

Matthias Herdegen

The Dynamics of International Law in a Globalised World

Cosmopolitan Values,
Constructive Consent and
Diversity of Legal Cultures



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Werner Gephart

Towards a Sociology of International Law: Between universalistic trends and particularistic claims

Before a close reading of Matthias Herdegen's marvellous book, which might well become a real compendium in the debate about international law in a global context, a closer look at the sometimes bewildering debate about globalisation might be useful. Different disciplines associate different things with the *concept of globality*. This can have various reasons tracing all the way back to founding myths of academic research landscapes. When speaking of the global level theoretically, empirically or historically, we rely on a variety of semantics: 'globalisation', 'world society', 'world culture', 'global capitalism', or highlight historical or intercultural interweavements in a global context. It should not be overlooked that these various terms might not only relate to different dimensions of globality, but also demarcate different discursive access points. Moreover, very specific spaces of meaning of globality are opened up depending on which topography of world society is put in focus: religion, politics, economics, or the law. Which new insights can then be gained by setting our research focus on 'Law as Culture' or opening it up to 'global' challenges? What consequences does this entail for following our own semantic habits, familiar to us from our own disciplines? And is it true that, in view of global developmental dynamics, we should remove the fixation on 'methodological nationalism' from our basic concepts and methodological approaches and learn to conceive them anew in the framework of a 'methodological cosmopolitanism', as some have demanded?

In the course of multi-dimensional globalisation, normative cultures have also moved closer together. At the same time, however, a retreat to local, traditional normative orders is to be observed. The particularistic tendencies occur *a fortiori* when their validity is religiously based. Law does not merely consist of the thin air of jurists' law and the autonomous laws of legal systems, but also of the exchange with the cultural basis of society. Both the hurdles to a – often welcomed – universalisation of legal conceptions and the access to the idiosyncrasies of particularistic images of law remain in the dark if they are exclusively dealt with from the perspective of the *quid juris* question. Whether it be human rights or questions

of global equality, whether it be questions of environmental law or international economic law, the influence of culture is felt everywhere. This understandably results in a growing need for translation on the level of normative legal policy and calls for new analytical and multi-disciplinary procedures in the social and legal sciences. However, the very well developed globalisation discourse, as can be seen from Wallerstein to Giddens, from Albrow to Luhmann and Beck, and from Bhaba to Chakrabarty, has had only little effect in the field of law, even though such venerable subjects as comparative law and disciplines of international law are well accustomed to conceptually framing local and transnational normative orders. Globalisation and law is a common subject of research, but the confrontation of advanced theories of global modernity with questions of transnational and local normative orders still promises to be fruitful for both academic cultures. Here, the different 'streams of globalisation' of law would need to be distinguished: questions of private law might be more closely associated with developments in the economic sphere; matters of public law cannot be separated from the political sphere; whereas issues pertaining to international criminal law reflect diverging *consciences collectives*. Precisely because law is traditionally considered the carrier of a legal order from the perspective of the state, competencies to set norms that transcend it point directly to the limits of the sphere of the state. Insofar it might be useful to conceive of law as a 'sphere' or – to put it in analogy to Appadurai's globalisation theory – a sort of 'judicio-scape'. Only once a multi-dimensional approach to understanding the processes of globalisation is taken can the variable place of law in this complex process be determined. We thought from the beginning that it would be an important task of the Käthe Hamburger Center for Advanced Study 'Law as Culture' to find productive nexuses for a more complex understanding of the normative dimension of the process of globalisation with the research tools offered by the humanities, as a substantial deficit is observable within the current debate.

Economic exchange is unthinkable without binding rules on the applicability of contracts, and the search for a fairer and more peaceful world order remains of importance, particularly in view of the heightened worldwide potential for conflict. Matthias Herdegen's courageous work takes these questions seriously. He starts with the interplay between international law and 'globalisation' (ch. I). These reflections are followed by a look at the multifold forces that stand behind the dynamics of international law: rationality standards on the one hand and more emotive forces, such as empathy and the 'sacredness of man' in the Durkheimian tradition, on the other hand (ch. II). Since we know how complex the generalisation of morally binding obligations is when it comes to the global level, the clear emphasis on normative orders of morality is giving a deeper foundation to international orders (ch. III). They might merge in some structures of a collective con-

science as they are condensed in collective memories of atrocities, paradoxically giving rise to the development of an international legal community. For Herdegen, the brilliant jurist that we have the pleasure to read, a reflection on the character of this rule-making process cannot be omitted (ch. IV). The tension of globalised legislation on the one hand and the exigencies of democratic generation of normative orders on the other hand is obvious. Therefore the question of the state as bearer of legal orders comes back into the debate, no less than the role of inter-agency cooperation has to be debated and a look behind the veil of sovereignty must be risked (ch. V and VII). In accordance with debates on several occasions at the centre about the role of sufferance, especially in Upendra Baxi's work, as a source of legitimacy and ground for the validity culture of the human rights, the jurist and the humanist tries to reconcile idealised standards of preserving human dignity, running the risk of losing the credibility of the human rights claim for factual validity on the one hand and the realities of culturally rooted foundations of human rights on the other (ch. VIII and X). In addition to the state as the responsible agent for standard-setting and to the jurisdiction of international courts, the role of private actors must be looked at with much more attention (ch. XI).

