「法과 政策」 第13輯 第1號, 2007. 2. 28.
濟州大學校 社會科學硏究所

Some Transitions of International Law: A Response to Globalization

*LI Wanqiang**

[Abstract] There come into being some new phenomena and changes in the world society due to the trend of globalization. In responding to these new phenomena and changes, international law has been undergoing transitions in four dimensions—the enlargement of the substantive contents of international law, the judicialization of the implementation of international law, the democratization of the legislative procedure of international law and the pluralization of the fundamental values of international law.

[Keywords] international law, globalization, world civil society

Globalization is one of the very hot topics in the contemporary world. Although there is still much debate over what the globalization is, it is an obvious fact that our world has been getting interconnected at an accelerating speed. People travel and migrate more and more frequently. Transnational corporations' production lines intersect international boundaries at an increasing number of points. International non-governmental organizations play a more and more active role on the world stage. Inter-government institutions agenda bulges with endless issues and problems.

Globalization imposes profound influence on the world community. From my viewpoint, the two most important international events after the World War Two, the Fall of the Berlin Wall and the "9.11" Terrorist Attack as Prof. Koh identified, are much related to, if not the direct result of, the globalization. The former is positive, the latter negative. The patterns of globalization vary from the simple transnational exchanges of a low level to the unification of a high level. Although in different degree, each pattern of globalization

* Deputy Dean, School of International Law, Northwest University of Political Science and Law, Xi'an, China. LL.B., China University of Political Science and Law, 1993; LL.M., China University of Political Science and Law, 1996; J.S.D., Xiamen University, 1999. Visiting Scholar, Yale Law School, 2003-2004.

has been bringing about the free flow of production factors and the appropriate allocation of resources. What we have seen clearly is the enhancement of welfare in our society. What we mentioned relatively little is that the situation has sometimes gone beyond the above-said. The things transcending the international borders with globalization include not only personnel, capitals and technology, but values and ideology in some sense. Combining with other functioning factors, globalization can give birth to political integration instead of economic integration under usual circumstances. The Fall of Berlin Wall is a good demonstration.

Partly but mainly due to the anarchy of world society and the lack of a world State that can assume the responsibility of taking care of the welfare in every corner of our world society, bad things such as poverty, pollution, conflicts and terrorist increased both in quality sense and quantity sense with the increasing transnational exchanges. Whatever we think of those bad things (say, intrinsic ones or side-products of globalization), the fact is that it exists. We condemn the terrorist attack of the twin towers of the World Trade Centre, but we should not fail to explore the causes behind the tragedy. From my perspective, to cope with these issues properly is the very pillars to underpin the globalization.

In a metaphor sense, we saw the disappearance of the international borders in the event of the Fall of the Berlin Wall and the absence of the international borders in t in the event of "9.11" Terrorist Attack. The world society is undergoing profound and complicated changes in the process of globalization. Accordingly, international law is developing in responding to these changes.

I. The Enlargement of the Substantive Contents of International Law: Internal Affairs v. International Affairs

Some scholars have been seeking to broaden the liabilities of private individuals or entities under international law. They argued private parties should take the international liabilities under some circumstances for their behaviors which were not committed in

their capacity of representing a State or a government, but in person. Prof. Peter Malanczuk, after talking on the actions taken by some non-state actors against multinational companies for the latter's polluting or abusing of labors, adds: "In this connection, a new more general discussion has started on whether multinational companies may be held liable for violations of international law."[1] From the perspective of civilian inviolability, Prof. Slaughter and Dr. Burke-White advocate that individual actors in society, whether they qualify as terrorists, rebels, insurgents, separatists or freedom fighters, and whether acting alone or as part of a group or network, should be held accountable for their acts toward fellow citizens or the citizens of other countries under both domestic and international laws.[2] They even advocate replacing the existing Article 2(4) of the U.N. Charter with a new version which should read: "All States and individuals shall refrain from the deliberate targeting or killing of civilians in armed conflict of any kind, for any purpose."[3]

It is wise of Prof. Slaughter and Dr. Burke-White to characterize the development of international law in this direction as the individualization of international law.[4] This characterization, however, does neither fully nor deeply reveal the changes of the substantive contents of international law over last fifty years. As Prof. Malcolm D. Evans[5] puts it, "The post-1945 period witnessed a veritably explosive increase in international law-making…… There was also a huge increase in the number on areas in which international cooperation was seen to be important. There scarcely seemed any walk of life that was not being energetically 'internationalized' after 1945—from monetary policy to civil aviation, from human rights to environment protection, from atomic energy to economic development, from deep sea-bed mining to the exploration of outer space, from democracy and governance to transnational crime-fighting".

