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Public International Law: A Forerunner in the Field of Global(ization of) Law

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Abstract
Public international law has, in several ways, reached the status of global law. But take care: 'international' is not necessarily 'transnational' nor is it equal to 'universal'. In the article, the author draws attention to, *inter alia*, the limits to 'the consent to be bound' and to the role of General Principles of international law. Further to that, he discusses aspects of international lawmaking, while underlining that the emphasis should be more on processes of globalization than on global as such: in most cases there is a long way to go.

Keywords
international; global; globalization; consent to be bound; lawmaking

1. Introduction

Public international law is like an extended family with many children, nephews and nieces. They listen to names like 'WTO-law', 'peace and security law', 'human rights law', 'international humanitarian law', 'environmental law', and 'law of the sea'. Some can even be called grandchildren: a UN Specialized Agency like the International Labor Organization, established itself in 1919 in the context of the League of Nations and later on incorporated in the United Nations, gave birth to numerous treaties, for instance in the field of the rights of indigenous people(s), which developed into a separate field of expertise. All this is relevant in order to keep in mind that public international law as such is a broad field, with many subfields.

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Despite this lack of internal homogeneity, the field is in many ways already 'global' and 'transnational' by its very nature, basically because large parts of it draw upon notions, which are shared by a variety of States worldwide.

2. The Consent to be Bound and Global Law

Before saying anything else, it is important to underline one overriding characteristic of public international law: *the consent to be bound*. International law is by its very nature not supranational - asking States to give up parts of their sovereignty - but based upon their will to participate. They join voluntarily. That at least is the starting point. However, there are many nuances to be added in this respect. Let me mention four of them, each relevant from the perspective of the theme of this article on global(ization of) law.

One is that 'some legal standards are more equal than others'. For instance, the duty to refrain from genocide - and something similar could be said about crimes against humanity and war crimes - is by all means binding, even if States are not party to the 1948 Genocide Convention or to the 1998 Statute of the International Criminal Court. The discussion on genocide is not anymore on the question whether States are bound by the duty to prevent and refrain from it, but about the application of and limits to the concept of genocide as expressed in judgments of, especially, international criminal courts. Also important is the question of who has jurisdiction to go after the crime of genocide, apart from the States concerned. That is the debate on universal jurisdiction, with its substantive side, of which we can say that the ban on genocide is qualified as a peremptory standard of international law and thus belongs to 'global law', and its jurisdictional side, of which we can observe that things are moving, but also that there is still a long way to go. The standard reasoning is that 'even' in cases of genocide, jurisdiction has to be established separately.

The International Court of Justice, for instance, struggled with the issue in the case of the *Democratic Republic of the Congo vs Rwanda* on 'Armed Activities on the Territory of the Congo'.[1] Despite some very interesting dissenting reflections, the Court came to the conclusion that the traditional

[1] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v *Uganda*) [2005] (Application) ICJ Reports 168; ICJ *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v *Rwanda*) [2006] (Jurisdiction and Admissibility) ICJ Reports 6.

system had to be applied: jurisdiction did not automatically follow from the *ius cogens* character of the genocide norm. The same dissenting opinions, however, might reflect future ways of dealing with the issue, thus developing a real global law path as to genocide, compulsory jurisdiction included.

Two: States are to some extent forced, by public pressure or by their peers, to become a party to a specific convention, while having an internal legal system that contradicts with some provisions of the convention concerned. In such cases, they have the escape of making reservations, as long as these do not relate to the object and purpose of the relevant convention (Article 19, Para. c, of the 969 Vienna Convention on the Law of Treaties).

In reality, however, many of such reservations are accepted by the other State parties, often because they want to have the State 'on board'. The fact that a convention has been ratified globally, therefore, does not mean automatically that all provisions can be seen as 'global law' because some might be 'undressed' by reservations. In addition, provisions are often openly formulated, thus leaving space to States to fill in and implement the norms in their own way, as long as they stay within the limits of the meaning of the convention, while using one of the methods of interpretation allowed by the Vienna Convention on the Law of Treaties (Articles 31-33), and/or the limits set by the relevant supervisory bodies. I will come back to that.

Three: sometimes an international organization is strongly in favor of introducing a specific norm while large groups of States are (still) against it. In the field of international law this is visible in many ways. The United Nations, for instance, or its Specialized Agencies often have an agenda which goes further than the common lowest denominator represented by their Member States. On each and every occasion, they keep pressuring their members to move ahead. A case in point is the policy of the World Health Organization on female circumcision or the policy of the UN on the death penalty. As to the latter: while the UN cannot enforce States to bow to its pressure and has to abide by the basic rule of the States' consent to be bound, in practice it can take action to make that norm more global than many States would want to have it.