A particularly interesting chapter (XIII) is opened when discussing 'Legal pluralism' in this context: this very much debated, sometimes ideologically overloaded battle-field of preserving the 'right of the Other', and to preserve or guarantee normative 'Otherness' in a legal context is reduced to a realistic view enhancing indigenous customs and remaining skeptical toward religiously impregnated normative orders. The last may bring about a fragmentation of law-making authority. In comparison to some of the participants in the legal pluralism debate, our author insists on a judicial perspective that asks for the constitutional framework of normatively ordering plural normative orders on the one hand, and then on the other hand on making clear conceptual distinctions between 'interlegality', 'multilateralism', and 'legal pluralism'. The state's role as an 'impartial organiser of religions' plays a central role in this differentiated system of dealing with pluralism and cultural diversity. The intimate knowledge of the debates in South America about indigenous rights culminates in a wonderful analysis of how the property rights entail cultural messages and a field of protection for collective identity. Herdegen's résumé is convincing and far reaching: 'In a broader sense, property rights allow and protect a kind of normativity based on custom and a certain cosmovision, within the physical confines of land and related natural resources.' (ch. XIV)

These reflections prepare a profound chapter about the implications of the 'Law as Culture' perspective for the application of international rules (ch. XV). Particularly interesting is Herdegen's look at the ruling of the European Court of Human Rights in the case *S.A.S. vs. France*. The French parliament had passed a law 'prohibiting the concealment of one's face in public places'. A resolution of the *Assemblée Nationale* had indicated the rationale behind this jurisdiction, con-

sidering ‘that radical practices undermining dignity and equality between men and women, one of which is the wearing of the full veil, are incompatible with the values of the Republic’. The court’s ruling underlined the ‘direct democratic legitimisation’ of national authorities, thought to be better placed for a judgement of how to draw the necessary limits on the manifestation of one’s own belief and religious practice than an international court. However, it could be argued that the reference to democratic legitimisation, in this case, could be seen as a hidden way to privilege a ‘culture of the state’ that, in France, relies on a very specific tradition of interpreting what has to be understood by the term of laicism! This is certainly the basis for the Parliament’s law-making process. This remark is not meant to dispute the result, but it should be pointed out that in this case a religiously legitimised practice (whatever we may think about its inner religious validity) has been confronted with a culturally shaped conception of the state and its vision of cultural diversity!

It is impossible to follow all the ways of revealing the cultural impact of international legal orders (ch. XV). It is for the reader to discover the artistic way in which the jurist Herdegen reflects upon the emergence of new transnational normative orders, remaining however focused on positive law. At the same time, these orders are observed from the outside, giving a legitimate place to diversity but also to a moral universalism. This highly complex compendium on the dynamics of international law in a global world cannot end without analyzing problems of distributive justice that lately have to be supplemented by the facet of the fair distribution of the rights and burdens in the refugee drama that Europe is experiencing. The concluding remarks testify to the *prudentia juris* of the author: without neglecting international economic law, about which Herdegen has recently published a remarkable and well remarked book, he insists on the dynamics of universal normative projections on the one hand and particularistic ones of national policy choices or national legal cultures embracing plural normative orders in themselves on the other hand. To find some kind of balance is a *Leitmotiv* not only of the modern international order but also of the whole treatise. To summarise one may quote the author himself: ‘International normativity thus operates as a social and cultural force which has become a category of legal sociology in its own right’ (ch. XXII).

Given all the insights, the modest caveat of Matthias Herdegen at the beginning to not ‘seriously aspire to bear even remote resemblance to an introduction to a sociology of international law’ proves to be wrong. But the author has raised an appetite for such further reading of international law in a global context, having nonetheless paid attention to cultural diversities with great sociological precision in a sometimes disconcerting debate about globalisation.