[1] Peter Malanczuk, Globalization and the Future Role of Sovereign States, International Economic Law with a Human Face, Edited by Friedl Weiss, Erik Denters and Paul de Waart, Kluwer Law International (1998), at 59.
[2] Slaughter and Burke-White, An International Constitutional Moment, 43 Harvard International Law Journal 14-15(2002).
[3] Id. At 2.
[4] Id. At 13.
[5] Malcolm D. Evans, "International Law" (first edition), Oxford University Press (2003), at 53-54.

Prof. Evans depicts a kaleidoscopic picture which seems a little bit dizzy. As a scholar from civil law system, I would like to divide the international treaties into three different types, namely, public law treaties, commercial law treaties and civil law treaties. Traditionally, international law, as called "public international law", always concerns public affairs, especially diplomatic, military or territorial ones. With the changing situations in the world community, we have seen an enlargement of the scope of international law. One side of the thing is that international law extends its jurisdiction from international public affairs to internal public affairs. This trend is evident when we look at the explosive emergence of international human rights treaties after the adoption of the Charter of the United Nations. In 1966, the UN General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economics, Social and Cultural Rights (ICESCR) and the Optional Protocol to the ICCPR. These instruments, together with a Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, the Universal Declaration of Human Rights (1948), and the human rights provisions of the UN Charter, comprise what is known as the "International Bill of Human Rights". Also, the International Bill of Human Rights is supplemented by a large number of human rights treaties within the framework or under the auspices of the UN. Most important of these are the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Convention on the Elimination of All Forms of Racial Discrimination Against Women (1979), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (1984), and the Convention on the Rights of the Child (1989). Furthermore, there exist many regional human rights treaties.[6] Treaties and customary law on human rights don't ask for a foreign element before a conclusion is drawn that a State has violated its international obligations regarding individual rights. Citizens have rights to file a complaint under international law with respect to their States' violations that have only internal effects.[7]

Prof. Anne-Marie Slaughter and Dr. William Burke-White, when addressing the legal response to the event of "9.11" attack, said: "Aside from the law of diplomatic relations

[6] Thomas Buergenthal and Sean D. Murhhy, Public International Law (3rd edition), West Group (2002), at 132, 135, 138-139, 141-153.

[7] Henry J. Steiner, International Protection of Human Rights, International Law (5th Edition, edited by Malcolm D. Evans), Oxford University Press (2003), at 773.

and a few other specialized areas, international law did not recognize or address state-society relations: the relations between a government and its citizens. The development of human rights law rendered these relations transparent, imposing direct obligations on governments to safeguard the basic rights of their citizens."[8] As above-mentioned, these human rights treaties have a broad coverage of diverse basic rights of human beings. In a country adopting constitutional systems, these rights should be constitutional rights. The human rights treaties do play an important role in pushing their contracting parties ahead in this direction. For instance, China's entry into the International Bills of Human Rights, combining with other functioning factors, drove China to take great paces in embedding the protection of human rights and property rights in her constitutional amendment of 2004. It may be a paradox if this process is named as the constitutionalization of international law.

The governmental regulation over the economy is also noteworthy. GATT(short for the General Agreement on Tariffs and Trade), once an important international treaty, governed the Contracting Parties' administrative behavior over their trade of goods. When GATT evolved into WTO (short for World Trade Organization) in 1995, the issues covered by the successor increased. GATT(1994), which is under the command of WTO, deals with at least thirteen kinds of trade-related administration procedures, some of which were not touched by GATT(1947). Furthermore, WTO copes with trade in services and trade-related intellectual property. The former is brand new in international arena and the latter is an adaptation and advancement of its predecessors such as WIPO (short for World Intellectual Property Organization). BITs (short for Bilateral Investment Treaties) had increased at an accelerating speed as well during the last quarter of past century. One of the two main functions of these treaties is shaping the treatments the host countries offer to the foreign investors in their respective territories.

The other demonstration of the enlargement of the scope of international law is the ascending number of the international commercial or "civil" treaties. The most manifest examples are the UN Convention on Contracts for the International Sale of Goods and the

[8] Slaughter and Burke-White, An International Constitutional Moment, 43 Harvard International Law Journal 13-14 (2002).

