GLOBALIZATION, STATE SOVEREIGNTY, AND THE DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

MILENA STERIO*

"Today, virtually all nation-states have gradually become enmeshed in and functionally a part of a larger pattern of global transformations and global flows. Transnational networks and relations have developed across virtually all areas of human activity. Goods, capital, people, knowledge, communications, and weapons, as well as crime, pollutants, fashions and beliefs, rapidly move across territorial boundaries. Far from being a world of "discrete civilizations," or simply an international society of states, it has become a fundamentally interconnected global order, marked by intense patterns of exchange as well as by clear patterns of power, hierarchy and unevenness."

"To speak of globalization is inevitably to raise interrogations about the fate of the state."

TABLE OF CONTENTS

INTRODUCTION

This Article discusses globalization and its influence on state sovereignty and the development of international law, specifically international criminal law. This Article argues that globalization affected international law and international criminal law, and it has contributed to the proliferation of norms, actors, and institutions in this field. In Part I, this Article defines globalization and discusses how globalization affected international law and international criminal

* The Charles R. Emrick Jr.–Calfee Halter & Griswold Professor of Law, Cleveland-Marshall College of Law. Admitted to the New York Bar (inactive). Master's Degree, Private International Law, 2003, University of Paris I; J.D., 2002, Cornell Law School; Maitrise en Droit (French law degree), 2002, University of Paris I; B.A., 1998, Rutgers University. The author would like to thank the organizers of the George Washington International Law Review's Symposium on the "State of the Nation-State" on March 18, 2022, for the opportunity to present a version of this Article.

law. In Part II, this Article focuses on globalization's impact on international criminal law in particular. In Part III, this Article explores globalization's influence on creating the International Criminal Court, one of the most fundamental institutions of international criminal law. Finally, this Article offers concluding remarks about globalization's presence in international affairs and its impact on state sovereignty.

I. Globalization: Preliminary Remarks

Globalization has been defined in a myriad of ways. Legal scholars define globalization as "a multi-facetted [sic] process of expansion of human activities to the entire globe and assorted cognitive frames of reference,"[1] as a "'stretching process'" in which "connections have been made between different social contexts or regions and become networked across the earth as a whole,"[2] and as "a phenomenon . . . [of] inter-connectivity between regions, peoples, ethnic, social, cultural, and commercial interests across the globe."[3] This Article argues that the forces of globalization have brought about fundamental changes in the field of international law and international criminal law. While only one of many effects, globalization profoundly affects state sovereignty and territoriality.[4] Globalization, by eroding state sovereignty, has loosened the state monopoly on jurisdictional issues. In addition, globalization has proliferated transnational judicial dialogue, contributed to the development of hybrid, supranational legal systems, and contributed to the interaction between different legal systems.[5] Thus, scholars have conceived

1. Frédéric Mégret, *Globalization and International Law*, Max Planck Encyc. Int'l L. 1, 1 (2009).

2. Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 537 (2001) (citing Anthony Giddens, The Consequence of Modernity 64 (2000)).

3. Milena Sterio, *The Evolution of International Law*, 31 B.C. Int'l & Comp. L. Rev. 213 (2008) [hereinafter Sterio, *Evolution*]. It should be noted that, in addition to the legal field, scholars in other disciplines have defined globalization. For example, anthropologists have argued that we live in the "global cultures ecumene" or a "world of creolization." *See* Robert J. Foster, *Making National Cultures in the Global Ecumene*, 20 Ann. Rev. Anthropology 235, 236 (1991); *see also* Ulf Hannerz, *Notes on the Global Ecumene*, 1 Pub. Culture at 66, 66 (Spring 1989); Ulf Hannerz, *The World in Creolisation*, 57 AFR. 546, 551–52 (1987). Sociologists, when discussing globalization, have written about a "starting point that concentrates upon analyzing how social life is ordered across time and space." *See* Giddens, *supra* note 3, at 64.

4. Mégret, *supra* note 1, at 9 ("International law's structuring concepts have undergone very significant changes. Although this has arguably always been the case, sovereignty is seen as ever more limited, conditional, and dependent on international law" (emphasis omitted)).

5. *Id.* at 5.

of globalization as "territory deletion" and have explained that "globalization involves geopolitical renewal; so that the social space is no longer fully identified in terms of territories, territorial distances, and territorial boundaries."[6] A corollary to this phenomenon is globalization's significant impact on criminal law and, in particular, the development of the field of international criminal law during the second half of the twentieth century.

