Beiträge zum Transnationalen Wirtschaftsrecht

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A. Introduction

“Global Governance and International Law” appears not only at first sight to be far too broad a topic in order to be discussed in a rather short contribution. Indeed, taking into account the complexity of this issue, it hardly needs to be emphasized that it will not be possible to elaborate on all its manifold implications in a comprehensive way. Therefore, this paper confines itself to give some general ideas on the structural changes currently visible in the international system and its legal order – ideas, that are intended to contribute to the ongoing discussion on the transformation of international law taking place under the impact of global governance at the beginning of 21\textsuperscript{st} century.

For this purpose, the paper has been divided into three parts. Part I deals with the question of what is meant by global governance, which phenomena do this term describe and what are their main characteristics. Part II provides an outline of what are considered to be the main underlying reasons of the emerging regulatory scheme of global governance. Finally, in Part III, some aspects of the interrelationship between global governance and international law are evaluated, namely the significance of international law in global governance as well as the impact that global governance has on the structure of the international legal order.

B. The Main Characteristics of Global Governance

Despite the ever-growing literature on global governance since the beginning of the 1990\textsuperscript{th},\footnote{See, e.g., the overview given by Koenig-Archibugi, in: Held/McGrew (eds.), Governing Globalization, 46 \textit{et seq}; Mürle, Global Governance, 3 \textit{et seq.}, with further references.} the as of today probably still most influential description of this concept has been given by the Commission on Global Governance\footnote{On the importance of the Commission on Global Governance’s findings for the subsequent research on this subject see only Tietje, Internationalisiertes Verwaltungshandeln, 164.} – founded at the initiative of the former German chancellor Willy Brandt\footnote{Mürle, Global Governance, 8; Messner/Nuscheler, in: Senghaas (ed.), Frieden machen, 337 (340).} – in its concluding report bearing the title “Our Global Neighbourhood” in 1995. According to this report, global governance has to be understood as:

“[…] the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest. […] At the global level, governance has been viewed primarily as intergovernmental relationships, but it must now be understood as also involving non-governmental organizations (NGOs), citizens’ movements, multinational corporations and the
global capital market. [...] There is no single model or form of global governance, nor is there a single structure or set of structures. It is a broad, dynamic, complex process of interactive decision-making that is constantly evolving and responding to changing circumstances.

In the light of this definition, which – considering the complex phenomenon it tries to describe – necessarily has to be a rather abstract one, it is possible to identify three main characteristics of the regulatory system of global governance, all of them being interrelated with each other.

I. Increasing Diversity of Law-Making Processes

First, a predominant feature of global governance is the increasing diversity of interconnected law-making processes – or, it is probably more precise to speak of normatively relevant regulatory processes because not all of these instruments are legally binding in a traditional sense. While in the past, legal regulations were – more or less – neatly divided between domestic law, created by states, and public international law, also arising from the regulatory activities of states, global governance has resulted in what has been called "an emerging legal pluralism beyond the state level" as well as – albeit still controversial as for example demonstrated by a recent decision of the Federal German Constitutional Court of 14 October 2004 – the development of a system of a functional unity between international law and domestic law. In addition, the former distinction between so-called “hard law” and non-binding regulatory instruments is increasingly blurred. To mention only a few randomly chosen examples: International judicial bodies like the International Court of Justice and the Appellate

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4 Commission on Global Governance, Our Global Neighbourhood, 2 et seq.
5 See, however, with regard to the importance of non-binding rules of behaviour in the international system already in previous centuries Delbrück, in: Nerlich/Rendtorff (eds.), Nukleare Abschreckung, 353 (358 et seq.); Tietje, Zeitschrift für Rechtssoziologie 24 (2003), 27 (31 et seq.).
7 See BVerfG, 2 BvR 1481/04 of 14 October 2004, para. 34, emphasizing that the relationship between international law and domestic law is characterized by the existence of two separate legal systems. The decision is available in German on the Internet under: <www.bverfg.de/entscheidungen/rs20041014_2bvr148104.html> (visited on 19 October 2004); an English summary of the decision is provided in the Court’s press release No. 92/2004 available on the Internet under: <http://www.bundesverfassungsgericht.de/cgi-bin/link.pl?presse> (visited on 19 October 2004).
8 On the idea of a functional unity between international and domestic law resulting from the emergence of global governance but to be distinguished from the classical monist theory see Tietje, Internationalisiertes Verwaltungshandeln, 640 et seq.; Thürer, SZIER 9 (1999), 217 et seq.; Allott, Health of Nations, 315.
10 See, e.g., ICJ, Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), ICJ Reports 1997, 7 (71 et seq.); Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), ICJ
Body of the World Trade Organization,\textsuperscript{11} in establishing the law to be applied by them, are currently taking frequent recourse to international declarations, commonly referred to as “soft law”, especially the ones adopted at the so-called “world order conferences” such as the 1992 Rio Conference on Environment and Development.\textsuperscript{12} Non-binding “codes of conduct” like the ones adopted by international organizations such as the “OECD Guidelines for Multinational Enterprises”,\textsuperscript{13} the International Labour Organization’s “Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy”\textsuperscript{14} or the “International Code of Marketing of Breast-milk Substitutes” of the World Health Organization\textsuperscript{15} as well as the respective codes adopted by individual corporations, sometimes intentionally being made subject to monitoring by NGOs,\textsuperscript{16} exercise considerable regulatory force.\textsuperscript{17}