UN Convention of the Carriage of Goods by Sea (also referred to as Hamburg Rules). When we look at the bodies of these two conventions, the bearers of the rights and obligations are not contracting States, but private entities or individuals. Under some circumstances and to some extents, these two conventions function as the contract law and the maritime law respectively in some countries. With the approaching of the era of New Merchant Law, the present author envisages a future in which a large number of international treaties of this kind will come into being.

Between "public" international law and "commercial" or "civil" international laws there exists a large grey area. For example, there are plenty of international treaties concerning conflict of laws in the sphere of private international law. In the academic circles of civil law system, the controversy continues over whether the rules of conflict of laws are "public" or "private". What is beyond doubt is that these rules have a proximate connection to the private parties as well.

The present author attributes these changes to the civilianization (or secularization) of international law, which means that international law is coming to interfere deeply with the life of civil societies.

To sum up, International law has stepped from solely dealing with state-state relationships down to the routine life of human beings in two directions, in one of which it enhances or adds much to the protection of constitutional rights of citizens and in the other it tries to unify the rules under which the civil society exists and runs.

The rules of international law dealing with the affairs which are traditionally regarded as internal ones have some characteristics. First of all, these rules always concern the relationship between the administrative branches and the private entities or individuals. Second, in those countries who ask for a "transformation" of international law, there must be a national law corresponding to such international legal rules. Third, they can be implemented through the domestic administrative or judicial systems of the parties concerned. On the contrary, it seems that the international legal rules dealing with such

issues as international borders have nothing to do with private entities or individuals. Sometimes it is of no necessity to "transfer" them into a domestic law. The legal issues arising out of these rules may be not actionable before domestic courts or tribunals of law.

Constitutionalization and civilianization of international law may encounter resistance of different degrees in different fields. Due to their putative value, it is relatively easier to take legislative actions in international arena with respect to human rights.[9] As far as government administration is concerned, the procedure and criteria applied in transnational economic transactions have a high possibility to be regionally or globally unified. Similarly, it is more difficult to make common practices in terms of civil affairs than commercial deals since the former has its roots deep in local ideology, traditions and customs. From my perspective, constitutionalization and civilianization are a process, the end of which we can neither foresee nor take willful steps to try to reach.

II. The Judicialization of the Implementation of International Law: Jurisdiction and Enforcement

In sharp contrast to municipal law, the legal character of international law has been put into doubt since it came into being. The doubts are often expressed in the opening chapters of books on international law in the form of the question "How can international law be binding?" or something like that. From a positivist perspective, there are two factors that make people question the nature of international law. One is that no one can exercise mandatory jurisdiction over disputes concerning international law. The other is the absence of efficient mechanisms for the enforcement of the judicial decisions on international disputes. For example, the International Court of Justice, which is the principal judicial organ of the United Nations, just has contentious jurisdiction over the disputes between States. That means the jurisdiction will not be established without the disputing States' prior consent. The membership of a State in the UN does not constitute

[9] It should be noted that there may be some factors functioning in the opposite direction. For instance, sometimes other States would be reluctant to become directly involved in responding to violations elsewhere as serious as gender discrimination, press censorship, or corrupt political trials just because their effects were limited intra-territorially. See Henry J. Steiner, International Protection of Human Rights, International Law (5th Edition, edited by Malcolm D. Evans), Oxford University Press (2003), at 774.

the State's consent. The UN has neither sheriff nor police force to enforce the judgments rendered by ICJ.

While we can not see a fundamental change in a comprehensive sense, the situations changed in some specific areas indeed. Take ICSID system as an example. Although ICSID system asks for the disputing State's consent to its jurisdiction prior to the commencement of the dispute settlement procedure just as ICJ does, the fact that so many countries have expressed their consent in BITs makes ICSID system approach compulsory arbitration.[10]

The vicissitude is also reflected in the practice of international human rights treaties. As far as the enforcement of international human rights law is concerned, we examine two mechanisms: one is to file a petition to a treaty body and the other is to bring a lawsuit before an international court. Human rights treaties creating petition or litigation mechanisms allow an individual, an organization, a State, or a combination thereof, to present a complaint (officially named "communication") alleging that a State party has failed to comply with treaty obligations. Usually, the jurisdiction of a treaty body or court to entertain such complaint is optional—that is, a State may ratify a treaty but refuse to accept the treaty body's or court's competence to deal with the case.[11] Yet some breakthroughs have been made. With the entry into force of Protocol No.11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the jurisdiction of the European Court of Human Rights, which used to be optional, became mandatory. A State that ratifies the European Convention is subject to the Court's jurisdiction to hear cases referred to it directly by individuals and other State parties to the Convention.[12] Another example is the 1966 International Convention on the Elimination of All Forms of Racial Discrimination. According to Article 11 of the Convention, the Committee on the Elimination of All Forms of Racial Discrimination exercises compulsory jurisdictions over inter-state and individual petitions.

