



# International Law in the New Age of Globalization

*Edited by*

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MARTINUS  
**NIJHOFF**  
PUBLISHERS

LEIDEN • BOSTON  
2013



Library of Congress Cataloging-in-Publication Data

International law in the new age of globalization / edited by Andrew Byrnes, Mika Hayashi, Christopher Michaelsen.

pages cm

Includes bibliographical references and index.

ISBN 978-90-04-22880-1 (hardback : alk. paper) -- ISBN 978-90-04-22881-8 (e-book)

1. International law. 2. Globalization. I. Byrnes, Andrew. II. Hayashi, Mika. III. Michaelsen, Christopher.

KZ3410.I5755 2013

341--dc23

2012050074

This publication has been typeset in the multilingual “Brill” typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities. For more information, please see [www.brill.com/brill-typeface](http://www.brill.com/brill-typeface).

ISBN 978-90-04-22880-1 (hardback)

ISBN 978-90-04-22881-8 (e-book)

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This book is printed on acid-free paper.



## ACKNOWLEDGEMENTS

This book is the outcome of the Third Four Societies Conference held at the Awaji Yumebutai International Conference Center on Awajishima Island, Japan on 27 and 28 August 2010. It contains revised and updated versions of essays presented at that Conference by early career scholars from the American Society of International Law, the Australian and New Zealand Society of International Law, the Canadian Council on International Law, and the Japanese Society of International Law. Prior to its acceptance, each paper proposal was reviewed and competitively selected by a Steering Committee comprised of senior members from the Four Societies. After the conference, the authors were invited to revise their papers in line with the feedback and criticisms received during the Awaji discussions, and the papers are current as of mid-2012.

The conference was organized by the Japanese Society of International Law and the Editors would like to thank the officers of the Japanese Society, including the staff of the Conference Secretariat and the organising committee for the conference, as well as the Steering Committee, comprising members of each society: Yuji Iwasawa, Gen Kikkawa, Naoya Okuwaki, Shigeki Sakamoto, Norio Tanaka, Masaharu Yanagihara, Elizabeth Andersen, David Caron, Kent Anderson, Craig Forcece, Joanna Harrington, Armand de Mestral, Yukari Takamura, Akiho Shibata, Shotaro Hamamoto, Dai Tamada, Machiko Kanetake, Tomoko Yamashita, Shiho Sugiki and Yoko Onishi. The conference was supported by the Egusa Foundation for International Cooperation in the Social Sciences.

We would also like to express our thanks to the following colleagues, all of whom contributed to the finalisation of this volume in one way or another: David Kinley, Ivan Shearer, Justine Nolan, Rosemary Rayfuse, Vivienne Bath and Finola O'Sullivan. We would also like to thank Kent Anderson for his role in getting the editing process of the conference proceedings up and running, and Michael Liu for his research assistance.

We would like especially to thank Jessie Ingle, at the time a final-year law student at the University of New South Wales, who undertook the major and arduous task of reducing the many and varied styles of references to a uniform style and did so magnificently. We are also grateful to the Faculty of Law at UNSW for generously supporting the project through its staff development grants program.



## PERMISSIONS

A number of the papers presented at the Third Four Societies Conference have been published in different versions in other journals. We are grateful to the editors of the journals involved for permission to include this previously published material in this collection: Karen N Scott, 'International Environmental Governance: Managing Fragmentation through Institutional Connection' (2011) 12(1) *Melbourne Journal of International Law* 177–216; Michael J Kelly, 'Grafting the Command Responsibility Doctrine onto Corporate Criminal Liability for Atrocities' (2010) 24 *Emory International Law Review* 671, and Charles-Emmanuel Côté, 'Looking for Legitimate Claims: Scope of NAFTA Chapter 11 and Limitation of Responsibility of Host States' (2011) 12(3) *Journal of World Investment and Trade* 321.

## PREFACE

NISUKE ANDO\*

This book represents the outcome of the Four Societies Conference held in Awaji in Japan in late August 2010. It brings together a series of innovative and timely essays commissioned to address the challenges that globalization poses to the international legal order. The essays were written and presented by selected early career scholars from the American Society of International Law, the Australian and New Zealand Society of International Law, the Canadian Council on International Law, and the Japanese Society of International Law. At the conference, I had the pleasure of delivering some introductory remarks in which I sought to reflect upon some aspects to be taken into consideration when dealing with the complex theme of globalization and international law.