Although the relevant convention, *i.e.* the 1989 Second Protocol to the 1966 International Covenant on Civil and Political Rights, has as of now (August 2012), been ratified by 75 States only, UN policy is to be against the death penalty in all its public statements and actions. One can think of the establishment by the UN Security Council of the International Criminal Tribunals for the former Yugoslavia and Rwanda, in 1992 and 1993 respectively, both not allowed to use the death penalty. The same goes for

the treaty-based International Criminal Court. It makes the ban on the death penalty in a way more global law than the States against it would love to see it.

However, if States still want to exercise it, they have the legal space to do so, the core barrier being Article 6, Para. 2 of the International Covenant on Civil and Political Rights (ICCPR), which states that 'in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime (…)'.

In addition, the death penalty 'can only be carried out pursuant to a final judgment rendered by a competent court'. States then have to be a Party to the ICCPR - as of now ratified by 167 States - while not having made a reservation to this particular Article, and while willing to live up to General Comment nr. 6 (1982) of the UN Human Rights Committee, in which it declares that the expression 'most serious crimes' 'must be read restrictively to mean that the death penalty should be a quite exceptional measure', that 'it can only be imposed in accordance with the law in force at the time of the commission of the crime (…)', and that procedural guarantees prescribed in the Article must be observed, 'including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal'.[2] In addition, a State must be willing to listen to the Committee itself, if and when it discusses the death penalty policy and specific cases in the State concerned. In other words: there are many 'whiles' and 'ifs', but those who look through the mist can even, in the case of the abolishment of the death penalty, discover a small, mountainous way forward, in the direction of global law.

Fourth: General Principles of international law. Belonging to the core sources of international law, the General Principles also have 'something uneasy'. While many things can be found in conventions, General Principles are often not included. Nevertheless, they are the salt and pepper of many international law meals, needed to come to balanced judgments and views, where treaty law is not clear enough or leaves space otherwise. To the domain of recognized General Principles of international law do belong notions such as *Pacta sunt servanda*, the duty to notify in cases of disasters, the principle of estoppel and the principle of good faith. Such General Principles do no doubt qualify as 'global law', even if not in all cases put to

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[2] HRC Sixteenth Session April 1982 'General Comment no. 06: The Right to Life' (article 6) (30 April 1982) para 5-7.

the test before and thus approved of by, the International Court of Justice. There will be no (blocks of) States arguing to the contrary. But a professor would not be a professor if he would not add a warning: the Principles of international law have to be dealt with in more detail, from a philosophical as well as a more empirical perspective, in order to be sure whether or not and to what extent they really belong to the domain of transnational, global law.

To illustrate: while general international law is cautious in labeling issues as a General Principle, several subfields of international law are using the word 'principle' in a much broader sense and for many more issues. One such field is international environmental law, which is full of principles, the 'Precautionary Principle' being the most famous one. Parts of this 'duty to prevent harm', in this case to the environment, do already have equivalents in other fields of international general law. Think, for example, of the Responsibility to Protect (RtoP), as recognized in the 2005 UN Summit Document (Para. 138): 'Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.'[3] These lines are followed by the promise that one will work on strengthening 'an early warning capability'. That sounds like 'precaution', but having observed that, it is clear that for such a principle to become global practice (and global law) there is a long way to go. Apart from 'RtoP crimes' to which the principle applies – genocide, war crimes, ethnic cleansing and crimes against humanity – one should for instance think of preventing gross conflicts about access to water and of structural poverty, but also of financial disputes about trading in derivatives leading to financial disasters all over the world, to mention but a few examples. The duty to prevent such problems touches upon views of political systems, economic interests, and shortcoming governmental and human capacities, which easily make the principle 'only' a principle. No less, no more.

3. International Lawmaking: Emphasis on 'Globalizing' rather than on 'Global'

Looking carefully at the foregoing, it will not come as a surprise that to my mind, in an article on global law, we have to look at what has already been

[3] UNGA Res 60/1 (24 October 2005) UN Doc. A/RES/60/1.

reached, but even more at the way forward: processes of globalization of law, *i.e.* making law global. These words strongly emphasize the idea that reaching the stage of global law means adopting a process-like approach. This is all the more the case, in a world where civil society is gaining strength and influence, and is being recognized more and more by the UN as a co-constituent of the international legal order, alongside States and the business sector (see, amongst (many) other things, the 2004 UN report, *We the peoples: civil society, the United Nations and global governance* and the follow-up to that);[4] a world with manifold fragile and otherwise weakly governed States; a world where Brazil, the Russian Federation, India, China and South-Africa (the 'BRICS'), but also Mexico, Indonesia and many others do show growing self-confidence.

As to the latter: the BRICS and others are right in tackling Western dominance and in questioning to what extent international law as it is, is in conformity to their views and interests. To give a recent example: in the past the International Monetary Fund invested mainly in developing countries, but recently it had to act similarly in countries like Greece, while countries like China and India decided to invest in the Fund. For all these reasons, Belgium and The Netherlands decided to share in the near future their position in the Board of Governors of the IMF, as Poland and Switzerland did before.