[10] Jan Paulsson, Arbitration without Privity, 10 ICSID Review-FILJ 232,234-235 (1995).
[11] Hugh M. Kindred and others, International Law: Chiefly as Interpreted and Applied in Canada (6th edition), Emond Montgomery Publications Limited (2000), at 835-836.
[12] Buergenthal and Murhhy, Public International Law (3rd edition), West Group (2002), at 142-143.

The 1982 UN Convention on the Law of the Sea created the International Tribunal for the Law of Sea. Although it is just one of the four alternative procedures for the disputing States to choose, the Tribunal does exercise compulsory jurisdiction over the release of arrested vessels and their crews under certain conditions.[13] The judgment of the Tribunal in the M/V *Saiga* case confirmed this point.[14]

The dispute settlement system of the WTO is also a powerful illustration. By entering into the Understanding on Rules and Procedures Governing the Settlement of Disputes(DSU), WTO members agree to use the WTO dispute settlement system to resolve all treaty-related disputes with other members. Thus, members can not evade the dispute settlement process when a claim is made under the DSU.[15]

In addition to the compulsory nature of the jurisdiction, some other efforts have been made to produce a better jurisdiction for international tribunals. First of all, permanent international tribunals came into being in some specific fields. The origin of international tribunals for war crimes can be traced back to the establishment of the International Military Tribunal at Nuremberg (IMTN) and the International Military Tribunal for the Far East (IMTFE) in 1945 and 1946 respectively. The UN Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994 respectively to try mainly the violations of international humanitarian law. All these Tribunals are *ad hoc* in nature. In 2002, the UN established the International Criminal Court (ICC) exercising jurisdiction over "the most serious crimes of concern to the international community as a whole."[16] To a great extent, the permanence of the ICC may make such *ad hoc* tribunals as the

[13] See Article 292(1)of the 1982 UN Convention on the Law of the Sea.
[14] The oil tanker *Saiga*, which was flying the flag of Saint Vincent and the Grenadines, was arrested by Guinean authorities for alleged smuggling activities. Saint Vincent and the Grenadines made a defense by accusing Guinean authorities of piracy. Both parties to the dispute could not agree on the forum for the dispute resolution and the case was brought to the Tribunal. In response to the question of jurisdiction raised by lawyers on the Guinea side, the judgment was unanimous in favor of the Tribunal having compulsory jurisdiction over the matter. See Hugh M. Kindred, International Law: Chiefly as Interpreted and Applied in Canada (6th Edition), Emond Montgomery Publications Limited (2000), at 970.
[15] James Bacchus, Groping Toward Grotius: The WTO and the International Rule of Law, 44 Harvard International Law Journal 542 (2003).
[16] See the ICC Statute, Preamble, para 4. According to Article 5(1), these crimes are genocide, crimes against humanity and the crime of aggression.

ICTY and ICTR unnecessary in the future. Second, some existing international tribunals have gained broader jurisdictions over the subject-matters in contrast to their forefathers or predecessors. For example, the WTO Agreements cover the trade of goods, the trade of services and the trade-related intellectual properties. The latter two fields were not covered and regulated by the GATT1947.

The enforcement of international law falls far behind what the situation is in domestic legal system. Nonetheless, much progress has been made in the direction of enhancing the ability of international tribunals to enforce their decisions. Just name a few examples. The ICSID Convention requests its member countries treat ICSID awards as the final judgments of their respective domestic courts and entail treaty commitments to recognize the binding force of the ICSID awards and enforce the monitory part thereof.[17] Under the WTO regime, a member will risk paying an economic price if it chooses not to comply with the decisions made by the Disputes Settlement Body (DSB). This mechanism is guaranteed and fastened up by two factors. One is that the DSU empowers the WTO members to enforce the decisions through the "last resort" of "compensation and the suspension of concessions" which have the effect of economic sanctions. The other is that the delinquent member may face "cross retaliation" which permits the victim member to take measures in one treaty-covered field to offset its sufferings from the other ones subject to some qualifications. In practice, WTO members almost always do comply with WTO dispute settlement decisions.[18]