As a point of departure I consulted some of the standard dictionaries of international law with a view to finding a definition of the term 'globalization'. In 2001, a number of French-speaking scholars published the *Dictionnaire de Droit International Public*.<sup>1</sup> Three years later, in 2004, the Max Planck Institute of Comparative Public Law and International Law in Germany combined into four volumes its previous work on *Encyclopedia of Public International Law*.<sup>2</sup> Then, in 2005, the Japanese Society of International Law published a *Dictionary of the Law of International Relations*.<sup>3</sup> None of these leading dictionaries contained an article or entry for the term 'globalization'.

However, the electronic version of the most recent Max Planck *Encyclopedia of Public International Law* defines globalization as 'a multifaceted process of expansion of human activities to the entire globe and assorted cognitive frames of reference.'<sup>4</sup> This is a rather broad definition. Yet, it suffices for the purposes of this collection which aims to identify some of the key implications of globalization in terms of actors,

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<sup>1</sup> *Dictionnaire de Droit International Public* (Bruylant, 2001).

<sup>2</sup> *Encyclopedia of Public International Law* (Oxford University Press, 2004).

<sup>3</sup> *Kokusai Kankei Ho Jiten* (Sanseido, 2nd ed 2005).

<sup>4</sup> Frédéric Mégret, 'Globalisation', *Encyclopedia of Public International Law* <[www.mpepil.com](http://www.mpepil.com)> (February 2009).



community regulations, human rights and humanitarian law, and environmental protection.

If we adopt this very general definition, we can say that throughout history we have witnessed many phenomena that might be regarded as globalization in one form or another. For example, in the sixteenth century, the developments of the Reformation and Counter-Reformation were linked with the great age of European navigation and discovery. These phenomena indicated an expansion of certain human activities, first from one part of Europe to another, then from Europe to the other parts of the world. In this context, it must be noted that legal scholars at the time elaborated on such concepts as *terra nullius* and the right to trade. Francisco de Vitoria, for instance, wrote on the Spanish conquest of Central and South America and concluded that the Spanish invasion was justified on the grounds that, contrary to natural law rules, the Native Americans had unlawfully attempted to exclude Spanish traders from their kingdoms. Vitoria also confessed, however, that his 'blood froze in his veins' at the thought of the terrible atrocities committed by the Spanish in the process.<sup>5</sup>

On the European continent the struggle between Catholic and Protestant princes, the Thirty Years War, ended in 1648 with the conclusion of the Peace of Westphalia. The peace treaty marked the end of the feudalistic social order of the Middle Ages in that the political power of princes would prevail over religious authority. State sovereignty thus became a cornerstone of international relations and remains a fundamental principle of modern international law. A similar development took place with regard to the historical quest for the control of the seas. In 1493, Spain and Portugal persuaded Pope Alexander VI to issue a decree dividing the global seas between the two, with a meridian line drawn in the middle of the Atlantic Ocean, a division varied a year later in the Treaty of Tordesillas between these two powers. The Netherlands, and later England, both new sea-faring nations, protested against this duopoly and claimed free use of the ocean space. Eventually, State practice accepted that this space should be divided into territorial seas and high seas, the former under exclusive control or jurisdiction of coastal States, the latter for free use of all States. Here again modern international law adapted itself to human activities on a global scale, producing rules such as freedom of the

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<sup>5</sup> Francisco de Vitoria, 'On the American Indians', in Anthony Pagden and Jeremy Lawrence (eds), *Political Writings* (Cambridge University Press, 1991) 231.



high seas and universal jurisdiction over piracy as acts *hostis humani generis*.