Bonn, spring 2016

Contents

Acknowledgements	15
Introduction	16
I. The Interplay between International Law and ‘Globalisation’	19
1. International Law and ‘Globalisation’	21
2. Cultural Globalisation and International Economic Law	22
3. Human Rights: the Essence of a Global Conscience and of Converging Fundamental Values	24
4. International Security in a Globalised World	24
5. Erosion of State Sovereignty?	29
6. The Density of International Standards	30
7. The ‘Fragmentation’ of International Law	31
8. The Impact on the Structure of International Law	32
II. The Forces behind the Dynamics of International Law	33
1. Rationality	33
<i>a. Self-Interest and Reciprocity</i>	33
<i>b. Common Responsibility for Global Goods</i>	35
<i>c. Mutual Respect for Diversity</i>	35
2. Empathy and the Sacredness of Man	36
3. Elastic Rules and General Clauses	40
<i>a. ‘International Peace and Security’ (UN Charter)</i>	40
<i>b. Proportionality</i>	41
<i>c. Fair and Equitable Treatment</i>	42
4. Values behind International Norms	43
5. Institutions with a Broad Understanding of Their Mandate: the Self-Empowerment of Treaty Bodies	44

III. Global Morality, Cosmopolitical Commemoration and Interpretation of Experiences: Towards a Universal Collective Conscience?	47
1. Globalisation of ‘Moral Sentiments’ and ‘General Rules of Morality’	47
2. Experience and Collective Conscience	49
3. Application of Legal Rules as Interpretation of Collective Experiences: The Case of Human Rights	50
4. The Impact of Globalisation on the Collective Conscience of the International Community	52
5. Representation, Registration and Collective Remembering of Mass Atrocities and Other Cases of Human Suffering	53
<i>a. The Importance of Formal Registration</i>	54
<i>b. The Contribution of Mechanisms under International Law</i> ..	54
<i>c. International Criminal Justice</i>	55
IV. New Structures of Rule-Making	57
1. The Erosion of the Principle of Consent: Extensive Treaty Interpretation	57
2. ‘Constitutionalisation’ of International Law	68
3. ‘Technocratic’ Rule-Making	71
4. Tendencies towards a Jurists’ Law	72
5. Globalised Legislation and Democracy	72
V. Disaggregation of the State	75
1. Inter-Agency Cooperation	76
2. Fight against Corruption	76
3. Indigenous Rights and Exploitation of Resources	77
4. Necessity as Justification for Non-Compliance	79
VI. Layers of Normativity: Ethics, ‘Soft Law’ and ‘Hard Law’	81
1. Moral Standards and International Law	81
2. Hardening of ‘Soft Law’	83
3. Softening of ‘Hard’ Law	85

Contents	11
VII. The Look behind the Veil of Sovereignty: Standards of Governance	87
1. Good Governance	87
2. Regional Arrangements and Democracy	88
3. The Impact of International Law on Political Structures and on the Institutional Order of States	89
4. Supremacy of International Law: Emerging Monist Tendencies	90
5. The Relation between Rule of Law, Democracy and Economic Development	91
6. Transparency and Consistency of Governmental Action	92
7. Backlash against Industrialised Countries	93
VIII. Human Rights in a Globalised World	95
1. The Inspirational and Empiric Sources of Human Rights	95
a. <i>The Experience of Human Suffering</i>	95
b. <i>The Push for an Open Society and the Rule of Law</i>	95
c. <i>The ‘Constitutional’ Function of Human Rights: Human Rights as a Cornerstone of a Democratic and Pluralist Society</i>	97
2. Litigant Concept of Human Rights versus a Confucian Model	99
a. <i>The Western Model of Individual Rights</i>	99
b. <i>The Confucian Approach</i>	102
c. <i>Convergence and Divergence</i>	103
d. <i>A Competitive Background of the Western Model</i>	105
3. Human Dignity: The New Interpretative Reserve of Human Rights Law	105
IX. Standards of Rationality	109
1. Proportionality	110
2. The Empire of Scientific Evidence	112
3. Consistency	114
4. Rationality and Socio-Economic Considerations	118
5. <i>A Caveat on Rationality as the Sibling of an Anthropocentric Vision</i>	118
6. Economic Rationality: Adjustment Programs and ‘Conditionality’	119

X.	The Changing Role of the State	121
1.	Old and New Asymmetries	121
2.	Standard-Setting	123
3.	Jurisdiction of Courts	125
4.	International Mechanisms of Dispute Settlement	127
5.	Regulation of Financial Markets	132
XI.	The Role of Private Actors	133
1.	Transnational Corporations and Corporate Social Responsibility .	133
2.	Enforcing Corporate Social Responsibility	134
a.	<i>Judicial Enforcement</i>	134
b.	<i>Monitoring by National Contact Points under the OECD Guidelines</i>	135
3.	Private Rule-Making	136
a.	<i>Rating Agencies</i>	136
b.	<i>Accounting Standards</i>	137
c.	<i>Governance of Cyberspace</i>	137
XII.	Climate, Water, Biodiversity and Beyond: The Administration of Global Commons and Other International Resources	139
1.	Categories of Global Goods	139
2.	The Majoritarian Fallacy and the Unfettered Outsider	140
3.	International Institutional Arrangements	140
XIII.	Legal Pluralism	143
1.	Legal Pluralism as the Sibling of Social and Religious Heterogeneity	143
2.	Normative Autonomy of Indigenous and Other Local Communities	144
3.	Deference to Customary Rules beyond an Indigenous Context ...	148
4.	Religious Communities	148
5.	Legal Pluralism as a Vehicle of Cultural Diversity	150
6.	Legal Pluralism and the Clash with Fundamental or Human Rights	151
a.	<i>Customary Law and Gender Equality</i>	151

