadian victim was to ask the Canadian government to issue a diplomatic protest to the Swedish government.¹³⁵ Moreover, if a military dictator from a given country decided to exterminate a minority group, such acts would be seen as matters of purely domestic jurisdiction.¹³⁶ In other words, the concerned state could, if it chose to do so, prosecute the military leader domestically. Practically speaking, such prosecutions never took place while the offending leader was still in power, and very rarely took place even after a change of regimes for a variety of reasons, including: fears of regional instability; lack of democracy in the new regime; need for national reconciliation; and lack of recognition of international criminal norms.¹³⁷

The evolutionary movement that began transforming international law played a dominant role in transforming the international criminal law field. With the notion that international law encompasses much more than purely inter-state relations, international criminal law gained freedom to explore the idea of criminalizing individual offenses—typically handled in domestic fora—on an international level. The creation of international tribunals was a logical step in that direc-

¹³³ See DUNOFF ET AL., *supra* note 35, at 607 (describing phenomena of recognition of criminal responsibility under international law, which began as early as fifteenth century). As noted above, certain crimes had been internationalized early on, such as piracy and trading in slaves. *See id.* Nevertheless, most other crimes would be prosecuted within a domestic criminal system.

¹³⁴ *See generally* J.L. BRIERLY, *THE LAW OF NATIONS* 276–87 (6th ed. 1963) (discussing traditional notion of state responsibility, including so-called diplomatic protection).

¹³⁵ *See id.*

¹³⁶ Austen L. Parrish, 31 *AM. INDIAN L. REV.* 291, 294–96 (2006) (discussing traditional notion of state sovereignty as asserting that “[s]o long as a state did not cause harm outside its territory, international law had little to say about what a state did internally”). Under traditional notions of sovereignty, any domestic policy choices, even those as flagrant as the decision to exterminate a minority group, would be free from external or internal constraints. *See* Cohan, *supra* note 4, at 914–15 (discussing “Westphalian sovereignty,” or the right of a sovereign state to be left alone from external interference, and “domestic sovereignty,” or the right of a sovereign state to be free of internal interference).

¹³⁷ DUNOFF ET AL., *supra* note 35, at 648. Regimes also often pass general amnesty laws exonerating government-sponsored atrocities. *See* Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 *GEO. L.J.* 707, 720–29 (1999) (noting that Angola, Argentina, Brazil, Chile, El Salvador, Guatemala, Haiti, Honduras, the Ivory Coast, Nicaragua, Peru, Togo, and Uruguay all passed broad amnesty laws in 1990s).

tion, as it provided specific jurisdictions to handle criminal prosecutions of individuals accused of international offenses.¹³⁸

More recently, the field of international criminal law has transformed itself once more by encompassing the idea of hybrid tribunals—jurisdictions created by international agreement between the U.N. and the host country. These agreements mix local law in their otherwise internationally-oriented statutes and employ a mix of domestic and international personnel. Examples of such tribunals include East Timor,¹³⁹ the Special Court for Sierra Leone,¹⁴⁰ the Iraqi High Tribunal,¹⁴¹ and the Extra-Ordinary Chambers in the Courts of Cambodia Tribunal.¹⁴² These hybrid courts solidify the idea of international criminal responsibility while recognizing the need to involve aggressors' home countries in the prosecution process, for substantive as well as practical reasons.¹⁴³ Moreover, they exemplify globalization—the interconnectivity between local and global domains as well as the linkage between domestic and international matters.¹⁴⁴

2. Creation of New Offenses

With the rebirth of international criminal tribunals and their quick creation in the 1990s, it became crucial to define specific offenses that would merit such high-profile prosecution in the interna-

¹³⁸ DUNOFF ET AL., *supra* note 35, at 18 (describing establishment of new international tribunals in 1990s).

¹³⁹ See Ellis, *supra* note 128, at 121–25; see also Danielle Tarin, Note, *Prosecuting Saddam and Bungling Transitional Justice in Iraq*, 45 VA. J. INT'L L. 467, 522–25 (2005) (discussing East Timor court).

¹⁴⁰ See Sterio, *supra* note 130, at 895–99; see also Ellis, *supra* note 128, at 136–39 (discussing Special Court for Sierra Leone in context of an accountability policy in Liberia).

¹⁴¹ For a discussion of the Iraqi High Tribunal, see generally MICHAEL P. SCHARF & GREGORY S. MCNEAL, *SADDAM ON TRIAL: UNDERSTANDING THE IRAQI HIGH TRIBUNAL* (2006); Tarin, *supra* note 139. The Iraqi High Tribunal is not a truly hybrid court because its seat is in Baghdad, its prosecutor is Iraqi, and its judges are all Iraqi. Thus, the Iraqi High Tribunal has been characterized as an “internationalized” domestic court because its statute and rules of procedure are modeled on the ICTR, ICTY, and the Special Court for Sierra Leone. See SCHARF & MCNEAL, *supra*, at 57–59.

¹⁴² For a discussion of the Cambodian court, see DUNOFF ET AL., *supra* note 35, at 656–57; Ellis, *supra* note 128, at 125–28.

¹⁴³ Avril McDonald, *Sierra Leone's Shoestring Special Court*, INT'L REV. OF THE RED CROSS, Mar. 2002, at 121, 121–124 (discussing distinct features of Special Court).

¹⁴⁴ See *supra* note 128 and accompanying text (providing a definition of globalization); see also Berman, *supra* note 1, at 540 (discussing use of hybrid courts in context of a discussion on plural sources of legal authority, a phenomenon linked to globalization).

tional dimension.¹⁴⁵ International law, even in its most traditional form, encompassed the idea that individuals should be treated fairly during wartime.¹⁴⁶ This notion logically follows the main premise of traditional international law: states, at peacetime, have unlimited sovereignty within their territory.¹⁴⁷ At wartime, however, states transcend their borders and encroach on other states' sovereignty. Thus, special rules are needed to address situations in which jurisdictional lines become blurred and territory no longer equals sovereignty.¹⁴⁸

The multiple Hague Conventions stemming from the beginning of the twentieth century,¹⁴⁹ the four Geneva Conventions negotiated in the wake of World War II,¹⁵⁰ and the Conventions' two Additional Protocols,¹⁵¹ represent the bulk of international legal norms specifying codes of behavior during wartime, as they relate to both soldiers and civilians. These norms, crafted to handle traditional warfare where states and their armies fought in clearly delineated battlefields, proved insufficient in the face of modern wars—often brutal civil conflicts, involving para-military groups, guerrillas, civilians, and interference from neighboring states.¹⁵² Recognizing this problem, drafters of the above-mentioned international court statutes sought to criminalize offenses in a manner that would encompass specific conduct taking place in the

¹⁴⁵ YUSUF ASKAR, IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW 84 (2004) (noting importance of defining limits of individual criminal responsibility in ICTY and ICTR statutes).