Furthermore, international standards developed by private or intermediate organizations like the International Accounting Standards Board, the Codex Alimentarius Commission of the Food and Agriculture Organization and the World Health Organization, the International Organisation for Standardisation, and the Basle Committee on Banking Supervision\textsuperscript{18} either acquire a certain amount of legally binding


\textsuperscript{12} For a more detailed evaluation of this development see, e.g., Charney, American Journal of International Law 87 (1993), 529 (543 et seq); Charney, in: Delbrück (ed.), New Trends in International Lawmaking, 171 (174 et seq); Mendelson, Rdc 272 (1998), 155 (378 et seq); Fidler, German Yearbook of International Law 39 (1996), 198 (217 et seq); Francioni, in: Lowe/Fitzmaurice (eds.), Essays in Honour of Jennings, 167 (168 et seq); on the notion of “world order conferences” see also Tomuschat, in: Makarczyk (ed.), Essays in Honour of Skubiszewski, 563 et seq.


\textsuperscript{14} The most recent version is reprinted in: I.L.M. 41 (2002), 186; see also Wallace, Multinational Enterprise, 1080 et seq.; Muchlinski, Multinational Enterprises, 457 et seq.

\textsuperscript{15} Reprinted in: World Health Organization, International Code, 6 et seq.; for an evaluation of this code of conduct see Sikkink, International Organization 40 (1986), 815 et seq.; Richter, Holding Corporations Accountable, 60 et seq.

\textsuperscript{16} A number of these voluntary codes of conduct are reprinted in: Blanpain (ed.), Multinational Challenges, 343 et seq; see thereto Mayne, in: Picciotto/Mayne (eds.), Regulating International Business, 235 et seq; Thirrer, ZaoRV 60 (2000), 557 (588); Wolff/Take/Brouws, in: Albert et al. (eds.), Entgrenzung der Politik, 140 (154 et seq); Webley, in: Addo (ed.), Human Rights Standards, 107 et seq.; Campins-Enriju/Gupta, Non-State Actors and International Law 2 (2002), 213 (220 et seq); Nowrot/Wardin, Liberalisierung der Wasserversorgung, 57.

\textsuperscript{17} On the various legal effects of these codes of conduct see, e.g., Baade, in: Horn (ed.), Legal Problems, 3 et seq; Sanders, in: Fouchard/Kahn/Lyon-Canen (eds.), Études offertes à Goldman, 281 (289 et seq); Kinley/Tadaki, Virginia Journal of International Law 44 (2004), 931 (952 et seq); Vogelaar, Netherlands International Law Review 27 (1980), 69 (76 et seq); Vagts, Common Market Law Review 18 (1981), 463 (470 et seq); Durugbo, Multinational Corporations, 121 et seq; van Genugten/van Bijsterveld, Tilburg Foreign Law Review 7 (1998), 161 (170 et seq).

\textsuperscript{18} On these as well as various other private and intermediate standardization organizations and the impact of their activities see only Braithwaite/Drahos, Global Business Regulation, passim; Cable, Globalization, 63 et seq; Smith, in: Dauvergne (ed.), Jurisprudence, 93 et seq.; Zarring, Texas International Law Journal 33 (1998), 281 et seq; Teixeira, in: Ladeur (ed.), Public Governance, 305
force through their incorporation in international treaty regimes such as the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures of the WTO legal order, or, even if they are not directly legally binding, they are nevertheless universally adhered to by the relevant actors and thus not devoid of normative value.

Finally, autonomous self-regulatory systems have evolved without any or only a negligible participation of states like the so-called “new lex mercatoria” for business transactions with the important role played by the International Chamber of Commerce, the lex informatica or lex electronica influenced, inter alia, by the Internet Corporation for Assigned Names and Numbers (ICANN), or the lex sportiva internationalis, prominently being represented by the International Olympic Committee.