Contents	13
<i>b. 'Hybridisation' of Principles as a Means to Settle Legal Conflicts</i>	151
<i>c. Criminal Sanctions</i>	152
<i>d. Human Rights as a Limitation on Cultural Diversity</i>	153
7. 'Interlegality' and Cosmopolitan Legal Pluralism	155
XIV. Human Rights as a Platform for Cultural Diversity: Freedom of Religion and Guarantee of Property	157
1. Freedom of Religion	157
2. The Protection of Property Rights in Land	158
XV. Law as Culture and the Application of International Rules	163
1. The Law as Reflection of Cultural Characteristics	163
2. The Harmonising Impact of International Rules: Clashes with Socio-Cultural Concepts on a Domestic Level	163
3. 'Living Instruments' and Judicial Activism as a Threat to Cultural Diversity	166
4. The Support for Dynamic Interpretation: 'Consensus' and its Pitfalls	170
5. Dynamic Interpretation and Judicial Activism: The Relevance of Context	173
<i>a. The Nature of Rights and Obligations</i>	173
<i>b. Taking the Social and Economic Context into Account</i>	174
<i>c. Constructive Consensus: Freezing National Policy Choices</i>	175
<i>d. Judicial Activism and Its Anti-Democratic Bias</i>	176
<i>e. Extensive Interpretation as a Challenge for Democracy</i>	176
<i>f. The 'Democratic Override'</i>	177
<i>g. Anti-Democratic Antagonisms: Activist Rulings in Conflict</i>	180
<i>h. Constructive Consensus: Judicial Activism Raised to Higher Power</i>	181
<i>i. Reservations as a Means to Maintain Socio-Economic Options and to Preserve Legal Culture</i>	182
<i>j. Transitional Justice and International Law</i>	183
<i>k. Pluralist Adjudication under International Treaties</i>	188
XVI. Democratic Dilemmas: Views from Within and from Without	191

XVII. Diversity	195
1. Public Morals	196
2. Margins of Appreciation and the Principle of Subsidiarity in Human Rights Law	198
3. Human Rights and Pluralism	204
4. Antinomies in Diversity	205
XVIII. Moral Views and Other Perceptions Rooted in Culture: Between Stability and Volatility in the Face of International Standards	207
XIX. Social and Distributive Justice: Challenges on the International Level	211
1. Conceptual Problems	211
2. Interrelation between Central Authority and Solidarity	215
3. Commitment to Basic Social Needs: The Millennium Development Goals and the Sustainable Development Goals	216
4. The Fight against Poverty in Context	218
5. Economic and Social Rights	219
XX. Developing Countries	221
1. Recognition of Particular Needs	221
2. International Trade Law	221
3. Beyond Trade: A Comprehensive Development Policy	223
4. Debt Relief	224
5. 'Common, but Differentiated Responsibilities'	225
XXI. The UN Charter: Different Ways of Reading the Constitution of the International Community	229
XXII. Concluding Remarks	233
References	237
Index	251

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For many reasons, the book cannot seriously aspire to bear even remote resemblance to an introduction to a sociology of international law. However, the underlying research has at least nourished the temptation of such an ambitious and daunting project in a more distant future.

Matthias Herdegen

Introduction

The present book is dedicated to the expansion of international law under conditions of economic globalisation. It tries to present the pervasion not only of inter-state relations but also of public life within our nations and even relations between individuals by a network of international norms and 'soft' international standards. International law makes its presence felt to a degree which would have been beyond all expectation only three decades ago and in some fields even until recently.

Human rights law, international economic law with international trade law and investment protection, and the preservation and restoration of international peace and security under the UN Charter are the three areas characterised by particular dynamics.

In all three areas, international law has a profound impact on the domestic legal order. Human rights and the new international criminal courts and tribunals have catalysed a collective conscience on a universal level as well as a convergence of values and value judgments.

Human rights law and international economic law both tend to bolster individual freedom, 'good governance' and rule of law as well as 'corporate social responsibility'. Maintaining international security meanwhile includes the protection of elementary human rights against systematic and massive violations. To a lesser degree than human rights law, the law of international security also has a democratic dimension apparent in cases of violent overthrow of democratic regimes.