¹⁴⁶ International law has long embraced the notion of *jus in bello*, commonly referred to as the law of war or international humanitarian law, which attempts to shield individuals from certain types of wartime harm, and which regulates the conduct of armed conflict. See DUNOFF ET AL., *supra* note 35, at 527.

¹⁴⁷ Parrish, *supra* note 136, at 294–96.

¹⁴⁸ DUNOFF ET AL., *supra* note 35, at 527 (describing development of law of war).

¹⁴⁹ “Hague law” refers to a series of conferences held in the Hague, producing a set of declarations and conventions, most notably in 1899 and 1907. *Id.*

¹⁵⁰ The Geneva Conventions of 1949 place numerous obligations on states to protect people in international armed conflict who are not actively engaged in hostilities. These people include the sick and the wounded (Convention No. 1), the sick and the wounded at sea (Convention No. 2), prisoners of war (Convention No. 3), and civilians (Convention No. 4). See generally Geneva Convention No. 4, *supra* note 101; Geneva Convention No. 3, *supra* note 101; Geneva Convention No. 2, *supra* note 101; Geneva Convention No. 1, *supra* note 101. In addition, Protocol I to the Geneva Conventions of 1977 includes additional rules covering international conflicts, and Protocol II to the same conventions includes rules covering internal armed conflict. Protocol Additional (No. 1) to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol II, *supra* note 122; see also DUNOFF ET AL., *supra* note 35, at 628, 638 (discussing subject matter of four Geneva Conventions).

¹⁵¹ Protocol II *supra* note 122; Protocol I, *supra* note 150.

¹⁵² DUNOFF ET AL., *supra* note 35, at 537–38.

new type of warfare. The ICC, ICTY, and ICTR statutes relied on the Nuremberg Charter to criminalize genocide and war crimes.¹⁵³ These statutes, however, expanded the Nuremberg idea of crimes against humanity that criminalized this offense purely during wartime,¹⁵⁴ into the notion of crimes against humanity applied equally to peace and wartime and to the new types of warfare.¹⁵⁵

Moreover, in the context of specific conflicts, statutes of some of the above tribunals adopted rules borrowed from domestic laws to criminalize conduct that was unique to the given war.¹⁵⁶ Thus, the Special Court for Sierra Leone statute gives the prosecutor the ability to indict individuals accused not only of the most heinous offenses, such as genocide, war crimes and crimes against humanity, but also of offenses specific to the civil war in Sierra Leone. These include offenses related to the abuse of girls, those related to the destruction of property, and those related to the use of child soldiers.¹⁵⁷ Similarly, the Extraordinary Chambers in the Courts of Cambodia criminalizes offenses such as the destruction of cultural property, crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations, as well as crimes of homicide, torture, and religious persecution as defined in the Cambodian domestic penal code.¹⁵⁸

¹⁵³ Charter of the International Military Tribunal at Nuremberg art. 6, 82 U.N.T.S. 279 (1945).

¹⁵⁴ *Id.* Under the Nuremberg Charter, the offense of crimes against humanity merely extended the offense of war crimes to the same category of protected person-civilian, so that crimes against humanity were reflections of an extension of war crimes. Thus, crimes committed before 1939 were excluded from prosecution under this offense.

¹⁵⁵ DUNOFF ET AL., *supra* note 35, at 621. Thus, article 7 of the ICC Statute embraces the definition of Crimes Against Humanity without requiring any nexus between the crime and a specific war. Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998). The ICTY and ICTR statutes adopt a similar definition of crimes against humanity. See Statute of the International Tribunal for Rwanda art. 3, 33 I.L.M. 1602, *available at* <http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf>, *adopted by* S.C. Res. 955, U.N. Doc. S/RES/955 (1994); Statute of the International Tribunal art. 5, 32 I.L.M. 1192, *available at* http://www.icls.de/dokumente/icty_statut.pdf, *adopted by* S.C. Res. 827, U.N. Doc. S/RES/827 (1993).

¹⁵⁶ SCHARF & MCNEAL, *supra* note 141, at 3 (noting that Iraqi High Tribunal's jurisdiction is comprised of a mix of international law crimes and domestic law crimes).

¹⁵⁷ Statute of the Special Court for Sierra Leone arts. 4 & 5, *available at* <https://www.sc-sl.org/scsl-statute.html>; see also Jonathan H. Marks, *Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council*, 42 COLUM. J. TRANSNAT'L L. 445, 480 (2004) (describing hybrid nature of Special Court's statute, which encompasses international as well as domestic criminal offenses).

¹⁵⁸ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea arts. 3, 7, & 8, *available at* <http://www.derechos.org/human-rights/seasia/doc/krlaw.html>.

The field of international criminal law, under the evolutionary influence of general international law, has thus transformed itself over the last two decades. The notion of inter-state relations as the governing mode of dialogue in international criminal law is no longer prevalent, and this field now governs individual criminal responsibility and extends to spheres traditionally left to purely domestic powers.

C. *Private International Law*

The globalization movement has played a particularly dominant role in the world of commerce. Large and even mid-size commercial operators no longer deal with local or regional partners; today, they frequently engage in cross-border business, dealing with foreign entities.¹⁵⁹ Laws governing such cross-border transactions have changed correspondingly.¹⁶⁰ We no longer deal with purely national commercial laws, but instead have to look for supra-national legal authority that has the power to regulate cross-border transactions.¹⁶¹ We have witnessed a rise of cross-border regulations, aiming to provide a legal framework for the globalized commercial world. At the same time, we have also witnessed a proliferation of actors. Traditionally, only states could conclude treaties, in which they could choose to protect their national business interests.¹⁶² Nowadays, commercial treaties are being concluded between states and foreign investors directly.¹⁶³ This public/private merger in the field of cross-border commercial law epitomizes the entire shift of international law from a body of law governing inter-state relations, to a complex web of regulations concluded between state and non-state actors and governing private entity-state relations.¹⁶⁴

¹⁵⁹ Sterio, *supra* note 70, at 97.

¹⁶⁰ *See id.*

¹⁶¹ Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT'L L. 931, 942–54 (2002) (discussing ways in which “regulatory power traditionally enjoyed by sovereign states has shifted” to supranational level, to private actors, and to “informal networks constituted among sub state-level agencies in different countries”).

¹⁶² *See* Vienna Convention on the Law of Treaties art. 2(1)(a), 1155 U.N.T.S. 331 (1969) (defining treaty as “an international agreement concluded between states . . . governed by international law”).

¹⁶³ *See* DUNOFF ET AL., *supra* note 35, at 216–17 (discussing corporations and businesses as international actors).

¹⁶⁴ *See* Berman, *supra* note 1, at 550 (noting that private parties today exercise forms of governmentally authorized power).