Another example relates to the position of the African Union on international criminal law. While as of now a majority of African States have ratified the ICC Statute (33 out 54), and while the new Public Prosecutor, Fatou Bensouda, has an African background, her nomination and appointment being strongly supported by the AU Member States of the Assembly of States' Parties to the ICC Statute, the same AU is now discussing the adoption of a Protocol on adding a range of international crimes to the jurisdiction of the African Court of Justice and Human Rights. The reasons are so far not very clear, but one of them seems to be frustration about the first ten years of the ICC, with its focus on African situations and cases.

Raising the question to what extent international law reflects the existing worldviews does not mean that the answers are always negative or that such questions should not be raised. To my mind, there are many reasons to embrace diversity and regional differences. In international criminal law this might be called 'complementarity' ('you are allowed to do it your own way, as long as you do it'; see the terminology on unwillingness and inability

[4] Panel of Eminent Persons on United Nations-Civil Society Relations, 'We the Peoples: Civil Society, the United Nations and Global Governance' (11 June 2005) UN Doc. A/58/817.

in Article 17 of the ICC Statute); in the field of human rights law this would be called the 'margin of appreciation' ('universality is not uniformity': the goals are by and large clear, but States can implement the standards their own way, within the frames set by the supervisory bodies). That diversity relates, amongst other things, to the views one has on the relation between individuals, communities/families, and States' governments.

To my mind, one should not overemphasize the individualistic character of the human rights concept, and ditto obligations of States, while neglecting the fact that community and family structures can also positively contribute to human dignity conditions, to begin with food, work, health care, shelter, security. However, stressing the role of the State and its negative as well as positive obligations in the human rights field, automatically leads to lowering the expectations one might have from families and other social entities, as we have seen in the recent history of human rights protection.

Right or wrong conceptually, it is a reality that in many African nations, and others alike, the State is not willing or able to provide the basic conditions within which human rights can flourish. So 'margins of appreciation' are in fact often much more than margins only. In addition, such margins of appreciation are not only relevant *between* States and the internationally acting supervisory bodies, but also *within* States. That relates to the space to be given to, amongst others, indigenous communities and their legal views and actions. That can and should be done more to my mind, as long as it is not romanticized and as long as individuals who do not want to be 'locked in' in the collective, or in the community-driven aspirations of the chief or other head(s) of the community, are effectively protected by law. The issue then of course is that some have an interest in keeping the law the way it is, while others are 'knocking on the door', often inspired by human rights based words and concepts. At that moment global (human rights) law aspirations again enter the scene.

Making parts of law more global, thus means first of all to discover and understand the local, national, and regional context, while using means that might have a realistic chance to be successful. Many such means relate to lawmaking and judiciary bodies and to the political domain, but also to economic notions and economic actors. In the past, economic interests have often been a driving force behind the globalization of law. Think for instance of the Law of the Sea, the development of which was at the beginning primarily driven by the economic interests of seafaring nations, later on followed by other nations conducting economic activities on open seas.

Recently, economic actors are getting new forms of recognition, for instance in the UN's Global Compact (2000), and even more recently by the

adoption in 2011 of the 'Guiding Principles on Business and Human Rights', prepared by the UN Secretary-General Representative for Business and Human Rights John Ruggie and following his protect-respect-remedy framework.[5] Supported by all Member States of the Human Rights Council, the Guiding Principles reflect global law, weak as they are in the eyes of some and marking progress as they do in the eyes of others.

4. Concluding Remarks

Scholarship in the field of public international law misses many chances if its focus is too much on international law as it is. Clearly: all people working in parts of this large field of law, have to know what they talk about in terms of positive international law, avoiding the mistake of mixing the *lege lata* with the *lega ferenda* and thus reading their lawmaking wishes into law as it is according to the formal lawmakers and the judiciaries tasked with the role of supervisors. But each of us also have to look beyond handbook wisdom and needs to contextualize international law. Each of us also have to look with historical eyes in order to judge trends, and with empirical eyes - often qualitatively rather than quantitatively - in order to see how the gaps between norms and reality are (not) filled.

International law is about concepts and norms that in several ways have reached the status of global law, but even there one has to be aware that such norms are not necessarily a given 'for eternity' and do deserve constant critical reflection and adaptation to changing circumstances. In this article I mentioned, as examples, the self-confidence of the BRICS-States and others, and the frustration of African Union Member States as to the focus of the first ten years of the International Criminal Court. Both are issues to be aware of, with their impact on international law. Simultaneously, however, one does not necessarily have to look at these challenges with a defensive mindset. The first thing to do, is at least trying to understand where the frustration comes from. The next step might be to look at the legal consequences and to see to what extent the 'challengers' are right or can be convinced otherwise.

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[5] HRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc. A/HRC/17/31.

This article has offered some 'second thoughts' on several aspects of the relation between international law and transnational, global law. They are to be seen as knowledge-based warnings against oversimplified equations: even international law is only partly global law. Hence, the words 'Global' as well as 'Globalization' in the title of this article.