Prof. Reisman puts it convincingly that the legal nature of international law does not rely on what the case is in domestic legal system.[19] The judicialization of the implementation of international law, however, adds much to the people's confidence in international law. Just as Mr. Bacchus comments, "the WTO offers an example of what even the skeptics are bound to acknowledge by their terms is *real* international law. The success of the WTO, and especially the WTO dispute settlement system, can and must be seen as

[17] See Article 54(1) of the ICSID Convention.
[18] James Bacchus, Groping Toward Grotius: The WTO and the International Rule of Law, 44 Harvard International Law Journal 542-543 (2003).
[19] He argued that the domestic enforcement system was not always more effective than that of international law. see Michael Reisman, Law in Brief Encounters, Yale University Press(1999).

evidence that, after long centuries of futile hoping and wishful thinking, the international rule of law can become a reality."[20]

Can we expect a future when international law runs in the same way as domestic law? This author is not so optimistic about this. As far as the jurisdiction is concerned, some phenomena deserve attentions. First, the treaties warranting mandate jurisdictions always cover a specific area. The organs which deal with issues in a broader or universal sense, like the ICJ, still exercise a contentious jurisdiction. Second, even these treaties often allow their members to make reservations. For example, Saudi Arabia reserves the rights not to refer to ICSID with the issues relating to the petroleum and sovereignty.[21] Third, some treaties, although having a great number of members, have lost much in terms of efficiency or practical functions due to the absence of some major powers. Forth, some international tribunals are subject to the priority of national courts or local remedies. The ICC is most striking in this point. According to Article 17 of the ICC Statute, a case is to be declared inadmissible if it is being investigated or prosecuted (or has been investigated) by national authorities, unless the State in question is unable or unwilling to carry out the investigation or prosecution. This flows naturally from principles of state sovereignty and means that the ICC jurisdiction has something of a residual flavor.[22] Fifth, some international tribunals may face other substantive or procedural obstacles erected by their mother treaties. Under the NAFTA system, if an alleged "expropriation" is accomplished through "taxation measures," the fiscal administrations of host and investor countries may veto the investor's right to arbitration by making a decision that the measures are normal taxes. In other words, the investor may proceed to arbitration only if the competent authorities "do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation."[23] The last, international tribunals were created by treaties and the jurisdictions thereof were finally grounded on the consent of the treaty members. The State in question may once-and-forever escape the jurisdiction of

[20] James Bacchus, Groping Toward Grotius: The WTO and the International Rule of Law, 44 Harvard International Law Journal 543 (2003).
[21] Christoph Schreuer, Commentary on the ICSID Convention, 12 ICSID Review-FILJ 148 (1997).
[22] Antonio Cassese, International Criminal Law, International Law (first edition, edited by Malcolm D. Evans), Oxford University Press (2003), at 732.
[23] Guillermo Aguilar Alvarez and William W. Park, The New Face of Investment Arbitration: NAFTA Chapter 11, 28 The Yale Journal of International Law 390 (2003).

a international tribunal through denouncing the treaty by which the tribunal was created. This is the "*Archilles*' heel" of most international tribunals.

What about the enforcement systems in international law? The lack of the enforced execution in international law makes it impossible for international enforcement systems to stand comparison with their counterparts in national law. Still, even those having been highly acclaimed can not avoid some feebleness either in institutional or realistic sense. Despite Article 54(1) of ICSID Convention, Article 55 allows for the member States' failure to enforce the ICSID awards if the enforcement is against their laws on sovereign immunity. As the "last resort" of the victim member under the WTO system, the retaliation may be proven void when the retaliator is an economic dwarf and the retaliated is an economic giant. We can not even imagine the retaliation would happen in this situation.

Although difficulties and obstacles exist in the process of the judicialization of the implementation of international law, the positive factors combined have lent much credit to international law and brought much order to a world that desperately needs it in the era of globalization.