1. Creation of New Cross-Border Regulations

Over the past few decades, several cross-border regulations have been concluded to provide a legal regime for international transactions involving commercial entities coming from two or more different states.¹⁶⁵ In other words, in today's inter-connected world, globalization has dictated a harmonization of substantive rules in specific fields. This harmonization supersedes national rules and undermines the traditional concept of state sovereignty. It also illustrates the complexity of modern international law in its transformed or globalized version.

In the law of sales, the U.N. Convention on the International Sale of Goods (CISG) was negotiated, representing a set of default rules that contracting parties refer to if their international sale contract are silent on certain issues.¹⁶⁶ Under the CISG, transacting parties may opt out of any nation-state law and instead choose a sort of *lex mercatoria* to govern their interactions, dispensing altogether with the need to consult any state laws.¹⁶⁷

In the field of international trade, the WTO already plays a hugely significant role, providing not only a body of substantive rules, but a dispute settlement mechanism as well, which encompasses state commercial interests.¹⁶⁸ Under this mechanism, states act against each other like private commercial entities would in a typical private arbitration.¹⁶⁹ Moreover, the WTO appellate tribunals seem to be creating an international common law of trade and amassing a body of legal rules that challenge traditional conceptions of state sovereignty and override domestic court decisions.¹⁷⁰ Finally, NGOs and international civil soci-

¹⁶⁵ See *id.* at 520–23 (discussing undermining of public/private law distinction in field of private international law).

¹⁶⁶ See generally Convention on Contracts for the International Sale of Goods, 52 Fed. Reg. 6262, 6264–80 (Mar. 2, 1987).

¹⁶⁷ See Berman, *supra* note 1, at 522; Clayton Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT'L L. 157, 159 (2004).

¹⁶⁸ DUNOFF ET AL., *supra* note 35, at 834; Berman, *supra* note 1, at 521–22.

¹⁶⁹ Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT'L & COMP. L. 161, 169 (1996); see also William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORDHAM INT'L L.J. 427 (1995).

¹⁷⁰ See Bhala, *supra* note 29, at 850 (“In brief, there is a body of international common law on trade emerging as a result of adjudication by the WTO’s Appellate Body.”); Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA and International Harmonization of Standards*, 50 U. KAN. L. REV. 823, 825 (2002) (“Expansive international rules strongly enforced through international dispute resolution bodies have significant implications for the laws and policies domestic governments may establish, as well as for the processes domestic governments use to make policy.”).

ety groups have become active in the WTO process, attempting to use the appellate panels to further their specific goals, particularly in environmental and labor law.¹⁷¹

Also in the field of transnational trade, NAFTA plays a dominant role in the North American continent.¹⁷² Under NAFTA, private investors can challenge a NAFTA government's regulatory decision directly within the NAFTA dispute resolution system, thereby again challenging the notion of state sovereignty.¹⁷³ In the field of intellectual property, WIPO functions similarly to the WTO.¹⁷⁴ Moreover, numerous cross-border regulations exist in the securities and tax fields, which are particularly impacted by the globalization movement.¹⁷⁵ Finally, international trade association groups and their standard-setting organs wield tremendous influence in creating voluntary guidelines that become industry norms and often have strong public policy ramifications.¹⁷⁶

All of the above involve cross-border regulatory rules in the form of treaties. All of the above were negotiated by state parties, but were heavily influenced by private commercial interests, epitomizing again the private/public merger and the complexity of today's globalized international law. According to Michael Reisman, the term "private" in "private international law" is a "misnomer, for what is transpiring is

¹⁷¹ See Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407, 455 (2003).

¹⁷² See Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation in the Americas*, 33 ENVTL. L. 501, 507 (2003).

¹⁷³ See *id.*

¹⁷⁴ See Jeffrey K. Walker, *The Demise of the Nation-State, the Dawn of New Paradigm Welfare, a Future for the Profession of Arms*, 51 A.F. L. REV. 323, 327 (2001) (discussing how organizations such as WTO and WIPO have encroached on state sovereignty and that latter sets and enforces international trademark and patent policy).

¹⁷⁵ See generally Steven M. Davidoff, *Paradigm Shift: Federal Securities Regulation in the New Millennium* (Wayne State Univ. Law Sch. Legal Studies Research Paper Series, No. 08-05, 2008) available at <http://ssrn.com/abstract=1080087> (noting impact of globalization on securities regulation); Philipp Genschel, *Globalization, Tax Competition, and the Fiscal Viability of the Welfare State* (Max Planck Inst. for the Study of Soc'ys, Working Paper 01/1, 2001) available at <http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp01-1/wp01-1.html> (discussing influence of globalization on taxation).

¹⁷⁶ Berman, *supra* note 1, at 522-23. In the chemical industry, for example, the Canadian Chemical Manufacturers Association and the International Council of Chemical Associations have set industry standards in conjunction with other NGOs and environmental organizations. See Lee A. Tavis, *Corporate Governance and the Global Social Void*, 35 VAND. J. TRANSNAT'L L. 487, 508-09 (2002). As another example, the Fair Labor Association has created standards now accepted as the norm in the apparel industry. See Fair Labor Ass'n, *Workplace Code of Conduct and Principles of Monitoring*, available at <http://www.fairlabor.org/conduct>.

a fundamental interstate competition for power that falls squarely within the province of public international law.”¹⁷⁷ Private international law has thus transformed itself from a set of transnational rules governing non-state, commercial entities, to a body of supra-national laws and regulations, which govern relations among many different state and non-state entities.

2. Expanded Role of Non-State Commercial Actors

Following the rise of cross-border regulations, typically negotiated and concluded among states, private actors became more involved in international commerce, attempting to exercise a direct influence on states and to obtain favorable treatment in their business endeavors.¹⁷⁸ Private investors started lobbying their own governments to conclude so-called bilateral investment treaties (BITs) with developing countries.¹⁷⁹ Although BITs represent a traditional form of international lawmaking—treaties negotiated among states—they signal a shift in the type of actors present on the international scene.¹⁸⁰ BITs truly are about investors’ interests and their power to lobby and persuade their governments to conclude favorable treaties with foreign nations. They demonstrate that powerful private interests can act and influence the international treaty process, and that non-state actors have gained an important seat in the world of international relations.¹⁸¹

Following the proliferation of BITs, private investors began working directly with foreign nations on various financing projects, typically

¹⁷⁷ W. Michael Reisman, *Introduction to JURISDICTION IN INTERNATIONAL LAW*, at xi–xii (W. Michael Reisman ed., 1999).

¹⁷⁸ DUNOFF ET AL., *supra* note 35, at 860 (noting most of growth in international production over past decade has come from cross-border mergers and acquisitions).

¹⁷⁹ *Id.* at 861 (noting that several European states are entering into BITs with developing world, and that United States launched its own BIT program in 1977 and began to enter into BITs with developing states in 1980s).