The factors driving the dynamic expansion and evolution of international law vary from field to field. In the area of human rights, extensive interpretation of treaties especially by regional human rights courts is a salient feature and has turned the European Convention on Human Rights and its American counterpart into a quasi-constitutional order, often competing with or even trumping fundamental rights and other rules flowing from national constitutions. An important strategy of the dynamic interpretation is the construction of an actual or emerging consensus from a more or less selective overview of national laws and international instruments. More and more frequently, international human rights courts and other supervisory bodies have shifted the focus from traditional human rights issues to what used to be considered the periphery of human rights standards. Now they engage in a fine tuning quite similar to the subtle fundamental rights jurisprudence of constitutional and supreme courts. The balance between conflicting human rights, same-sex marriage and *in vitro* fertilisation have become salient

issues of human rights adjudication, just as denial of nationality to the children of illegal immigrants, referral of disadvantaged children to special schools, or release from lifelong imprisonment.

By contrast, the interpretation of international trade agreements by independent expert bodies of the World Trade Organization or the interpretation of investment treaties by international arbitral tribunals tend to be much closer to the common meaning of treaty texts and to the original intent of the parties. The broad impact of trade and investment law on political choices rather stems from the structure of bilateral or multilateral agreements and the burden of a rational and consistent argumentation which they establish for parties trying to justify interference with treaty standards.

The dynamic evolution of the international order, especially of human rights law and international economic law, is a growing challenge not only to state sovereignty in general. This development increasingly risks pre-empting democratic choices and democratic processes in open societies when the interpretation of international treaties strays far from perceptions and expectations of the governing political consent to these agreements. This dilemma puts more and more treaty regimes to a severe test of democratic legitimacy, especially in European states. The discussion of bilateral trade and investment agreements between the European Union and Canada respectively the United States has placed this issue in the center of a broad public debate. Critical voices attack trade liberalisation, investment protection and international arbitration between private investors and states as undue checks on democratically legitimised policy choices in the area of environmental, health and labour law or corporate governance.

Economic and cultural globalisation nourishes universal empathy which, in turn, is one of the driving forces behind human rights protection. New mechanisms of international criminal law like the proceedings before the International Criminal Court or the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia (now the residual Mechanism for International Criminal Tribunals – MICT) have made important contributions to the collective memory of massive and systematic violations of human rights and of humanitarian law.

The cosmopolitan pull towards universal values and the dynamics of international regimes stand in a complex and often conflictive relationship with the diversity of legal cultures. The current international order challenges legal diversity on universal and regional level, but often fosters legal pluralism in a national context.

The self-empowerment of international courts and other independent dispute settlement or monitoring bodies in terms of an evolutive interpretation seems to corroborate crucial aspects of Max Webers's sociology of law on the international level: the pull towards the construction of norms as a coherent and comprehensive

order,¹ the claims to power of jurists² and the evolutive potential of an evaluative, interest-driven approach to legal normativity.³

The establishment of a complex ‘apparatus’ of applying, developing and even enforcing international norms has fostered a process which gradually materialises Ronald Dworkin’s approach to law as a coherent system based on sometimes concurring, sometimes conflicting principles and values.⁴ Still, the understanding of international law as an order based on the consent of states calls for some caution in transposing this theory to international law.

The British House of Lords recalled these differences when it was invited to construe inherent limitations on state immunity by the respect of human rights in *Jones v The Kingdom of Saudi Arabia*:

‘As Professor Dworkin demonstrated in *Law’s Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to “develop” international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.’⁵

However, the ever closer network of international courts and tribunals, other dispute settlement mechanisms and monitoring bodies catalysed the evolutive approach of adjudication based on principles and values. The development of an international law of jurists in terms of Max Weber’s sociological approach comes very close to Dworkin’s model in the actual international order.

The rationality of international law and its technical structure as jurists’ law in a Weberian sense is catalysed not only by international courts and supervisory bodies. These features also characterise the standard-setting by international bodies composed of representatives of national administrative agencies (‘international administrative law’).

¹ Weber: *Wirtschaft und Gesellschaft*, pp. 192 et seqq.; see also Gephart: *Gesellschaftstheorie und Recht*, pp. 497 et seqq.; Petersen: *Max Webers Rechtssoziologie*, pp. 92 et seqq.

² Weber: *Wirtschaft und Gesellschaft*, pp. 476 et seqq.; see also Gephart: *Gesellschaftstheorie und Recht*, pp. 565 et seqq.

³ Weber: *Wirtschaft und Gesellschaft*, pp. 412 et seqq.; see also Gephart: *Gesellschaftstheorie und Recht*, pp. 565 et seqq.