II. Growing Variety of Law-Enforcement Processes

Secondly, global governance is also characterized by changes in and a growing variety of the law-enforcement processes in the international system. Traditionally, international law had been primarily enforced by confrontational means, in a decentralized way by individual states or groups of states. To the contrary, one can currently identify at least four alternative trends with regard to international law enforcement: First, international treaty regimes, but also other regulatory instruments show an increasing reliance on non-confrontational, cooperative enforcement mechanisms considered to be more conducive in promoting compliance with international legal obligations. Among these mechanisms is the approach of seeking compliance by provid-

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19 See thereto only Tietje/Nowrot, European Business Organization Law Review 5 (2004), 321 (343 et seq.), with further references.
21 From the numerous literature on this issue see, e.g., Cutler, Private Power, 180 et seq.; De Ly, in: Appelbaum et al. (eds.), Rules and Networks, 159 et seq.; for an evaluation of this perception see also Oeter, German Yearbook of International Law 44 (2001), 72 et seq.
ing incentives to adhere to international norms – a prominent example is the Global Compact initiated by the United Nations Secretary General Kofi Annan. Other co-operative compliance mechanisms are, inter alia, notification and reporting requirements, monitoring systems, capacity building and technical assistance with can be found in various areas of international law such as international human rights law, international environmental law, and international economic law. With regard to an example of these new enforcement structures one only needs to consider the various so-called “flexible mechanisms” included in the Kyoto Protocol to the United Nations Framework Convention on Climate Change which mirror nearly all of these just mentioned compliance mechanisms.

Furthermore, the evolving private and intermediate self-regulatory mechanisms do increasingly no longer rely on states for securing compliance but develop their own judicial and non-judicial enforcement mechanisms. Aside from the well-established practice with regard to private and mixed business transactions that by now for example in the field of investment protection show a growing shift from ad hoc tribunals to the establishment of more institutionalized investor-state arbitration proceedings, other notable examples are the various private and intermediate mechanisms for the resolution of domain-name-disputes.

Thirdly, a tendency has evolved to enforce international law by invoking respective violations in civil and administrative law cases before domestic courts. This “transnational human rights litigation” has been especially tried in the United States with regard to foreign individuals such as the former leader of the Bosnian Serbs Karadzic as well as a number of transnational enterprises based on the by now well-
known Alien Tort Claims Act. While these just mentioned cases in the United States primarily deal with the possible civil law consequences of violations of human rights and international criminal law, the Supreme Court of the Philippines has already in 1993 handed down a “far-reaching decision” with regard to international environmental law in the case Minors Oposa v. Secretary of the Department of Environmental and Natural Resources being concerned with a claim for the termination of timber license agreements granted to private companies. The Court ruled that the plaintiff minors have standing to invoke for themselves as well as for their unborn posterity, for future generations, the right to a healthy environment based on the concept of “inter-generational responsibility” under Philippine constitutional law, but also, as invoked by the plaintiffs, under international law.

Last but not least, there are clear indications that “the idea of an institutionalized judiciary as an instrument of international law enforcement has gained momentum”. In recent years, one can not only observe an increasing use by states and the United Nations General Assembly of the “old” International Court of Justice in light of which the Court has on 30 July 2004 decided to take further measures for increasing its productivity. Rather, what is even more notable is the establishment of various new international judicial bodies such as the International Criminal Court, the International Tribunal on the Law of the Sea, the Dispute Settlement Body of the WTO, the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the Special Court for Sierra Leone, leaving aside similar developments at the regional level in the areas of human rights as well as economic integration.

III. Important Role of Non-State and Sub-State Actors

In addition to this growing diversity of interconnected law-making and law-enforcement processes, a third central feature of global governance is the important role played by non-state as well as sub-state actors in the development and enforce-
ment of these regulatory instruments. Not only do international governmental organizations create among each other an increasingly dense network of formal and informal agreements – one of the most recent examples being the Agreement between the United Nations and the International Criminal Court signed on 4 October 2004. Rather, also virtually countless examples exist of non-state actors like NGOs and transnational enterprises being involved in the law-making as well as law-enforcement processes. NGOs were incorporated in the preparation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, the Convention on the Rights of the Child, the Convention to Combat Desertification, the Convention on International Trade in Endangered Species, and the establishment of the International Criminal Court. Transnational Enterprises played a key role, inter alia, in the adoption of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Finally, the preparations of the “Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” by a Sessional Working Group on the Working Methods and Activities of Transnational Corporations of the UN Sub-Commission on the Promotion and Protection of Human Rights, a process recently being interrupted or at least slowed down by the UN Commission on Human Rights, had so far also manifest a concerted effort of states and international organiza-

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43 Generally on the increasingly influential role of especially non-state but also sub-state actors as an important feature of global governance see only Woods, in: Held/McGrew (eds.), Governing Globalization, 25 (26 et seq.); Tietje, Internationalisiertes Verwaltungshandeln, 167; Ruffert, Globalisierung als Herausforderung, 29 et seq.; Schuppert, Staatswissenschaft, 870 et seq.; Reinisch, German Yearbook of International Law 44 (2001), 270 (272 et seq.).

44 Generally on these agreements see only Schermers/Blokker, International Institutional Law, §§ 1691 et seq.; specifically with regard to the function of this form of international institutional cooperation in the context of global governance see also Tietje, Journal of World Trade 36 (2002), 501 et seq., with further references.

45 Further information as well as the text of the agreement is available on the Internet under: <www.icc-cpi.int/newspoint/pressreleases/47.html> (visited on 16 October 2004).