¹⁸⁰ As noted above, traditionally only states could be subject to international law—whenever wronged a person indirectly harmed his state. The harmed individual had to persuade his state to adopt his grievance on the international level against the offending state. The pursuit of such claims by states in the commercial world is problematic for political, diplomatic, and foreign policy reasons. Thus, with the rise of foreign investment, pressures built for alternative mechanisms, and BITs, which provide strong investor protection as well as a dispute settlement procedure, are one of the responses. *Id.* at 869.

¹⁸¹ Private investors also have important protection, besides BITs, under the ICSID Convention. Under this Convention, private parties have direct access to an international arbitral forum to pursue claims against host states—namely, the ICSID, an institution closely associated with the World Bank. *Id.* at 870.

linked to building infrastructure in developing countries.¹⁸² Private investors started concluding commercial contracts directly with foreign governments that specify the investors' role in the particular building project.¹⁸³ This phenomenon, typically referred to as "project finance,"¹⁸⁴ demonstrates that everything about traditional commercial law has changed. For one, commercial agreements are no longer negotiated simply by states, but they also involve private entities as direct contracting partners.¹⁸⁵ Additionally, the subject matter of treaties has shifted from detailing particular state interests and trade-offs, to focusing on investment relations and the rights and liabilities of private investors.¹⁸⁶ Finally, these project finance agreements signal that states are willing to relinquish a tremendous amount of their sovereign power to private entities.¹⁸⁷ For example, states will allow private operators to run their roads, dams, factories, and plants.¹⁸⁸ Globalization, in this context, has impacted state behavior in a powerful way, by transferring sovereign-type powers to non-state actors and by involving the latter heavily in the commercial negotiation process.

III. THE IMPACT OF GLOBALIZED INTERNATIONAL LAW

As described above, international law has transformed itself over the past few decades and now represents a complex body of global rules and regulations that apply to a vast field of state and non-state actors.¹⁸⁹ Although the latter phenomenon is relatively non-controversial and has already received significant scholarly attention,¹⁹⁰ the relevant question for the purposes of this Article is whether such globalized international law has had a significant impact on international legal ac-

¹⁸² Dinesh D. Banani, Note, *International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction*, 26 B.C. INT'L & COMP. L. REV. 355, 358 (2003).

¹⁸³ See CARTER ET AL., *supra* note 19, at 15 (noting rise of foreign investment in context of evolving role of individuals in international law); Richard A. Brealey et al., *Using Project Finance to Fund Infrastructure Investments*, 9 J. APPLIED CORP. FIN. 25, 25-38 (1996).

¹⁸⁴ See Brealey, *supra* note 183, at 25 (noting that in recent years, private funding of large infrastructure investments has increasingly taken form of project finance, and describing main characteristics of such financings).

¹⁸⁵ Banani, *supra* note 182, at 357 (noting that infrastructure development has been increasingly funded by private capital).

¹⁸⁶ *Id.* at 356 (describing need for investor protection in project finance agreements).

¹⁸⁷ *Id.* at 373-74 (describing risks to state sovereignty that private finances causes).

¹⁸⁸ See Berman, *supra* note 1, at 550 (noting that states are increasing delegating authority to private actors).

¹⁸⁹ See *supra* Part I.

¹⁹⁰ See generally Berman, *supra* note 22; Sands, *supra* note 1.

tors. First, to what extent, if any, has globalized international law affected state behavior; and, second, to what extent, if any, has it affected individual behavior?

A. State Behavior

International law now displays a globalized shape: it covers a wide variety of legal fields, it encompasses a myriad of different rules and regulations, and it governs state as well as non-state behavior.¹⁹¹ In light of such a radical transformation, the relevant inquiry focuses on understanding how such transformation has affected state actors, and whether their behavior on the international scene has changed in considerable ways.¹⁹² Thus, this Article examines two different phenomena in this Part: (1) whether states comply with globalized international law more willingly than they did decades ago, when international law exhibited a more traditional form; and (2) whether states are more prone to incorporating globalized international law into their own domestic laws or to relying on globalized international law in their international relations. All these observations can be simplistically explained by the fact that lines between international and domestic legal domains have become so blurred that states no longer view international law as the “enemy.”

1. Willing Compliance Phenomenon

Because international law is omni-present in state life, it seems that it no longer meets the same resentment it did in some legal cultures throughout the past century.¹⁹³ Moreover, it seems that Louis Henkin’s famed observation, that most states obey their international legal obligations most of the time, is becoming truer by the day.¹⁹⁴ Particularly

¹⁹¹ See Cohan, *supra* note 4, at 954 (“Today there is a veritable panoply of treaties, regional agreements, U.N. Declarations, and other protocols that globalization is pushing toward a[n] orderless world so that domestic actions in one state can have rippling effects that impact other states.”).

¹⁹² See *id.*

¹⁹³ The United States, for example, was overtly hostile to international law at the beginning of the twentieth century, as exemplified in its isolationist doctrine, which dominated U.S. foreign policy between the two world wars, and resulted in U.S. refusal to join the League of Nations. See, e.g., Bassiouni, *supra* note 123, at 20 (“By then, the United States was in the throes of isolationism, with its rejection of President Woodrow Wilson’s internationalist views, evidenced by Congress’ refusal to have the United States become part of the League of Nations.”); WBUR, U.S. Foreign Policy, 1776–2001, http://www.wbur.org/special/special-coverage/feature_isolation.asp (last visited May 10, 2008).

¹⁹⁴ See LOUIS HENKIN, *HOW NATIONS BEHAVE* 320–21 (2d ed. 1979).

relevant, however, is the reason behind such state compliance.¹⁹⁵ This Article argues that the evolution of international law into a globalized *force majeure* has instilled a legal sense of obligation in states toward this new globalized international law. Because international law no longer entails mainly state relations, any state behavior on the international scene today necessarily affects a wide range of actors. Thus, states, when they (mis)behave, have to account for a variety of consequences that their (mis)behavior will produce: they have to envision the impacted state, as well as non-state actors; they have to calculate whether any of their international legal obligations under the myriad of international treaties they may be party to will be triggered; and they have to fear any grievances that may be asserted against them in a variety of possible jurisdictions. When such a complicated calculus must be performed before any state action, this Article argues that states are likely more willing to take international law into account, or to at least try not to disrespect it in a blatant manner.

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

For example, after the terrorist attacks on the United States on September 11, 2001, the Bush administration chose to detain so-called enemy combatants at the Guantanamo military base in Cuba.¹⁹⁶ Under

¹⁹⁵ There are many theories of compliance with international law, the major ones being institutionalism, constructivism, the New Haven School, a Kantian model, and a managerial model. See DUNOFF ET AL., *supra* note 35, at 30–31; see also Koh, *supra* note 36, at 566–70 (discussing emergence of transnational law as a reason for compliance with international law). See generally Berman, *supra* note 22 (arguing that approach to international law should be a mixture of Robert Cover’s legal pluralism and insights of the New Haven School); Harold Hongju Koh, *Filartiga v. Pena-Irala: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, in INTERNATIONAL LAW STORIES, *supra* note 32, at 45, 67–73 (using *Filartiga* to illustrate a key claim of the “New New Haven School of International Law” about application of international law by individual countries).