The developing laws of war provide yet another example of modern international law responding to the technological innovation of weapons and new means of injuring combatants. Having witnessed the cruelty of the Thirty Years War, Hugo Grotius wrote his famous treatise *De Jure Belli ac Pacis* (On the Law of War and Peace) and attempted to provide a general ethical basis on which conflicts might be restrained. Two centuries later, US President Abraham Lincoln, facing the realities of the Civil War, ordered Colonel Lieber to prepare a code on the conduct of war. A general concern for the regulation of hostilities also led to the two Hague Peace Conferences of 1899 and 1907, where many treaties concerning the topic were adopted and subsequently applied in World War I. In 1949, taking into account the experiences of World War II, the four Geneva Conventions for the Protection of War Victims were adopted, and in 1977 they were supplemented by the two Additional Protocols to reflect subsequent practices. The international community has succeeded in adopting a treaty to prohibit the manufacturing, stockpiling and use of biological weapons as well as a similar treaty on chemical weapons. However, no such treaty has yet been adopted with respect to nuclear weapons.

In the field of economic and social issues, the Industrial Revolution, which started in eighteenth-century England and subsequently spread to the European continent, brought about the large-scale production of various consumer goods together with development of different means of transportation, thus prompting a rapid growth of cross-border trade and communication. This required the reduction or abolition of old tariff barriers as well as the creation of new universal rules for the exchange of people and commodities. Similarly, international co-operation on mail and postal services, cross-border railways and other categories of land transport led to the establishment of international administrative unions in the latter half of the nineteenth century. International economic and social cooperation further developed in the League of Nations era, which led to the establishment of various specialized agencies under the auspices of the United Nations. In 1944, the Allied powers concluded the so-called Bretton Woods Agreement which created the World Bank and the International Monetary Fund for the coordination of post-World War II international monetary and financial activities and in order to avoid a repeat of the failure of monetary and financial systems during the inter-war period. Furthermore, in 1947, States adopted the General Agreement on Tariffs and Trade to promote international trade.



As described above, international law has always responded to various forms of globalization and, in this sense, globalization is not an entirely new phenomenon to international law. However, as in the past, the current phase of globalization has its own specific characteristics of which I like to briefly pay attention to the following three: the development of information technology (IT); the decreasing factual importance of national borders; and the role of the sovereign State.

In this day and age, due to the evolution of information technology, anyone possessing a personal computer, mobile phone or similar device can share information almost simultaneously. This, in turn, has the potential to affect one's ideas as well as behaviours across borders in an unprecedented way. In spite of the numerous benefits of these possibilities, one should not forget that there are many who do not have access to these means of obtaining information and who thus do not benefit from it. Indeed, both poverty and repressive political systems continue to impede access to information in many parts of the world.

Those, however, who are in the privileged position of being able to benefit from the digital age, may potentially contribute to reducing or redefining traditional national barriers. Of course, each individual's pattern of feeling and acts are very much the product of his/her environments, social and natural, or of his/her education, widely defined. Therefore, his/her reaction to the same information may differ. On the other hand, there may be common patterns of feeling and thinking which are universally recognized and which lead to individuals in different parts of the world reacting to the same information in the same or similar manner. In any event, there is no denying the fact that one and the same information simultaneously shared is likely to reduce the importance of national borders. This may also explain the ever-increasing flow of cross-border migration of workers.

Nevertheless, so long as we have not established a world government, sovereign States continue to regulate and govern most aspects of our daily lives. But they do so with varying degrees of legal and political accountability and transparency. The European Union, for instance, has emphasized that the essence of good governance comprises of the rule of law, democracy and human rights. Few sovereign States would deny the importance of good governance, but the number of sovereign States which adhere to the above-mentioned principles of good governance is still comparatively small. Although the impact of IT development, as referred to briefly above, is gradually increasing, many States continue to curtail the free flow of information which is integral to ensuring good governance.

I have tried to clarify that globalization widely defined is not a new phenomenon for international law. Rather, international law has always been responding to globalization, in many cases effectively, and there is no reason why current international law cannot be developed and shaped to respond adequately to the current challenges of globalization. One of these challenges lies in making accessible the benefits of globalization to the greatest number of people. International law plays a decisive role in this regard. And I am pleased to note that in one way or the other, all the contributions in this collection offer fresh and intriguing insights on how this inclusiveness can be achieved under an international rule of law.