III. The Democratization of the Legislative Procedure of International Law: State Actors and Non-State Actors

There has been too much deliberation on the States' increasing participation in the world affairs. As being pointed out repeatedly, "democracy" neither prevailed nor was adopted as the constitutive principle in the world of States before the decade of the 1960s. In the decades following the World War Two, the "population" of States swelled and the new States carried out a fruitful struggle for justice distribution. A world society composed of States became ripe. At least since the Vienna Declaration on Universal Participation (1969), each State has begun to enjoy a full right to participate in the international "legislative" process, subsuming the rights to be presented, to have access to information, to be heard on the issues, to cast a vote equal in weight or value to the vote of every other

State and to have the views of the majority prevail (one state-one vote majority rule).

Despite of the great progress afore-said, the author, sharing the viewpoints with some luminaries, questions the fullness and the thoroughness of this inter-state democracy. We can see in the current practice that the representatives to a treaty-making conference are not elected by the people, but appointed by the government. We can also see a markedly comparison: the limited number of the permanent members or decision-makers in specific organs, like the permanent member countries of the Security Council, the executive directors of the World Bank, or the judges of the International Court of Justice, on the one hand; the creasing number of the States and the diversified or varying kinds of issues to be decided, on the other. With a view to eliminate these weaknesses, some scholars called for the elected representatives or more decision-makers of different origins and something like this.[24] The author is doubtful of the effectiveness of the measures though.

Instead, two phenomena make the author envisage the hope for a full or thorough democratization of the legislation of international law. One is that the non-state actors, especially NGOs, have been much involved in the decision-making of international affairs. The other is the openness of judicial procedure of international tribunals, admitting that judicial decisions are the subsidiary source of international law.

A. NGOs' Access to the International Law- Making

Globalization has given birth to a large number of non-state actors on the world stage, among which non-governmental organizations (NGOs) are a great draw. From my viewpoint, NGOs may be seen as an illustration that the right of association also exists in international community. When looking at the NGOs' interaction with the State actors, we can see four different pictures. From a specific State's perspective, some of its policies may be challenged by some NGOs, or so may the policies adopted by the State Group to which it belongs. NGOs, however, don't necessarily amount to anti-government

[24] Christopher W. Pinto, Democratization of International Relations and Its Implications for the Development and Application of International Law, International Law as a Language for International Relations (Proceedings of the United Nations Conference on Public International Law, New York, 13-17 March 1995). Kluwer Law International (1996), at 255-263.

organizations. Persons from NGOs may be enlisted in the governmental delegation to an international conference and enhance the government's negotiating ability. Sometimes NGOs behave in favor of a government while the latter stays in the backstage. It is the NGOs whose purposes, values or interests are different to those of the governments that contributed immeasurably to the emergence of a world civil society. NGOs are essential to the world civil society.

Traditionally, States, acting as unitary bodies, played roles exclusively in the shaping process of the international relations. In the era of globalization, NGOs become more and more important in the creation, development, and enforcement of international law. They operate as lobbyist, protestors, advocates, and activists in a way that generates publicity about international law. They can either accelerate or delay or retard the emergence of the rules of international law. In addition, they seek to increase the transparency of international decision-making. Usually, NGOs just have indirect or remote influence on international law. Their activities can be evidence of international law. Under rare circumstances, institutional arrangements are available for NGOs' participation in the legislation of international law. For example, the International Committee of the Red Cross (ICRC) has the express acknowledgement of its role in the Geneva Convention 1949 and the 1977 Protocols. According to these documents, States can entrust the fulfillment of their duties to the ICRC (Article 10). They must cooperate with the ICRC during conflicts (Article 81). Before any amendment proposed by a State to the Protocols can be acted upon, the ICRC must be consulted (Article 97 Protocol I and Article 24 Protocol II). Also, great importance has been attached to NGOs in international trade system. Unlike the GATT(1947) which spoke nothing about NGOs, the WTO agreement, in its Article V (2), foresees that the General Council may make appropriate arrangements for consultation and cooperation with NGOs concerned with matters related to those of the WTO. By the Decision of 18 July 1996, the General Council provided a set of Guidelines for Arrangements on Relations with NGOs.[25]

[25] Wolfgang Benedek, Relations of the WTO with Other International Organizations and NGOs, International Economic Law with a Human Face (Edited by Friedl Weiss, Erik Denters and Paul de Waart, Kluwer Law International 1998), at 491.