¹⁹⁶ See Oona A. Hathaway, *Hamdan v. Rumsfeld: Domestic Enforcement of International Law*, in INTERNATIONAL LAW STORIES, *supra* note 32, at 229, 234 (describing establishment of U.S. military detention center at Guantanamo Bay); see also DUNOFF ET AL., *supra* note 35, at 999 (discussing establishment of Guantanamo detainee program).

a traditional version of international law, the United States would be concerned only about the impact this detention had on the parent state of the detainees.¹⁹⁷ Other than those states, the United States would evidently be free to treat the detainees as it wished, within the purview of its domestic law.¹⁹⁸ The globalization movement that has transformed international law brings a major change in the above analysis.

First, the United States must now consider not only relevant state actors, but also a number of non-state and supra-state actors. In addition to concerns raised by the home states of detained individuals, the United States has received a vast number of complaints about the Guantanamo detention facility from a variety of NGOs, regional state organizations, and human rights protection bodies.¹⁹⁹ Moreover, the United States can no longer consider only whether the detention program is legal under its domestic law; it must also consider all relevant international conventions to which it is a member.²⁰⁰ Thus, the United States could very well interpret the detention program as legal under its Constitution and Bill of Rights, but the same conclusion may not hold true under the four Geneva Conventions, the Hague Conventions, or the Torture Convention. To complicate things further, the evolutionary process of international law has elevated certain legal principles to the status of customary norms, which bind all states in a conclusory manner without room for derogations or reservations, even if states are not parties to specific treaties codifying the legal norms.²⁰¹ Thus, if U.S. treatment of Guantanamo detainees were to violate a customary norm

¹⁹⁷ For a general discussion of the difference between the traditional version of international law, and the globalized or evolutionary version of international law, see *supra* Part II.

¹⁹⁸ See Cohan, *supra* note 4, at 914–15 (discussing “Westphalian sovereignty,” or the right of a sovereign state to be left alone from external interference).

¹⁹⁹ See Hathaway, *supra* note 196, at 235–36 (describing criticism Bush Administration received because of alleged abuse of Guantanamo detainees).

²⁰⁰ See *id.* at 235. The Bush Administration effectively claimed that the Geneva Conventions did not apply to the conflict with al Qaeda. This shows that the Bush Administration, although adamant about its desire to continue the Guantanamo detention program, saw the need to justify its actions internationally, and to prove that they were in compliance with U.S. international legal obligations. See *id.* It is also worth noting that the U.S. Supreme Court—possibly because of domestic and international criticism of the Bush Administration—ultimately held that the military commissions designed to try al Qaeda detainees violated Common Article 3 of the 1949 Geneva Conventions. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

²⁰¹ See DUNOFF ET AL., *supra* note 35, at 78–81 (providing general discussion of international custom). States can choose to “opt out” of an emerging customary norm by objecting to the rule as it develops. *Id.* at 78. Once a norm reaches the status of international custom, however, all states are bound by it. *Id.*

of international law, such treatment would be a violation of international law, although legal under domestic law.

Finally, the United States must both consider the effect of its actions on the proliferating number of relevant actors impacted by its behavior and the implicated legal norms, as well as account for a number of jurisdictions that may choose to challenge the United States as a country, or some of its leaders, if U.S. behavior becomes so offensive as to warrant judicial proceedings. States may assert grievances against the United States in the ICJ, a traditional form of state-to-state complaint procedure.²⁰² Additionally, state and non-state actors may complain about the United States to committees or judicial bodies set up under various international conventions, regional organizations, or other human rights protection mechanisms.²⁰³ Such state and non-state actors may directly target top U.S. political leaders through criminal complaints brought in foreign domestic courts,²⁰⁴ or even international courts, under their expansive jurisdiction statutes.²⁰⁵ Thus, in light of all the legal challenges such a program may face on the international level, this Article argues that a country like the United States should at least think twice before instituting such a program as Guantanamo.

In the specific case of the United States, international law has not necessarily changed the Guantanamo policy at stake. International law has however, certainly provoked a vigorous public debate at both the international and national levels concerning the legality of the policy.²⁰⁶ The existence of such a debate signals the erosion of state sover-

²⁰² See Statute of the International Court of Justice art. 36, June 26, 1945, 33 U.N.T.S. 993. ICJ jurisdiction is based on state consent, so that any exercise of jurisdiction by the tribunal would have to be based on a treaty or on *ad hoc* consent. See *id.*

²⁰³ See DUNOFF ET AL., *supra* note 35, at 450 (describing Torture Convention mechanism); Grossman, *supra* note 32, at 81–83; David Seymour & Jennifer Tooze, *The Soering Case: The Long Reach of the European Convention on Human Rights*, in INTERNATIONAL LAW STORIES, *supra* note 32, at 115, 118–19 (describing Convention on Human Rights' complaint procedure whereby individuals can bring claims against states).

²⁰⁴ See DUNOFF ET AL., *supra* note 35, at 383. For example, a complaint was filed with the German Federal Prosecutor's Office against U.S. Secretary of Defense Donald Rumsfeld and other government officials by a U.S.-based NGO and several Iraqi citizens alleging that the officials were responsible for unlawful acts committed against detainees at the Abu Ghraib prison and elsewhere. *Id.* The complaint was brought under the German universal jurisdiction statute. *Id.* Although this complaint was ultimately dismissed by the German Prosecuting Attorney, it nonetheless signals the possibility that U.S. leaders may face prosecution in a foreign domestic court. See *id.*

²⁰⁵ For a discussion of universal jurisdiction statutes, see *supra* Part I.D.

²⁰⁶ Cohan, *supra* note 4, at 942 ("Subsequently, human rights and civil liberties organizations, politicians, and newspapers brought further pressure upon the Bush Administra-

eignty brought about by the evolutionary process that has been transforming international law. This erosion of state sovereignty translates itself into a heightened level of compliance with international law. Although compliance might be a direct product of a pragmatic calculus, whereby states realize it may be strategically advantageous for them to obey an international rule, this Article argues that it nonetheless signals a phenomenon of willing legal obedience. Continuous repetition of willing state compliance with international law may instill a profound sense of legal obligation in states' behavior in the years to come.

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

Willing compliance with international law has already shaped state behavior in two ways.²⁰⁷ First, states seem willing to comply with international law on a new level—by relying on it directly in domestic legal arenas. Second, states seem eager to rely on international law to justify specific actions in international relations with other states or entities.