47 See, e.g., Sell, Private Power, 1 et seq.; Ryan, Knowledge Diplomacy, 67 et seq.; Matthews, Globalising Intellectual Property Rights, 7 et seq.; generally on the role of business organizations and transnational corporations in the regulatory scheme of global governance see also Fuchs, in: Schirm (ed.), New Rules, 133 et seq.


tions, as well as NGOs, business organizations, trade unions, transnational enterprises and individual scholars.\(^{50}\)

With regard to the sub-state level, it becomes increasingly obvious that states are, contrary to the previously dominant perception,\(^{51}\) often no longer acting as solid units in international relations. Rather, for example territorial sub-state entities such as regions are interacting with each other in transboundary cooperative regimes;\(^{52}\) administrative units below the level of government are, together with non-state actors, participating in international regulatory regimes such as the above mentioned standardization organizations.\(^{53}\) Together with the evolving transgovernmental networks of national legislative bodies and courts, this phenomenon of the “disaggregated state” has recently been comprehensive described and analysed by Anne-Marie Slaughter, current President of the American Society of International Law, in her work called “A New World Order”.\(^{54}\)

To summarize, the term “global governance” does not at all refer to some kind of centralized world government.\(^{55}\) Quite to the contrary it has already been described as “Governance Without Government”\(^{56}\) – although it is probably more precise to speak of “Governance by, with and without Governments”\(^{57}\) – leading to the evolution of a multidimensional regulatory system of networks and transnational legal as well as political processes that require us to broaden our understanding of international relations.\(^{58}\)

C. Reasons for the Emergence of Global Governance

What are the underlying reasons for this emerging regulatory scheme of global governance? The causes for this development are indeed manifold, making it impossible to discuss them all at length in the course of this contribution.\(^{59}\) However, prominently among them are the processes that are commonly summarized by the term

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\(^{50}\) On the drafting history of this document and the involvement of the various different actors therein see Nowrot, Die UN-Norms, 5 \textit{et seq.}; Weissbrodt/Kruger, in: Bergsmo (ed.), Essays in Honour of Asbjørn Eide, 421 (429 \textit{et seq.}).

\(^{51}\) On the previous understanding of foreign policy as an exclusive prerogative of the government as the head of the executive branch see, e.g., Tietje, Internationalisiertes Verwaltungshandeln, 182 \textit{et seq.}; Cottier/Hertig, Max Planck Yearbook of United Nations Law 7 (2003), 261 (265 \textit{et seq.}); for a vivid example of such a view see only Krüger, Allgemeine Staatslehre, 24 \textit{et seq.}, 507 \textit{et seq.}

\(^{52}\) See only Brand, in: Cremer \textit{et al.} (eds.), Festschrift Steinberger, 667 \textit{et seq.}; with regard to regional cooperation in Europe see also recently the in-dept study provided by Kotzur, Grenznachbarschaftliche Zusammenarbeit, \textit{passim}.

\(^{53}\) With regard to the international cooperation of administrative units see especially the comprehensive analysis by Tietje, Internationalisiertes Verwaltungshandeln, \textit{passim}, with further references.

\(^{54}\) Slaughter, A New World Order, 2004; for a related observation already three decades ago with regard to sub-units of government see also Keohane/Nye, World Politics 27 (1974), 39 \textit{et seq.}


\(^{58}\) See only Tietje, Journal of World Trade 36 (2002), 501 (503).

\(^{59}\) For a more comprehensive analysis see, e.g., Nowrot/Wardin, Liberalisierung der Wasserversorgung, 49 \textit{et seq.}, with further references.
“globalization”. Despite the prevailing concentration on the well-known economic side of globalization, the economic aspect is only one among many other processes that contribute and belong to this phenomenon.

Other relevant developments are, for example, the revolution in telecommunications and information technologies, most prominently being represented by the Internet, that are by many scholars considered to be the “basis of globalization” and made possible a permanent worldwide dialogue and exchange of information between people who share the same interests – whether benign or not; the globalization of security interests caused by transnational organized crime as well as the emergence of truly global terrorist networks; the “globalization of public health” resulting, \textit{inter alia}, from the worldwide spread of infectious diseases; and the phenomenon of what might be called “ecological globalization” caused by threats to the global environment such as climate change.

All these various processes of globalization, especially by way of reinforcing each other, have one thing in common: They lead to an increasing loss by states of their previously held and virtually unchallenged ability to control these processes even if they take place on their own territory. In particular, states acting individually are to a growing extend lacking the necessary steering capacity to effectively channel the various processes of globalization to the benefit of their citizens and in pursuance of the