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## INTRODUCTION

ANDREW BYRNES, MIKA HAYASHI AND CHRISTOPHER MICHAELSEN

That we live in an increasingly globalized world is clear, as is the fact that previous times have also seen similar periods of globalization. While the existence of the phenomenon in the modern world is irrefutable, the forms it takes are multifarious, its meanings contested,<sup>1</sup> and its impacts both beneficial and burdensome. For some, ever-increasing globalization and connectedness is seen as a largely undiluted good to be promoted and underpinned by law, while for others it is a phenomenon that brings homogenization, alters the role and capacity of States,<sup>2</sup> undermines the democratic institutions of the nation-State,<sup>3</sup> and destroys local cultures.

There are many definitions or descriptions of 'globalization'. Political scientists Martin Griffiths and Terry O'Callaghan have described it as 'a term that refers to the acceleration and intensification of mechanisms, processes, and activities that are allegedly promoting global interdependence and perhaps ultimately, global political and economic integration. It (...) involves the *detritorialisation* of social, political, economic, and cultural life.'<sup>4</sup> Stephan Hobe has referred to globalization as 'an increase of transnational actors with political negotiation power, global threats, challenges beyond the capacity of states to regulate, and far-reaching changes in societal and political integration.'<sup>5</sup> Similarly, Manfred Steger has suggested that globalization signifies 'a social condition characterized by the existence of global economic, political, cultural, and environmental

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<sup>1</sup> See, eg, Tun Myint, 'Globalization and the Institutional Dynamics of Global Environmental Governance' (2011) 18 *Indiana Journal of Legal Studies* 395.

<sup>2</sup> See, eg, Saskia Sassen, 'The State and Economic Globalization: Any Implications for International Law?' (2000) 1 *Chicago Journal of International Law* 109, 110; Armin von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law' (2004) 15(5) *European Journal of International Law* 885, 892; David P Fidler, 'The Globalization of Public Health: Emerging Infectious Diseases and International Relations' (1997) 5 *Indiana Journal of Global Legal Studies* 11, 14.

<sup>3</sup> See Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 3 *European Journal of International Law* 435.

<sup>4</sup> Martin Griffiths and Terry O'Callaghan, *International Relations: The Key Concepts* (Routledge, 2002) 126–127 (emphasis added).

<sup>5</sup> Stephan Hobe, 'The Era of Globalization as a Challenge to International Law' (2002) 40 *Duquesne Law Review* 655, 656.



interconnections and lows that make many of the currently existing borders and boundaries irrelevant.’<sup>6</sup>

In the literature on globalization and international law, it is common to refer to earlier historical periods, where there was an expansion of European power and influence to all corners of the world during the ‘great age’ of European exploration and the colonization and settlement that followed, with religious, political and economic influence being extended to many corners of the world.<sup>7</sup> International law played its role in that process, in particular in providing justification and legitimacy for the exercise of power by Europeans over non-Europeans, and by Christian over non-Christians, and also supplying a legal basis for the allocation of dominion over other parts of the globe among the continental European powers. The period also saw the struggle to establish basic rules of international law (such as the freedom of the high seas) that served the interests of the expansionist European powers or reflected contests over their competing interests, and the development of common bodies of law (such as the *lex mercatoria*) that facilitated the international flow of trade.<sup>8</sup>

The standard narrative sees another major era of globalization in the period following the Thirty Years War in Europe, a conflict which ‘deflected European attentions from colonial expansion and globalization for much of the seventeenth century’ and which concluded in the Peace of Westphalia, a political settlement commonly identified as the foundation of the modern State-based international legal system.<sup>9</sup> From this time until the late nineteenth and early twentieth century, in particular during the period of colonial imperialism in the nineteenth century, international law justified, facilitated and at times also provided resistance to forms of globalization (which was manifested in political domination, increasing trade, and the movement of peoples), sometimes simultaneously. The two world wars of the first half of the twentieth century – in particular World War I – are sometimes seen as the collapse of globalization, but they are also viewed as interruptions in the continuing expansion of globalizing trends or indeed major globalized events themselves. However one views these – as disjunctive or continuous – there is little doubt that since

<sup>6</sup> Manfred B Steger, *Globalization – A Very Short Introduction* (Oxford University Press, 2003) 7.

<sup>7</sup> See, eg, David J Bederman, *Globalization and International Law* (Palgrave Macmillan, 2008).

<sup>8</sup> See Nisuke Ando, ‘Preface’, in this volume.