Traditionally, only a monist system encompasses international law as part of domestic law.²⁰⁸ In a dualist system, a particular international legal norm must first be incorporated into domestic law by a specific statute. Similarly, in a traditional system, national jurisdictions are independent of the ICJ, and the ICJ is not supposed to function as a supra-national entity.²⁰⁹ Yet, the globalization of international law has blurred these lines as well. Because international law touches on so many aspects of everyday life, and now pertains to issues that had been traditionally left to the realm of domestic law, when asked to resolve such issues, domestic courts are increasingly faced with international norms or rulings by the ICJ or other supra-national courts.²¹⁰ This is particularly true in the human rights legal field.

tion to close the [Guantanamo] detention center.”); *see also* Hathaway, *supra* note 196, at 236 (noting that Bush administration faces pressure to close Guantanamo).

²⁰⁷ *See supra* Part III.A.1.

²⁰⁸ DUNOFF ET AL., *supra* note 35, at 267–68.

²⁰⁹ Statute of the International Court of Justice, *supra* note 203, art. 36. Under the ICJ Statute, the tribunal's jurisdiction is based solely on state consent. *Id.*

²¹⁰ *See, e.g.*, *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) 486–99 (1989). In *Soering*, the European Court of Human Rights held that extradition of a German national accused of murder from the United Kingdom to the United States breached article 3 of the European Convention on Human Rights. Extradition would violate this article, which bans torture or inhuman or degrading treatment or punishment, because the defendant would be subject to the death penalty and “death row phenomenon” (the psychological degradation caused by living on death row). *See id.*

For example, litigation under the Alien Tort Statute in the United States, revived in the *Filartiga* case,²¹¹ centers around violations of the law of nations. Thus, U.S. domestic courts are called on to decide when there has been a violation of international law that would warrant damages in the domestic legal system.²¹² General Augusto Pinochet's extradition proceedings between the United Kingdom and Spain required domestic courts, particularly in the United Kingdom, to interpret the multilateral Torture Convention and how its diplomatic immunity provision would affect Great Britain's legal obligations *vis-à-vis* the relevant parties.²¹³ More recently, an Oklahoma criminal court specifically relied on an ICJ ruling²¹⁴ in a case involving the claim that the United States had violated the Vienna Convention on Consular Relations (Vienna Convention).²¹⁵ The Oklahoma court gave specific deference to the ICJ's interpretation of the Vienna Convention and held the United States was bound by the Vienna Convention, and more importantly, by the ICJ interpretation thereof.²¹⁶ Thus, on a judicial level, states, and in particular their judges, seem more willing to rely on international law in reaching everyday decisions because international law now governs and influences a growing variety of legal areas.²¹⁷

²¹¹ See *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980).

²¹² See Koh, *supra* note 36, at 65–66 (describing an era of “transnational public law litigation,” a novel and expanding effort by state and individual plaintiffs to fuse international legal rights with domestic legal remedies”).

²¹³ See *Regina v. Bow Street Magistrate, ex parte Pinochet Ugarte* (No. 3), (2000) 1 A.C. 147, 148–49 (H.L.) (U.K.).

²¹⁴ *Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J. 1 (Mar. 31). The ICJ held that the United States breached its obligation under article 36(1)(a) of the Vienna Convention on Consular Relations to ensure that Mexican consular officials can communicate with their nationals and, under article 36(1)(c), have the right to visit their nationals in detention. *Id.* ¶ 153. The ICJ held that “the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases by the [U.S.] courts . . . with a view to ascertaining whether in each case the violation of Article 36 . . . caused actual prejudice to the defendant in the process of administration of criminal justice.” *Id.* ¶ 121.

²¹⁵ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

²¹⁶ See *Torres v. State*, No. PCD-04-442, 2004 WL 3711623, (Okla. Crim. App. May 13, 2004). Judge Chapel stated that his court was, without any doubt, bound by the Vienna Convention, and thus also bound to give full faith and credit to the ICJ's *Avena* decision. *Id.* at *1–5.

²¹⁷ DUNOFF ET AL., *supra* note 35, at 29 (alleging that both “breadth” and “depth” of international law have increased). The U.S. Supreme Court has shown a particular willingness to consider international law. In *Thompson v. Oklahoma*, the Court determined that the Eighth Amendment's Cruel and Unusual Punishment Clause prohibited the execution of any offender under the age of sixteen at the time the crime was committed. The Court stated that this view was consistent with views expressed by “other nations that share our

Additionally, states seem more willing to rely on international law on a diplomatic level. In their international relations, states like to have the international law “crutch” and be able to pronounce the legality of their actions under international law. Because international law now touches on so many legal areas, states seem to rely on it in many more aspects of their diplomacy. International law experts have taken up predominant positions in governments, and virtually every foreign policy or diplomacy decision is scrutinized for its coherence under international law.²¹⁸

For example, when NATO countries decided to launch air strikes on the territory of the former Yugoslavia because of then-President Milosevic’s oppressive rule of the province of Kosovo, they sought U.N. Security Council approval for their use of force.²¹⁹ Even when the U.N. fell short of approving such use of force, NATO countries still sought to justify their actions on the ground of international necessity,²²⁰ al-

Anglo-American heritage, and by the leading members of the Western European community.” 487 U.S. 815, 830 (1988). In *Roper v. Simmons*, another case interpreting the Eighth Amendment in connection with a juvenile offender, the Court wrote that it was appropriate to refer “to the laws of other countries and to international authorities.” 543 U.S. 551, 575 (2005). The Court specifically considered the U.N. Convention on the Rights of the Child, which the United States has not ratified, and which bans capital punishment for crimes committed by juveniles under eighteen. *See id.* at 576. The Court further stated, “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” *Id.* at 578. Even Justice O’Connor, in her dissent, acknowledged that “[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.” *Id.* at 604 (O’Connor, J., dissenting).

Note, however, that the U.S. Supreme Court has recently shown skepticism regarding the enforceability of international law in domestic courts, holding that the Vienna Convention was not self-executing and that the U.S. President could not order states to abide by ICJ rulings. *See Medellin v. Texas*, 128 S. Ct. 1346, 1351 (2008). This decision does not imply that international law will be entirely displaced from our judicial dialogue; rather, this decision may simply reflect the notion that, in most cases, congressional action must be taken in order to ratify international law and implement it domestically.

²¹⁸ Guillaume Sacriste & Antoine Vauchez, *The Force of International Law: Lawyers’ Diplomacy on the International Scene in the 1920s*, 32 L. & SOC. INQUIRY 83, 87 (2007) (observing existence of “gentlemen-politicians at law,” who are international legal experts working as advisors to their governments).

²¹⁹ John J. Merriam, Note, *Kosovo and the Law of Humanitarian Intervention*, 33 CASE W. RES. J. INT’L L. 111, 144 (2001) (noting that NATO chose to act unilaterally in Kosovo because Security Council was deadlocked). NATO members ultimately decided not to seek U.N. Security Council approval for their action in Kosovo because of Russia’s threatened veto. DUNOFF ET AL., *supra* note 35, at 940.