\begin{itemize}
  \item From the voluminous literature on this issue see only recently the various contributions in \textit{Walter \textit{et al.} (eds.)}, Terrorism as a Challenge, 3 et seq., each with further references.
  \item See thereto recently \textit{Fidler}, SARS, Governance and the Globalization of Disease, 2004; for a comprehensive analysis of this issue see also \textit{Fidler}, International Law, \textit{passim}, with further references.
  \item On the notion of “ecological globalization” see only \textit{Hingst}, Auswirkungen der Globalisierung, 26 et seq., with further references.
  \item See thereto, e.g., \textit{Delbrück}, Das Staatsbild, 10; \textit{Tietje}, in: Delbrück (ed.), International Law of Cooperation, 45 (48); \textit{Hobe}, Duquesne University Law Review 40 (2002), 655 (656); \textit{Jackson}, American Journal of International Law 97 (2003), 782 (784, 799); \textit{Ladeur}, in: \textit{Ladeur} (ed.), Public Governance, 1 (9 et seq.); \textit{Matull}, in: von Hoffmann (ed.), Global Governance, 31 (35); \textit{Nowrot/Wardin}, Liberalisierung der Wasserversorgung, 51. However, for a more cautious view on this issue see also \textit{jennings}, in: Kreijen (ed.), International Governance, 27 (33 et seq.).
\end{itemize}
promotion of global public goods\textsuperscript{70} such as the protection of human rights and the environment as well as the enforcement of core labour and social standards: Transnational enterprises can shift – or at least threaten to shift – their production plants to more “comfortable” places, transboundary capital movements can take place in minutes, individual states cannot successfully combat global warming or the worldwide spread of infectious diseases. This phenomenon of a “denationalization of clusters of political, economic and social activities”,\textsuperscript{71} caused by the processes of globalization, and the resulting decline in the steering capacity ultimately require states to create and participate in formal as well as informal cooperative mechanisms with not just other states and international organizations, but also with increasingly influential non-state actors like NGOs, business organizations, trade unions and transnational enterprises in order to provide an effective regulatory scheme for the political, economic, ecological, and social processes they are to a growing extend unable to control while acting on their own.\textsuperscript{72} Furthermore it forces states to tolerate self-regulatory mechanisms in areas that are nearly completely outside of their control.

Thus, in the absence of something close to a world government – whether such an institution would be feasible or even only desirable is an open question\textsuperscript{73} – the processes of globalization require states to contribute to, to tolerate and to actively participate in the emergence of what is called global governance.

D. The Interrelationship between Global Governance and International Law

In light of these mere factual findings the following normative question arises: Is there an interrelationship between global governance and international law? And if so, what are the specific characteristics of this connection? In the following, it is argued that indeed a strong interrelationship exists between global governance on the one side and international law on the other.

I. The Significance of International Law in Global Governance

Beginning with the impact of international law on the regulatory scheme of global governance, it is common knowledge and thus hardly worth mentioning that formerly public international law had since the establishment of the so-called “Westphalian

\textsuperscript{70} On the notion of “global public goods”, also being known as “community interests”, see only Simma, RdC 250 (1994), 217 (235 et seq.); Delbrück, in: Götz et al. (eds.), Liber amicorum Jänicke, 17 (29 et seq.); Frouein, in: Haßelbrunner et al. (eds.), Festschrift Doehring, 219 et seq.; as well as the various contributions in Kaul et al. (eds.), Global Public Goods, 2 et seq.; and Kaul et al. (eds.), Providing Global Public Goods, 2 et seq.

\textsuperscript{71} Delbrück, Indiana Journal of Global Legal Studies 1 (1993), 9 (11).


\textsuperscript{73} See thereto, e.g., Randelzhofer, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, Vol. II, 143 (147), with further references.
system”74 basically confined itself to being a set of rules – often merely of a procedural nature – having the purpose to limit and guide states – as the sole subjects of international law – in their interactions with each other.75 However, this traditional conception of international law has, already over the past few decades, undergone quite substantial changes. Most significantly, with regard to its contents, public international law has considerably extended its scope of application to areas that were previously thought to be in the exclusive competence of states76 – for example with regard to the international protection of human rights, core labour and social standards, environmental protection, the prosecution of the worst of crimes, and probably – albeit still controversial – with regard to the legitimate form of government.77 Thus, by transforming into what had already been called a “comprehensive blueprint for social life”,78 international law is more and more independent of the will and interests of individual states. Rather, its substantive norms are increasingly focusing on the realization of community interests, the promotion of global public goods79 – a process that for valid reasons has already been labelled the “constitutionalization of international law”.80

It is submitted that it is precisely in this context of the realization of global public goods that the significance of international law in the regulatory framework of global governance lies. The substantive norms of international law provide the underlying values, the goals to be pursued by the various and diverse processes of global govern-

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74 Generally on the importance of the Westphalian peace treaties of 1648 as marking the “birth” of the modern interstate system Delbrück, SZIER 11 (2001), 1 (2 et seq); Perez, Wisconsin International Law Journal 14 (1996), 463 (466); Müllerson, Ordering Anarchy, 99; Suter, Global Order, 17; Kohona, Journal of World Investment 2 (2001), 537 (538 et seq).