NGOs have done a lot and achieved much in two areas of international legal system: one is international humanitarian law and human rights law and the other is international environment law. For example, NGOs assisted in the drafting of the Convention on the Rights of the Child and the Convention on the Conservation of Migratory Species of Wild Animals 1979, organized a systematic campaign towards the adoption of the Convention Against Torture and other related documents, the creation of the International Criminal Court, the banning of landmines, as well as fostered proposals for the establishment of a UN High Commissioner for Human Rights.[26]

Anyway, NGOs are still at their outset for becoming real participants in international law-making. Their capacity of participating in international legislative process is very limited. For example, in spite of the Guidelines for Arrangements on Relations with NGOs, the WTO does not allow NGOs to be directly involved in its work or its meetings. In a broader sense, international legislative systems lack institutional arrangements for NGOs' participation in them. In addition, the world civil society is less developed. There are no international institutions guaranteeing NGOs' legal status. Unlike international governmental organizations, their legitimacy is grounded on national legal systems and their activities are possible only when States allow them to happen. NGOs themselves are also very heterogeneous and under-organized.

B. The Openness of Judicial Procedure of International Tribunals

It seems that more and more international tribunals have been ready to accept *amicus curiae* information from various origins. When explaining why this could happen to the ICJ, Shelton said:

> [ICJ] judgments affect not only the rights and obligations of states parties to the disputes, but also increasingly the rights and obligations of individuals. Justice requires that [NGOs] representing the public interest have the opportunity to submit information and arguments to the Court. Such participation reinforces the concept of

[26] Robert McCorquodale, The Individual and the International Legal System, International Law (5th Edition, edited by Malcolm D. Evans), Oxford University Press (2003), at 317.

obligations *erga omnes* and can lead to enhancing the role of the Court and the long-term development of international law.[27]

In a recent debate over the NAFTA, its dispute settlement process was attacked for, among other things, the confidentiality of the proceedings ("lack of transparency"). Succumbing to this pressure, US Trade Act of 2002, in its Sec. 2102 (b) (3), sets many objectives for the future multi-literal trade negotiations. Those with respect to the transparency in the investment dispute settlement mechanism are the following:

(i) ensuring that all requests for dispute settlement are promptly made public;
(ii) ensuring that
(1) all proceedings, submissions, findings, and decisions are promptly made public; and
(2) all hearings are open to the public; and
(iii) establishing a mechanism for acceptance of *amicus curiae* submissions from businesses, unions, and nongovernmental organizations.[28]

Some other international legal systems, just as WTO, have recognized "the Third Party's right" to participate in the dispute resolution process. All these things reflect the fact that more and more actors on the world stage, especially those non-state actors, have easily got involved in "international" affairs due to the globalization. It is the inter-relationship that has been pushing these actors to press for the democracy in the dispute resolution process.

IV. The Pluralization of the Fundamental Values of International Law: Sovereignty V. Human Dignity

The Peace of Westphalia of 1648 was marked as the beginning of modern international law. Since then, the notion of sovereignty has been the organizing principle of

[27] D. Shelton, The Participation of Nongovernmental Organizations in International Judicial Proceedings, 88 AJIL 642 (1994).
[28] http://www.sice.oas.org/Trade/tradeact/act7.asp, Jan.1, 2004.

international relations. As traditionally defined, a sovereign State enjoys supreme political authority and a monopoly of the use of legitimate force within its borders; has control over its borders, both what comes in and what goes out; is free to chart its own policy course; and is recognized by other governments as an independent entity.[29]

Why could the notion of sovereignty prevail predominantly during the past centuries? First, international law was created in the soil of west Europe, where the doctrine of sovereignty developed among European thinkers from the fifteenth century on. Also, the Christian culture implanted the notion of equality into this doctrine which appealed to the world community. Second, for a long period after the Peace of Westphalia, States were self-contained and the international transactions and communications ran at a lower level. The challenges that States faced were neither essential nor inherent. Instead, also thirdly, the primary task of most States was to avoid subordination and keep its independence. To be invaded and subordinated was not so much a threat to the sovereignty of States as a dynamic for the promotion of the doctrine of sovereignty. Actually, in the course of decolonization of 1960s, the new nation-states, basing their business on the notion of sovereignty, carried out a successful campaign of fighting against maltreatment and economic exploitation by western powers.