²²⁰ *See* Press Release, Javier Solana, Secretary-General of NATO, NATO Press Release 040 (March 23, 1999). NATO Secretary-General Javier Solana, in his statement announcing the start of air strikes on the territory of the Federal Republic of Yugoslavia, referred to “military action . . . intended to support the political aims of the international commu-

though, arguably, NATO members were acting within their jurisdiction and had at least regional authority to act.²²¹ This signifies that international law truly matters, and that powerful organizations like NATO would rather comply with international law, taking action that is not authorized internationally only when deemed truly necessary. For example, the U.S. government sought U.N. Security Council approval for both Gulf Wars, even though the United States had the military capacity to act unilaterally and had invoked self-defense grounds, which would have justified the use of force without Security Council approval.²²² It can be argued that the United States sought U.N. affirmation for strategic or diplomatic reasons, but it can be equally argued that part of the affirmation process included a belief in the necessity of compliance with international law.

B. *Individual Behavior*

The above-described calculus that states now perform when faced with assessing the validity of their behavior in light of globalized international law also pertains to individuals.²²³ In other words, in the same manner that states' behavior seems curtailed by the evolving and expanding forces of international law, individual rights appear to be gaining greater protection from state intrusion. Thus, the evolution and globalization of international law that has eroded state sovereignty has provided a sphere of protection to the individual—a sort of a buffer zone between individual rights and states' prerogatives to regulate individual behavior. Individuals, in this new spectrum of protection stem-

ity," "humanitarian catastrophe," and "instability spreading in the region," but never evoked a specific legal ground to justify the invasion. *Id.*

²²¹ North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. NATO has jurisdiction in Europe and is charged with maintaining peace and security on that continent by enabling member countries to exercise collective self-defense if one or more of such member countries are under an armed attack. *See id.*; *see also* CARTER ET AL., *supra* note 19, at 549 (describing role of NATO).

²²² DUNOFF ET AL., *supra* note 35, at 891 (noting that United States sought U.N. Security Council authorization to use force in First Gulf War); *id.* at 894–95 (discussing issue of whether United States could have legally used force in First Gulf War in absence of Security Council authorization, on ground of self-defense); *id.* at 905–08 (describing U.S. efforts to obtain Security Council authorization to use force in second Gulf War, and, once efforts failed, its ultimate decision to use force without Security Council approval). Note also that the United States, as well as its allies in the second Gulf War, attempted to justify legally their decision to use force in various Security Council resolutions. *Id.* at 908–09. This exemplifies the importance of international legal justification for controversial actions on the international level, even for powerful countries like the United States. *See id.*

²²³ *See supra* Part III.A.1 (discussing "willing compliance" phenomenon whereby states comply with their international legal obligations more willingly today).

ming from globalized international law, now have different expectations about what states can do to them, as well as newly created rights enforceable in various courts of law.²²⁴

1. Expanded Individual Expectations in the Face of Globalized International Law

Individuals today expect more protection from international law. Because international law has become omni-present in everyday life, individuals can find a protectionist international legal norm in almost every aspect of their lives. For example, international human rights norms protect the individual from undue state interference with basic rights, such as the rights to be free of torture, to have one's human dignity respected, to have counsel appointed, to vote, and to receive a general education.²²⁵ International labor laws protect individual workers and place limits on the rights of their employers.²²⁶ International environmental laws provide the individual with a healthy living environment.²²⁷ International tax laws ensure that individuals do not have to pay their taxes multiple times if they are involved in international transactions.²²⁸

²²⁴ See *infra* Part III.B.1.

²²⁵ See generally ICCPR, *supra* note 81; ICESCR, *supra* note 81; Universal Declaration of Human Rights, *supra* note 81. Many of these basic human rights stem from the so-called International Bill of Rights, consisting of the Universal Declaration, the ICCPR, and the ICESCR. See generally ICCPR, *supra* note 81; ICESCR, *supra* note 81; Universal Declaration of Human Rights, *supra* note 81.

²²⁶ David M. Trubek, *Emergence of Transnational Labor Law*, 100 AM. J. INT'L L. 725, 727 (2006) (discussing "transnational labor law" or a regime of protection of workers' rights). The International Labour Organization has maintained and developed international labor standards. For a complete database of conventions and recommendations setting forth international labor standards, see ILOLEX: Database of International Labour Standards, <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited May 10, 2008).

²²⁷ See, e.g., Rio Declaration on Environment and Development, June 14, 1992, U.N. Conference on Environment and Development, Doc. A/CONF.151/5/Rev. 1, *reprinted in* 31 I.L.M. 874 (1992); Declaration of the U.N. Conference on the Human Environment, June 16, 1972, U.N. Doc. A/Conf. 48/14, *reprinted in* 11 I.L.M. 1416 (1972).

²²⁸ See generally INTERNAL REVENUE SERV., U.S. TAX TREATIES (2007) (describing tax exemptions provided by U.S. treaties), *available at* www.irs.gov/pb/irs-pdf/p901.pdf; HM REVENUE & CUSTOMS, DIGEST OF DOUBLE TAXATION TREATIES (2007) (describing double taxation treaties to which United Kingdom is party), *available at* www.hmrc.gov.uk/cnr/dtdigest.pdf. Numerous countries have concluded bilateral taxation treaties exempting their citizens or residents from being subject of double taxation, which occurs when two or more taxes may need to be paid for the same asset, financial transaction and/or income, arising from an overlap between different countries' tax laws and jurisdictions. EU member states have concluded a multilateral agreement on information exchange. This means that they will each report (to their counterparts in each other jurisdiction) a list of those

Such a protectionist structure directly affects individuals by providing a shield, a web of rules and regulations that ensure individuals are not unnecessarily burdened by the state. Unsurprisingly, individual expectations have changed. Individuals no longer believe in absolute state sovereignty. Individuals today can easily consult international law on many different aspects of their lives. When faced with a question of state powers—e.g., can my state do this to me?—individuals are likely to look to international law as a shield and to invoke international legal norms to curb state behavior.²²⁹ Most importantly, individuals are likely to invoke specific international legal norms as bestowing certain rights on them, and as taking away such rights from their home states.²³⁰

2. Newly Created Individual Rights in Light of Globalized International Law

The globalization forces that have transformed international law and confined state behavior as well as expanded individual expectations, have also affected specific individual rights.²³¹ Individual rights are typically created by domestic legal systems. These are known as private, judicially enforceable rights.²³² In a dualist legal system, international law needs to be specifically incorporated into domestic law

savers who have claimed exemption from local taxation on grounds of not being a resident of the state where the income arises. These savers should have declared that foreign income in their own country of residence, so any difference suggests tax evasion. See European Commission, Taxation and Customs Union, http://ec.europa.eu/taxation_customs/taxation/gen_info/tax_policy/index_en.htm (last visited May 15, 2008) (providing overview of EU tax policies).

²²⁹ See, e.g., *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 1 (1998) (concerning U.K. citizen claiming campaign contribution laws violated her free speech rights under Convention for Protection of Human Rights and Fundamental Freedoms).