75 For a description of this traditional understanding of international law see only Dahm/Delbrück/Wolfraum, Völkerrecht, Vol. I/1, 23; Fatouros, in: Mélanges Valticos, 131 (139); Henkin, Georgia Journal of International and Comparative Law 25 (1995/96), 31 (32 et seq); Zemanek, RdC 266 (1997), 9 (112); Zacher, in: Rosenau/Czempiel (eds.), Governance Without Government, 58 (59 et seq); on the resulting issue of whether under these circumstances international law can be qualified as having a legal character at all see also Hart, Concept of Law, 213 et seq; Radbruch, Einführung, 223 et seq; Franck, Power of Legitimacy, 27 et seq; Brownlie, British Yearbook of International Law 52 (1981), 1 et seq; D’Amato, Northwestern University Law Review 79 (1984), 1293 et seq.

76 See, e.g., Friedmann, Changing Structure, 67 et seq, 152 et seq; Delbrück, Indiana Law Journal 68 (1993), 705 (706 et seq); Tietje, DVBl. 118 (2003), 1081 (1085); Tomuschat, RdC 281 (1999), 9 (63 et seq); Hobe, Der offene Verfassungsstaat, 216 et seq; Zemanek, RdC 266 (1997), 9 (112 et seq); Faasbender, in: Walker (ed.), Sovereignty in Transition, 115 (139).

77 On the last mentioned issue see, e.g., Franck, American Journal of International Law 86 (1992), 46 et seq; Franck, Fairness, 83 et seq; Cerna, New York University Journal of International Law and Politics 27 (1995), 289 et seq; Nowrot/Schabacker, American University International Law Review 14 (1998), 321 (378 et seq); as well as the contributions in Fox/Roth (eds.), Democratic Governance, 1 et seq.

78 See thereto as well on the quoted characterization Tomuschat, RdC 281 (1999), 9 (63 et seq).

79 Tietje, DVBl. 118 (2003), 1081 (1088); Nowrot, Die Friedens-Warte 79 (2004), 119 (141).

80 See, e.g., Frouwein, BDGVR 39 (2000), 427 et seq; Frouwein, RdC 248 (1994), 345 (355 et seq); Delbrück, SZIER 11 (2001), 1 (35); Bryde, Der Staat 42 (2003), 61 et seq; Tietje, DVBl. 118 (2003), 1081 (1088 et seq); Nowrot/Wardin, Liberalisierung der Wasserversorgung, 45 et seq; on the concept of “societal constitutionalism” as a further alternative theory to the traditional state-centred understanding of constitutionalism see recently Teubner, in: Joerges et al. (eds.), Transnational Governance, 3 et seq; however, for a more sceptical view with regard to the constitutionalization of international law see Grimm, in: Brenner et al. (eds.), Festschrift Badura, 145 (163 et seq); Hiltgébrüger, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, Vol. II, 929 (962).
ance. By providing these substantive guidelines, international law thereby ensures that global governance serves the purpose of contributing to, *inter alia*, the promotion of human rights, core labour and social standards and environmental protection.\(^81\) At the same time, international law thereby also creates the basis for the – especially with regard to the participation of non-state actors – often disputed legitimacy of the regulatory framework of global governance.\(^82\)

II. The Impact of Global Governance on the Structure of the International Legal Order

The question remains of what are on the other side the effects of global governance on international law? It is argued that the emergence of the regulatory scheme of global governance does not merely result in a continuation of the progressive development of international law that had already been visible in previous decades. Rather, under the impact of global governance, international law undergoes profound changes and is thereby transformed into something new – something that only remotely resembles the normative structure of what we have so far considered to be the international legal order. A number of terms have already been suggested to describe this “new international law” – “global law”, “new world law”, “world (internal) law”, “transnational law”.\(^83\) Leaving aside the issue of how to label this – neutrally phrased – “new international law”, a selection of three basic concepts in international law are to be briefly highlighted in the following that require a reconceptualized understanding under the impact of global governance.

1. Sources of International Law

First, under the impact of global governance the enumeration of the classical sources of international law as most prominently being enshrined in Article 38 (1) of the Statute of the International Court of Justice is more or less outdated and in need

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\(^81\) On the promotion of global public goods as the main focus of the regulatory processes of global governance see, e.g., Tietje, Journal of World Trade 36 (2002), 501 (503).

\(^82\) On the need for a reconceptualized, output-oriented understanding of legitimacy that focuses on the ability of the respective regulatory framework to contribute to the promotion of global public goods see, e.g., Delbrück, Indiana Journal of Global Legal Studies 10 (2003), 29 et seq.; Tietje, DVBl. 118 (2003), 1081 (1094 et seq.); Steffek, in: Joerges et al. (eds.), Transnational Governance, 81 et seq.; for a comprehensive analysis of the changing concept of legitimacy and the various approaches adopted in this connection see also Peters, Verfasung Europas, 499 et seq.

\(^83\) See also, e.g., Di Fabio, Staatsrechtslehre und der Staat, 81, speaking of a “erneuerten Völkerrecht” [renewed international law].

\(^84\) Teubner (ed.), Global Law Without a State, 1997.

\(^85\) See, e.g., Delbrück, Indiana Law Journal 68 (1993), 705.