⁴ Dworkin: *Law’s Empire*, pp. 225 et seqq.

⁵ House of Lords *Jones v the Kingdom Saudi Arabia* [2006] UKHL 26, Opinion of Lord Hoffmann, para. 63.

I.

The Interplay between International Law and ‘Globalisation’

International law is one of the driving forces of ‘globalisation’ in economic terms. A network of international agreements catalyses the integration of markets and cross-border flows of capital through liberalising international trade, fostering regional integration, protecting foreign investment, providing for assistance to development and stabilising monetary relations.¹

In the field of human rights, international law has dramatically expanded the network of universal standards. Standards which, up to two or three decades ago, only prevailed in a few states now have emerged on the regional and global level. Even countries with a rather impeccable human rights record find themselves challenged by a continuous fine-tuning of human rights through ‘evolutive’ interpretation by international courts and other international bodies. The protection of privacy or access to justice and due process and non-discrimination on grounds of sex or age on an international level often overshadow even the bold activism of national legislators or national courts. Regional case law in Europe or in America is espoused by human rights bodies in other continents. Sometimes international economic law and the protection of human rights join forces when abuse of power by governments affects rights under investment treaties as well as under human rights agreements (as in context with the dismantlement of the Russian company *Yukos* and the prosecution of ‘oligarch’ executives and shareholders). Corporate social responsibility of transnational corporations is a common domain of human rights law and international economic law.

International law does not only play a pivotal role in the emergence of a globalised society. It is also itself the object of new factors which restructure the process of transnational decision-making in economic, technological and political fields under the impact of globalisation. This development includes an extended number of actors as agents of law-making or subjects of international rights and duties, e.g. non-governmental organisations, multinational corporations and individuals. In many fields the process of standard-setting has become more pluralistic, though not necessarily more representative.

International law-making bodies or international courts and tribunals consider

¹ Herdegen: International Economic Law; see Dolzer: Wirtschaft und Kultur.

the submissions of non-governmental organisations and the positions adopted by national courts. The forum for regular cooperation within the select group of seven industrialised lead nations (G 7, (G8 with Russia after the Cold War until the exclusion of Russia in 2014,)) expanded and became the G 20.

The end of the Cold War and the East-West polarity catalysed the readiness of the UN Security Council to intervene in international conflicts or civil strife and to combat international terrorism. In addition, on a regional level old and new bodies address threats to international peace or security and sanction their violations. Resolutions of the UN Security Council and the Rome Statute of the International Criminal Court and special international criminal tribunals stipulate individual responsibility for crimes against humanity, war crimes and for crimes of aggression.

There are essentially three areas of international law which have been shaped by a particularly dynamic development associated with the processes of globalisation:

- international economic law (international trade law, international investment law, international monetary law),
- human rights law and
- international regimes established to maintain or restore international peace and security.

Quite often, the dynamic expansion and concretisation of international norms is driven by a 'technocratic' approach or the selective focus on specific interests. Some bodies administering international treaties are more committed to specific goals such as trade liberalisation, human rights, environmental protection and investment protection or even single issues such as the elimination of racial prejudice than to a complex balancing of conflicting legal interests (e. g. eradication of discrimination and free speech).

The growing network of international rules and the increasing density of international standards of course have a dramatic impact on national autonomy and the regulatory powers of individual states. The same holds true for the internationalisation of regulatory concerns like environmental protection and the growing importance of resources which are inherently international such as cyberspace. From this perspective the globalised world has become flatter.²

On the other hand, the internationalisation of certain processes such as processing data via Internet vests rulings of national or regional authorities with a global impact. Thus, the ruling of the European Court of Justice in the case *Google v Agencia Española de protección de Datos*³ on a 'right to be forgotten' has

² Friedman: The World is Flat; see also Bethlehem: The End of Geography.

³ ECJ Case C-131/12 *Google v Agencia Española de protección de Datos* ECLI: EU: C: 2014: 317 (13 May 2014).

the potential to transform the mining and saving of data on a worldwide scale. The Court held that under the law of the European Union affected persons have a right against operators of Internet search engines to have sensitive personal data suppressed or erased if after the lapse of a considerable timespan there is no longer a preponderant interest of the public at large in the storage of these data.⁴ Similarly, the business presence of transnational corporations in many countries or the simultaneous listing of companies on US and European stock exchanges often vest local jurisdictions with a global reach, e. g. with respect to accounting standards, corporate structures or the prosecution of corruption and financial manipulations.