<sup>9</sup> Bederman, above n 7, 21.



World War II the process of globalization has intensified and expanded, driven on by the expansion of international trade and transport, the internationalization of production, and more recently the explosion in new information and communications technology that renders the limits of time and space redundant in many respects.

Yet the current period of globalization, sometimes dated to after World War II, sometimes to later events such as the end of the Cold War, is seen involving something different from that of previous eras. Armin von Bogdandy, for example, has noted that the ‘common ground among the different understandings of globalization is the observation of a massive global increase of interaction between the same spheres of different nations, especially since the beginning of the 1990s.’<sup>10</sup> The extent of economic integration, the volume of international trade, the institutional and regulatory structures set up to facilitate ever increasing integration and interaction – and above all the influence of new communications technology – are seen by many as involving new challenges and opportunities by changing the way in which we can and do interact, and the abilities of national States and international institutions to respond.<sup>11</sup>

The point of departure for all the chapters in this volume was a recognition that classical international law remained insufficiently equipped to deal with, either practically or/and theoretically, certain new phenomena in an increasingly globalizing world. Recognizing the need for innovative steps or remedies, the essays aim to identify such issues with reference to classic international law, and explore the feasibility of fresh solutions.

Part I of the book contains four essays each addressing the question of how existing international legal tools to regulate and adjudicate community interests and conflicts can be adapted, both conceptually and in practice, to the enlarged scope and changed nature of international law in the new era of globalization. In Chapter 1, Christopher Michaelsen examines the Security Council’s emerging practice of adopting sanctions targeting private individuals. As Michaelsen explains, this practice raises a number of important legal questions which stem mainly from the fact that international organisations developed as elements of the inter-State system of international law to regulate the relations between States and to organize their cooperation. Therefore, conceptually these organisations were not held to regulate and sanction the behaviour of private individuals, at least

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<sup>10</sup> von Bogdandy, above n 2, 888.

<sup>11</sup> See, eg, Frank J Garcia, ‘Globalization and the Theory of International Law’ (2005) 11 *International Legal Theory* 9, 13.



not directly. As the Security Council's practice has significant implications for due process rights of targeted individuals, Michaelsen argues that it is all the more important to clearly determine the constitutional basis for, and the limits to the Council's measures.

In Chapter 2, Anna Spain examines how certain effects of globalization present limits for the classical international legal tool of adjudication as a means for settling disputes in order to promote international peace and security. She argues that these developments demand adapting the traditional international legal system to embrace non-judicial methods of dispute resolution, such as mediation and conciliation, and the institutions that provide them. Spain's chapter provides a framework for doing so in an integrated manner that strengthens the capacity of the overall dispute settlement system. Chapter 3, in contrast, focuses on an established mechanism of international dispute settlement. Yoshiyuki Lee-Iwamoto focuses on the challenges facing the International Court of Justice (ICJ) as it evolves to address unforeseen developments, such as the appearance of community interests, while maintaining the format of bilateral proceedings presented before the Court. Lee-Iwamoto suggests that the ICJ has used existing procedural devices for the enforcement of community interests, but that it can do so only within the scope of its judicial function. His chapter explores the possibilities and the limitations of the ICJ to protect community interests through provisional measures, and argues that the necessary requirements for provisional measures tend to focus on the bilateral rights-obligations relations between parties.

Mika Hayashi, in Chapter 4, takes up explosive remnants of war as yet another example where a bifurcated/bilateral approach does not satisfactorily respond to a contemporary challenge of fundamental significance. Hayashi accepts that apportioning the responsibility for clearance of explosive remnants of war to the affected State and the user State may be a logical consequence of a bilateral approach, and observes that this approach is taken in various instruments. She notes, however, that there are also multilateral treaties that appear to be truly collective in their approach. Hayashi's chapter explores in particular how one of these treaties, the Ottawa Convention on Landmines, regulates and realizes the community interests in clearance of explosive remnants of war.

In Part II of the book, the focus shifts to the challenge of coordinating dialogues and governance strategies within and between international legal systems and institutions. Philippa Webb's analysis in Chapter 5 focuses on responses to globalization by the interpretive community of international law. By focusing on the issue of legality of the use of force in