\(^87\) Jessup, Transnational Law, 1956; with regard to the emergence of a “transnational economic law” see also Tietje, ZVglRWiss 101 (2002), 404 it seq.
of a supplementation. The growing diversity of law-making processes in the international system, the increasingly blurred distinction between hard law and in the traditional sense non-legally binding regulatory instruments, as well as the rising importance of non-state actors in these processes are no longer adequately reflected in this provision. However, Article 38 of the ICJ-Statute not only requires a supplementation with regard to the possible sources of international law, but is also in need of a reconceptualized understanding of the classical sources already enumerated in it. In this connection – to give only one example – it is suggested that the traditional etatistic understanding of “state practice”, being one of the constitutive elements of customary international law, has to be modified by also directly taking into account the practice of powerful non-state actors like a number of NGOs and transnational enterprises as increasingly influential participants in global governance. Interestingly enough, the wording of Article 38 (1) lit. b of the ICJ-Statute allows such a reinterpretation because it speaks only of “international custom, as evidence of a general practice accepted as law” without restricting the possible scope of acting and contributing entities. In addition, this preposition is supported by the fact that already as of today the overwhelming majority of international legal scholars considers international governmental organizations to be in a position to contribute through their practice to the formation of customary international law.

2. Prerequisites for Legal Personality under International Law

Second, in light of the emergence of global governance also the traditional prerequisites for international legal personality – namely the explicit granting by states of rights or duties under international law to the entity in question – have to be consid-

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88 Generally on the discussion of whether Article 38 (1) of the ICJ-Statute contains an exhaustive list of the sources of international law see, e.g., Danilenko, Law-Making, 30 et seq.; Riedel, European Journal of International Law 2 (1991), 58 (60 et seq.); Zemanek, in: Haflner et al. (eds.), Liber Amicorum Seidl-Hohenveldern, 843 (844); Rosennie, RdC 291 (2001), 9 (49); Fastenrath, Lücken im Völkerrecht, 84 et seq.

89 Tietje, Journal of World Trade 36 (2002), 501 (503) (“legally relevant interrelated activities of governments, international organizations and private actors that can no longer be explained any more simply by referring to the classical sources of public international law in the sense of Article 38 (1) of the Statute of the International Court of Justice”).

90 On the need for a reconceptualized understanding of the sources of international law in general see only Delbrück, Indiana Journal of Global Legal Studies 9 (2002), 401 (414 et seq.); Tietje, German Yearbook of International Law 42 (1999), 26 et seq.; Fidler, Chicago Journal of International Law 2 (2001), 137 et seq.

91 With regard to the already currently visible indirect influence of non-state actors on the formation of customary international law see, e.g., Roberts, American Journal of International Law 95 (2001), 757 (774 et seq.); Nowrot, Indiana Journal of Global Legal Studies 6 (1999), 579 (595).

92 See thereto also Hobe, AVR 37 (1999), 253 (266 et seq.); as well as, de lege ferenda, Gunning, Virginia Journal of International Law 31 (1991), 211 (227 et seq.).

93 See only Brownlie, Principles, 6; Hobe, AVR 37 (1999), 253 (267); for example as early as in ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports 1951, 15 (24 et seq.), the Court refers to the respective practice of the Council of the League of Nations.

94 See, e.g., Jennings/Watts, Oppenheim’s International Law, Vol. I/1, 16; Brownlie, Principles, 57 et seq.; Cassese, International Law, 46; Shaw, International Law, 176 et seq.
considered as being an increasingly inappropriate approach for the identification of normative responsibilities of influential non-state actors in the international system.95

A broad consensus exists among international legal scholars that the international society can be characterized as a community governed by the rule of law.96 Thus, it is the purpose of the international society to pursue international stability, avoid disputes, and the arbitrary exercise of power.97 In order to pursue these goals – that are necessary for the continued existence of the international community98 – in an effective way, the development of the international legal order has always been dependent upon a close conformity to the realities in the international system as already been pointed out by the International Court of Justice in Reparations for Injuries in 1949.99

As a consequence, the recognition of international subjectivity also has to orientate itself to the changing sociological circumstances on the international scene.100 The international legal order needs to set the relations between all the de facto powerful entities in the international system on a legal basis,101 since a failure to bring major actors under the international rule of law “imposes unnecessary risks on the inherently frail international legal system”.102

Thus, contrary to the current predominant view, it follows from these findings that in light of the aims to be pursued by the international legal order, a rebuttable presumption arises – already on the basis of a de facto influential position in the international system – in favour of the respective actor being subject to applicable international legal obligations with regard to the promotion of community interests such as human rights, environmental protection and core labour and social standards.103 This presumption can only be refuted by way of a contrary expression of the international community in a legally binding form stating that the respective category of actors is