1. International Law and 'Globalisation'

In previous periods, international law did not play a very significant role in the process of globalisation. Up to the mid-19th century and even later, the establishment of the Spanish or the British empires, the steamship and the telegraph did more to fuel globalisation than international agreements. Even the high integration of capital markets in the decades before the First World War, which was not reached again until much later in the 20th century,⁵ did not rest on international treaties, but on a mere understanding between central bank governors regarding the gold standard which provided for free convertibility of major currencies and fixed exchange rates.⁶ Without depending on international agreements, investors and traders could reliably calculate the value of claims, assets and transactions in US dollars, the British pound sterling or the German mark.

As late as in the early 20th century, great imperial powers resorted to military force rather than international legal mechanisms to enforce monetary claims and to protect their investors against foreign governments. Thus, in the Venezuelan Crisis of 1902–03, the United Kingdom, Germany and Italy imposed a blockade on Venezuelan ports in order to press the government of Venezuela to pay its foreign debts and compensation for damages to the property of their nationals. Finally, the *Drago-Porter Convention* of 1907 put an end to this kind of military intervention.⁷ Since then, repayment of foreign debt and protection of foreign investors in times of crisis have become one of the great issues of international economic law.

⁴ ECJ Case C-131/12 *Google v Agencia Española de protección de Datos* ECLI: EU: C: 2014: 317 (13 May 2014), paras. 89 et seqq.

⁵ Wolf: *Why Globalization Works*, p. 118.

⁶ Herdegen: *Principles of International Economic Law*, pp. 502 et seqq.

⁷ However, even under the Convention, a state failing to submit to arbitral proceedings or an arbitral award could legally be confronted with the use of force by another state exercising diplomatic protection, see Newcombe/Paradell: *Law and Practice of Investment Treaties*, p. 10.

In contrast with previous periods of globalisation, the present economic order cannot be conceived without a complex network of universal, regional and bilateral treaty arrangements which sustain the integration of markets.

2. Cultural Globalisation and International Economic Law

The free trade in goods and services, the internationalisation of the production process as well as the protection of foreign investments also promote cultural globalisation. The impact on the cultural dimension of the life of nations is threefold:

- the flow of goods and services affecting traditional habits and societal perceptions ('coca-colonisation' of life styles),
- the challenge of trade restrictions which rest on socio-economic choices and reflect deeply entrenched national or local preferences, and
- the enhancement of cultural pluralism.

The removal of protective mechanisms which shield domestic products from the sharp winds of competition may change traditional consumer habits and affect cultural 'biotopes'. Similarly, free trade regimes put to the test restrictions to novel products (e. g. genetically modified organisms) which arise from traditional aversion to biotechnology. International investment agreements may challenge corporate governance structures (e. g. protecting labour interests against the influence of controlling shareholders) or the adoption of stricter environmental standards. This fuels wide-spread concerns. A recent example is the passionate controversy in Europe over the free trade and investment agreements with Canada (Comprehensive Economic and Trade Agreement – CETA) and the United States (Transatlantic Trade and Investment Partnership – TTIP).

In contrast, deeply rooted consumer attitudes may even bolster the resilience of traditional products against international competition, even if free trade eliminates a protective bias. Thus, the demise of the German 'purity requirement' for beer⁸ has hardly affected the dominance of traditional breweries. Beer which conforms to the 16th century edicts of Bavarian dukes dominates the German market, now supported by free consumer choices in lieu of legal regulation. As the European Court of Justice pointed out, protective measures entrenching traditional perceptions and preferences may undermine free choice of consumers in defiance of market mechanisms:

'[...] Firstly, consumers' conceptions which vary from one Member State to the other are also likely to evolve in the course of time within a Member State. The establishment of the

⁸ ECJ Case 178/84 *Commission of the European Communities v Federal Republic of Germany* [1987] ECR 1227.

common market is, it should be added, one of the factors that may play a major contributory role in that development. Whereas rules protecting consumers against misleading practices enable such a development to be taken into account, legislation of the kind contained in Article 10 of the *Biersteuergesetz* prevents it from taking place. [...] the legislation of a Member State must not “crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them”.⁹

Agriculture is an important segment of the cultural heritage of all societies. It is also an area where conflicting legal cultures crystallise in a cross-border context. Concepts of the proper way of farming are closely related to societal perceptions of ‘natural’ ways of life and of managing the environment in harmony with nature. While many countries cultivate genetically modified crops on a large scale, outright rejection of modern biotechnology or at least profound scepticism prevail in many societies in Western Europe. It remains to be seen whether a clear preference for conventional or ecological agriculture in most parts of Europe will survive the competition with genetically modified crops in the long run.

The different degrees of risk aversion in our societies find expressions in many sectors of law, ranging from energy law and environmental law to food standards and the regulation of financial services. International economic trade law puts many of these risk-related rules to scrutiny. This scrutiny particularly affects societies with a very high risk aversion which are often driven by the empirically unsustainable perception of dangers. In many countries of continental Europe and the European Union, large sectors of the population are receptive to mere ‘phantom risks’, e. g. with respect to biotech products.