²³⁰ See, e.g., *id.* As a corollary to this protectionist nature of globalized international law, it is important to note that the evolution of certain international legal fields, such as international criminal law, has expanded individual liability, thus imposing additional limitations on individual behavior. For example, the concept of international criminal responsibility evolved over the latter half of the twentieth century, and was implemented particularly in the 1990s in the judicial proceedings that have taken place in the ICTY and ICTR. See *supra* Part III.B; see also ASKAR, *supra* note 145, at 84–112 (discussing different types of individual criminal responsibility as they exist in ICTY, ICTR, and ICC statutes). For literature on the work of the ICTY and ICTR and their role in implementing the notion of individual criminal responsibility, see Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 A.J.I.L. 407 (2004); Dermot Groome, Book Review, *International Crimes and the Ad Hoc Tribunals*, 100 A.J.I.L. 993 (2006); Theodor Meron, *Centennial Essay: Reflections on the Prosecution of War Crimes by International Tribunals*, 100 A.J.I.L. 551 (2006).

²³¹ See *supra* Parts III.A & B.1.

²³² For a discussion of private, judicially enforceable rights, see Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59.

by the passage of specific statutes; thus, an international legal norm may only protect private, individual rights to the extent that the incorporating domestic statute allows.²³³ This result, however, seems to have been somewhat undermined by recent litigation challenging this traditionalist conception and seeking to establish that individuals can sometimes rely on international law directly to have their individual rights protected in a domestic court of law.²³⁴

Several examples of such litigation occurred in the United States, a dualist legal system. There had been significant judicial debate over the issue of whether article 36 of the Vienna Convention creates a private, judicially enforceable right.²³⁵ Litigation in the United States centered around the question of whether private plaintiffs could directly rely on this international convention to have their private rights enforced and protected by U.S. courts.²³⁶ Although the majority of the Court chose not to answer this question directly in the latest case it heard on the issue,²³⁷ the dissent strongly pointed out that the Vienna Convention is a self-executing treaty, and that its provisions are such that “they are intended to set forth standards that are judicially enforceable.”²³⁸ Although the majority left the issue unanswered, the dissent suggested it would be prudent to let the individual rely on this international treaty directly, indicating a desire to recognize the importance of international protectionist norms on the rights of the individual.²³⁹

In Europe, such a shift already occurred in the second half on the twentieth century. There, individual rights are specifically protected under the European Convention on Human Rights, and individuals can bring specific grievances against their home countries in the Euro-

²³³ DUNOFF ET AL., *supra* note 35, at 268.

²³⁴ See, e.g., *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006); *Medellin v. Dretke*, 544 U.S. 660 (2005); *Breard v. Greene*, 523 U.S. 371 (1998).

²³⁵ See, e.g., *Sanchez-Llamas*, 126 S. Ct. 2669; *Medellin*, 544 U.S. 660; *Breard*, 523 U.S. 371. Article 36 of the Vienna Convention states that “if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. . . . The said authorities shall inform the person concerned without delay of his rights under this subparagraph.” Vienna Convention, *supra* note 166, art. 36(1)(b).

²³⁶ Several foreign plaintiffs have raised this argument unsuccessfully in U.S. courts. See, e.g., *Medellin*, 544 U.S. 660; *Breard*, 523 U.S. 371.

²³⁷ *Sanchez-Llamas*, 126 S. Ct. 2669.

²³⁸ *Id.* at 2695 (Breyer J., dissenting).

²³⁹ *Id.* at 2698. The dissent noted that “the language, the nature of the right, and the ICJ’s interpretation of the treaty taken separately or together so strongly point to an intent to confer enforceable rights.” *Id.*

pean Court of Human Rights.²⁴⁰ Thus, individuals in Europe can rely on this multilateral treaty to have their rights protected and enforced in an international tribunal, and subsequently, in domestic tribunals that follow the European Court's directive.²⁴¹

Furthermore, European individuals and corporate non-state actors have other newly created rights stemming from a variety of EU Regulations and Directives, which offer protection on many levels, including antitrust, labor, insurance, and health.²⁴² Thus, the globalization trend in international law that has been transforming the world seems to have particularly embedded itself in Europe. In the United States, the trend seems weaker; nonetheless, U.S. courts appear at least more willing to consider international protectionist norms and their impact on individual rights.²⁴³

Individual expectations and behavior have changed across the globe in light of the powerful influence of globalized international law, which has eroded state sovereignty in significant ways and granted the individual certain quasi-absolute rights and protections.²⁴⁴ The degree of protection afforded to the individual by modern-day international law may vary from region to region and country to country, but a core group of individual rights seem to have been firmly embedded in almost every nation's legal culture, a phenomenon brought about by the potent forces of globalized international law.

CONCLUSION

The powerful forces of globalization have transformed international law through a process of evolution, which has had significant consequences on this legal field. Besides the proliferation of actors, processes, and sources in international law, this evolution has heavily impacted several legal fields, in particular human rights law, international criminal law, and private international law. The evolutionary

²⁴⁰ See *Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 1 (1998); Sands, *supra* note 1, at 546–47.

²⁴¹ Seymour & Tooze, *supra* note 203, at 119 (noting that judgments of European Court of Human Rights are binding on states as a matter of international law).

²⁴² For a general discussion on the vast EU regulatory powers, see Peter L. Strauss, *Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice Versa*, 12 COLUM. J. EUR. L. 645 (2006); see also CARTER ET AL., *supra* note 19, at 520–49 (discussing different kinds of legislative acts that can be adopted by European Community, including regulations and directives); Cohan, *supra* note 4, at 940 (describing expansive EU role and fact that it has gained “legal supremacy over Member States”).

²⁴³ See, e.g., *Sanchez-Llamas*, 126 S. Ct. 266; *Medellin*, 544 U.S. 660; *Breard*, 523 U.S. 371.

²⁴⁴ See *supra* Parts III.A & B.

process has also magnified the impact of international law, in its globalized shape and form, on state behavior and individual expectations. Although state powers and sovereignty seem to have been curtailed by this evolutionary process, by the same token, individual powers have been reinforced and reinvented through new transnational judicial norms and processes. How far the evolution of international law will take us remains uncertain, but it seems likely that international law will play a crucial role in the future life of both state and non-state entities, and that its study will require a truly elaborate approach.²⁴⁵

²⁴⁵ Scholars of the so-called “New” New Haven School of International Law have already started exploring the problem of finding the proper approach to the study of such a complex field as modern international law, and recommend the use of a pluralist approach, an inter-disciplinary focus, and as a commitment to the study of transnational law. See generally Berman, *supra* note 23; Laura A. Dickinson, *Toward a “New” New Haven School of International Law?*, 32 YALE J. INT’L L. 547 (2007); Koh, *supra* note 36. This Article focuses on the evolution of international law in light of globalization, and will leave the question of how to study such globalized international law to future endeavors.

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