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95 For a general critique of the currently predominant concept of international legal personality see also, e.g., Higgins, Problems and Process, 50; Allott, Eunomia, 372 et seq.
99 ICJ, Reparations for Injuries Suffered in the Service of the United Nations, ICJ Reports 1949, 174 (178); see also, e.g., Hobel/Kimminich, Völkerrecht, 65; Bryde, Verhaltensregeln, 3; Nowrot, Indiana Journal of Global Legal Studies 6 (1999), 579 (613 et seq.); on the resulting need for an interdisziplinary approach to international law see only Jennings, in: Anghic/Sturgess (eds.), Essays in Honour of Weeramantry, 497 (506); Nowrot, Die Friedens-Warte 79 (2004), 119 (144 et seq.); as well as for an in-dept discussion of this issue Slaughter, RdC 285 (2000), 9 et seq.
100 See thereto Tietje/Nowrot, NZWehrr 44 (2002), 1 (12); Thürer, in: Hofmann (ed.), Non-State Actors, 37 (58); Okeke, Controversial Subjects, 217.
103 For a more detailed discussion of this new approach with regard to the establishment of international legal personality see Nowrot, Die Friedens-Warte 79 (2004), 119 (139 et seq.).
not obliged to observe human rights as well as recognized environmental and labour standards. This last mentioned option has thereby to be regarded as a currently still necessary concession to the still predominant position especially of states in the international system and the resulting possibility of these actors to influence, to a certain extent, the granting of subjectivity under international law.

It is submitted that this new concept concerning the establishment of international legal personality – which would currently apply especially to some transnational corporations and NGOs – is clearly more in conformity with the evolving image of an international legal community which has as its central aim the civilization of international relations and the promotion of global public goods to the benefit of all.

3. State Sovereignty

Third, under the impact of global governance, the necessity arises for a reconceptualized understanding of the sovereignty of states. It is not argued that states are no longer of importance in the newly evolving international system. Overall, they still remain influential actors in some areas, such as the use of force, more influential, in other areas, like for example the international economic system, considerably less important. However, under the influence of globalization, states are increasingly incorporated in the multi-layered scheme of global governance and their position in these regulatory processes often cannot even be characterized as being primus inter pares. Therefore, in order to describe the modified understanding of state sovereignty, recourse can be taken to Abram Chayes, former professor at Harvard Law School, and Antonia Handler Chayes, former Undersecretary of the U.S. Air Force, who in their outstanding work called “The New Sovereignty” already in 1995 stated that:

“It is that for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life.”

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106 See also, e.g., Isensee, in: Mellinghoff et al. (eds.), Erneuerung des Verfassungsstaates, 7 (8 et seq.).

107 In this connection see, e.g., Jackson, American University Journal of International Law and Policy 10 (1995), 595 (603) (“there is hardly any subject that can be said to be effectively controlled by a single national sovereign”).

108 Kokott, VVDStRL 63 (2004), 7 (23 et seq.), with further references.

To summarize, global governance and international law are mutually affecting each other: While the substantive norms of international law provide the goals to be pursued by global governance in order to gain legitimacy; the regulatory scheme of global governance has a profound impact on the structure of international law by, *inter alia*, expanding the kind of relevant law-making and law-enforcement processes in the international legal order, as well as by increasing the number of participants being of relevance in these processes, and thereby also changing the role of the nation state in the international system.

### E. Conclusion

In concluding, however, it has to be emphasised that this transformation of the international legal order taking place under the impact of global governance into a “new international law” is, of course, not a constant and linear process.\(^{110}\) Especially very powerful states, but also a number of other countries, try to resist, or do – at least in the short run – even successfully resist some of the developments outlined above.\(^ {111}\) They partially try to “opt out” of global governance. In other words, one cannot deny that occasional “backlashes” in this transformation process do in fact occur, caused by actions of what might be appropriated labelled “state sovereignty liberation movements” comprising especially of certain governments. One only has to point to the controversy with regard to the establishment of the International Criminal Court\(^ {112}\) as well as a number of other well-known instances in recent years. For an appropriate comment on these “backlashes” recourse can again be taken to Abram Chayes and Antonia Handler Chayes who stated in their above mentioned work that:

“The largest and most powerful states can sometimes get their way through sheer exertion of will, but even they [and one might add: not to talk about other countries] cannot achieve their principal purposes – security, economic well-being, and a decent level of amenity for their citizens – without the help and cooperation of many other participants in the system, including entities that are not states at all.”\(^ {113}\)

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\(^ {110}\) See also recently with regard to a more cautious view on this transformation process Oeter, in: Zangl/Zürn (eds.), Verrechtlichung, 46 et seq.

\(^ {111}\) Generally on the problematic issue of integrating great powers into the international legal order see, e.g., Dellbrück, in: Frowein et al. (eds.), Liber Ämoricum Eitel, 23 et seq.; specifically with regard to the United States see recently the comprehensive study provided by Murphy, The United States and the Rule of Law in International Affairs, 2004; as well as the various contributions in Byers/Nolte (eds.), United States Hegemony and the Foundations of International Law, 2003.


\(^ {113}\) Chayes/Handler Chayes, The New Sovereignty, 27.
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