Economic globalisation driven by legally entrenched free trade also fosters cultural diversity by eliminating barriers to imports. If international agreements check censorship and other restraints on the marketing of books and other audiovisual materials in the interest of free trade, they also bolster freedom of speech and cultural pluralism. The famous case *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* settled by the Dispute Settlement Body of the World Trade Organisation in Geneva¹⁰ amply demonstrates these implications. In this case, China relied on the protection of ‘public morals’ to restrain and control the import of audiovisual products. The case also shows that the control of cultural goods which convey ‘undesirable’ messages and conflict with governmental policies on behavioural patterns or with established societal perceptions of family and ways of life has different aspects. The possible reliance on the public morals exception

⁹ ECJ Case 178/84 *Commission of the European Communities v Federal Republic of Germany* [1987] ECR 1227, para. 32.

¹⁰ WTO: China: Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report of the Appellate Body (2009) WT/DS363/R.

to justify trade restrictions may serve legitimate concerns of social stability as well as illegitimate self-perpetuation of power structures.

International trade law contributes to the exposition of prevailing political perceptions, leaving more room for competition, and broadening the basis for societal choices. Finally, the promotion and protection of foreign investment in bilateral or multilateral treaties may foster a cultural spill-over effect and thereby contribute to plurality and diversity.

3. Human Rights: the Essence of a Global Conscience and of Converging Fundamental Values

Since the end of the Second World War, human rights law has turned into one of the pillars of the modern international order. As factors behind the enhancement of human rights, the emergence of a global collective conscience and economic globalisation are closely intertwined. Catalysed by the General Declaration of Human Rights, universal human rights standards under treaties and customary law regimes have expanded over the last decades. Regional human rights have developed at a dramatic pace, especially under the European Convention on Human Rights and its American counterpart, the American Convention on Human Rights. For quite a number of countries in Europe and Latin America, regional human rights law fulfils a quasi-constitutional function.

4. International Security in a Globalised World

The preservation and restoration of international security is one of the areas in which international law has displayed particular dynamics. This evolution rests on two catalysing factors:

- new threats with a global dimension on the one hand and
- a broader understanding of 'international peace and security' in international treaties and other instruments, giving rise to new international regimes reflecting this extensive understanding on the other hand.

In the 'pre-globalised' world of earlier decades (i.e. a world with lesser integration of markets, international trade at a much lower level and slower pace, lesser cross-border movement of persons, lesser threat from destructive technologies available all over the globe), security issues were more straightforward and complex threats were easier to define. Countries were less vulnerable to long-distance attacks and to disruptive interference by non-state actors. In the meantime, large-

scale threats from internationally operating terrorist groups or cyber-attacks orchestrated by governments and individuals have become phenomena which are – if not induced by them – at least closely associated with global systems of transportation by land, sea and air, global networks of communication and a financial system where large sums of money can be transferred, more or less discreetly, around the globe within seconds.

For their energy flow, a number of countries depend on the reliable transport of oil and gas through intercontinental pipelines or on the safety of sea routes. More than in the past, conflicts over rare resources like water in certain areas or the impact of climate change might trigger confrontation and even armed strife. All these developments demand a dramatically enhanced grade of international coordination.

The international community, led by states with particular sensitivity to new threats and by the few countries with a capacity to respond to new global threats with military or other technical means, has reacted to new transnational risks with an extensive reading of international treaties, in particular the UN Charter. In Article 24 of the Charter, the members of the United Nations

‘[...] confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf.’

Chapter VII of the UN Charter vests the Security Council with very broad powers to fulfil this mandate. Under Article 39, the Security Council ‘shall determine the existence of any threat to the peace, breach of the peace, or act of aggression’ and, on the basis of such a finding, make recommendations or decide what measures shall be taken to ‘maintain or restore international peace and security’, by non-military measures (Article 41) or by measures involving the use of force (Article 42). For defining the scope of the Security Council’s mandate, the term ‘international peace and security’ is absolutely crucial. A violation of or a threat to ‘international peace and security’ triggers the tremendous powers of the Security Council and the maintenance or restoration of ‘international peace and security’ covers an almost boundless arsenal of military and non-military actions under Chapter VII, only conditioned by this objective. The gradual expansion of the notion ‘international peace and security’ is one of the driving forces behind the dynamic evolution of modern international law.

Until the end of the Cold War, international peace and security were construed in negative terms, as the absence of military conflict between states. Since the Second Gulf War, this negative understanding has been superseded by a positive interpretation which includes settlement of internal conflicts and the protection of elementary human rights. The positive understanding underlies the Council’s practice in many recent internal conflicts. Thus, the Security Council adopted