Globalization has brought about great changes in the past decades. On the one hand, although the world welfare is enhanced, trade and production patterns have been altered by the evolution of transnational and multinational corporations, the internationalization of manufacturing through affiliates or outsourcing of components and foreign assembly, and the globalization of markets. For example, the intra-corporation transactions across national boundaries can escape or evade the national regulation such as anti-dumping laws. On the other hand, we are encountering more problems in the era of globalization: the degradation of the environment, the demographic explosion, massive refugee flows, transnational criminal activities, global terrorism, and so on. A State can not cope with these issues successfully by itself. The usefulness of the nation-state itself has been called into question in view of global changes and challenges. As a result, the dominance and

[29] Richard Hass, A Talk on Yale Campus, Jan. 29, 2004.

autonomy of the sovereign State is increasingly subject to critical scrutiny. Micro-nationalism and localism even advocate that people turn to the small community—the village, neighborhood, or ethnic group—where they can control their lives on the local level.[30]

Some luminaries were aware of these great changes and put forward following comments and observations:

> A relevant jurisprudence will recognize that the whole of mankind does today constitute a community, in the sense of inter-determination and interdependence, and will extend its focus of inquiry to include this largest community, embracing the whole earth-space arena.[31]

They continued,

> The comprehensive set of goal values which, because of many heritages, the present writers recommend for clarification and implementation are, as already suggested, those which are today commonly characterized as the basic values of human dignity, or of a free society.[32]

The new reality and theories fostered the new developments in international law. The manifestation was the booming of international human rights law, international humanitarian law and international environment law in the past decades. Many scholars regarded the sovereignty as the obstacles in their pursuit of the goal values of human dignity and alleged that the sovereignty is outdated. They strongly supported the allegation that human rights took superiority over sovereignty. Also, they advocated

[30] Oscar Schachter, The Erosion of State Authority and Its Implications for Equitable Development, International Economic Law with a Human Face (Edited by Friedl Weiss, Erik Denters and Paul de Waart), Kluwer Law International (1998), at38-40.
[31] Myres S. McDougal, Harold D. Lasswell and W. Michael Reisman, Theory about International Law: Prologue to A Configurative Jurisprudence (first published in 1968, see Virginia Journal of International Law), International Law Essays: A Supplement to International Law in Contemporary Perspective (edited by Myres S. McDougal and W. Michael Reisman), The Foundation Press, Inc. (1981), at 54.
[32] Id. at 59.

humanitarian interventions.

Actually, sovereign-states are still playing an important role in the world community. Non-state actors are subject to internal regulations and policies. Their activities are protected by international treaties concluded among States. In legal terms, the sovereignty of States has remained a cornerstone of international law. Needless to say, sovereignty is still the States' last resort for protecting their interest and no State can easily give up its appeal for sovereignty. It is enough to think about the responses of the US to the recent lawsuits with respect to its obligations under the Chapter 11 of NAFTA.[33]

Definitely, the present author does not overlook the impact of globalization on the sovereignty. The situation in the era of globalization is different from that in the era of colonization. With things changed, sovereignty has lost much in the substantive law sense and seemed to approach to a pure procedural right. It provides States with a last resort, but does not set any goal values for States. When the world stepped from subordination, through coordination, to cooperation, State governments should endeavor to improve the people's welfare and promote the human dignity. They will be stigmatized if they refuse to do this or even behave in the opposite direction under the guise of sovereignty.

Neither does this author agree with the allegation that human rights takes superiority over sovereignty. Sovereignty is a procedural right while the human dignity is kind of a substantive right. It is neither necessary nor possible to draw a comparison between them. They are supreme in their respective domains. International community is something like anarchy compared to national community. All States are equal in legal terms. Furthermore, no State has played a role of world police successfully and convincingly. Intervention and subordination under any excuse can arouse strong resilience and objection. A State is not the appropriate one, at least not the sole one, to assume the inspection, criticism and correction of other States' human rights conditions.

[33] Guillermo Aguilar Alvarez and William W. Park, The New Face of Investment Arbitration: NAFTA Chapter 11, 28 The Yale Journal of International Law 370 (2003). Another example was the debate on the America's entry into the WTO. See J.J. Jackson, The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results, 36 Columbia Journal of Transnational Law 157-188(1997).

This author, however, does not mean that there should not be any supervision over States' behavior. Great importance should be attached to the world "civil" society. This is a human beings-centered era. All individuals are identified with or affiliated to, or make demands on behalf of, many different groups—nation-states, territorial communities, multinational organizations, non-governmental organizations, political parties, pressure groups, tribes, and private associations of all kinds. A mild climate should be provided for the growth of the world civil society. Non-state actors are supposed to contribute much to the promotion of human dignity.