Criminal law is inherently territorial; the most common criminal law scenario is when the territorial state prosecutes a person or a group of persons who committed crimes on its territory. Historically, issues of criminal law and individual criminal responsibility were left to the state:

> Traditionally, international law has been concerned with governing relations between states. As a consequence, individuals within the territorial boundaries of states enjoyed only such protection as the state of their nationality was willing to extend to them and they had neither rights nor recourse on an international plane against abuses committed upon them by their own governments.[7]

However, as scholars have noted, "[g]lobalization has influenced everything, such as crime, criminal [sic], and the victim [sic], the process of committing a crime, the trial method, reasons to prove a claim, criminalization and decriminalization[,] and criminal policy."[8] One such aspect of globalization is the de-territorialization of criminal law—in particular, the imposition of supranational accountability on those who commit human rights violations and other atrocity crimes.[9]

One aspect of globalization's impact on the development of international criminal law has been the de-linking of territoriality and jurisdiction. Historically, jurisdiction over criminal prosecutions was viewed as a sovereign power that was enforced by the individual sovereign.[10] More recently, however, criminal law has been disconnected from territorial state powers through globalization. First, the concept of universal jurisdiction, stemming from sixteenth- and seventeenth-century piracy-related offenses, redeveloped in the second

6. Shirin Ahmadi Dastjerdi et al., *The Effect of Globalization on the National Criminal Law Systems*, Libr. Phil. & Prac. (e-journal) at 1, 2 (Aug. 31, 2018), https://digitalcommons.unl.edu/libphilprac/2614 [https://perma.cc/TJ4J-JB38].

7. Rod Jensen, *Globalization and the International Criminal Court: Accountability and a New Conception of State*, *in* 23 Governance and International Legal Theory 159, 171 (Ige F. Dekker & Wouter G. Werner eds., 2004).

8. Dastjerdi et al., *supra* note 6, at 2.

9. *See* Parts I and II, *infra*.

10. *See, e.g.*, Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 Harv. L. Rev. 241, 241 (1923).

half of the twentieth century.[11] Universal jurisdiction allows any state to prosecute and punish offenders of universal crimes; universal crimes include piracy, war crimes, slave trade, or genocide. This concept experienced a rebirth as a result of the 1960 Eichmann case.[12] Under universal jurisdiction laws, dictators who committed human rights violations faced the threat of prosecution by other states. A Spanish court indicted the former Chilean dictator, General Augusto Pinochet, on charges of crimes against humanity committed in Chile during his reign.[13] Hissène Habré, the former ruler of Chad, was the subject of an international arrest warrant in Belgium.[14] Most recently, a German court prosecuted and convicted a Syrian official for acts of torture committed in Syria, under German universal jurisdiction law.[15] These types of universal jurisdiction-based prosecutions exemplify how globalization has contributed to the development of international criminal law by removing the territorial state's monopoly on accountability.

Another aspect of globalization's impact on international law and international criminal law is the proliferation of international organizations and other non-state actors. "To the extent that globalization is challenging the state's ability to assert power, it is also inevitably stretching the legal fiction that states are and should be the only subjects of international law."[16] Thus, post-World War II, the United Nations became a global legal forum and peacekeeper for

11. Eugene Kontorovich, *The Parochial Uses of Universal Jurisdiction*, 94 Notre Dame L. Rev. 1417, 1418 (2019).

12. Sterio, *Evolution*, *supra* note 3, at 223. Israel tried Adolf Eichmann for his role in the Holocaust. *See id.*

13. *See, e.g.*, David Sugarman, *From Unimaginable to Possible: Spain, Pinochet, and the Judicialization of Power*, 3 J. Spanish Cultural Stud. 107, 108 (2002).

14. *See* Oumar Ba, *Hissène Habré, Chad's Former Dictator, Just Got a Life Sentence for Crimes He Committed in the 1980s*, Wash. Post (June 1, 2016, 9:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/01/hissene-habre-chads-former-dictator-just-got-a-life-sentence-for-crimes-he-committed-in-the-1980s/ [https://perma.cc/2QBK-KE7W]. Hissène Habré, the former dictator in power in Chad, received sanctuary in Senegal. Belgium attempted to arrest Habré under its own universal jurisdiction law and demanded Habré's extradition from Senegal. After Senegal refused, Belgium referred the case to the International Court of Justice (ICJ), which ruled that Senegal had to either prosecute or arrest Habré. Following the ICJ ruling, Senegal referred the matter to the African Union, which ultimately established a specialized supranational tribunal, the Extraordinary African Chamber, to prosecute Habré. The Chamber convicted Habré for various crimes and sentenced him to life imprisonment in 2016. *See id.*

15. *See, e.g.*, Deborah Amos, *In a Landmark Case, a German Court Convicts an Ex-Syrian Officer of Torture*, NPR (Jan. 13, 2022), https://www.npr.org/2022/01/13/1072416672/germany-syria-torture-trial-crimes-against-humanity-verdict [https://perma.cc/V9EY-B6NH]. This prosecution may provide a blueprint for future prosecutions in which a national of one state is prosecuted in another state's courts under the principle of universal jurisdiction.

16. Mégret, *supra* note 1, at 5–6.

states.[17] In addition to the United Nations, other specialized international organizations have been created, such as the International Monetary Fund, the World Trade Organization, the World Bank, the World Intellectual Property Organization, and the International Center for the Settlement of Insurance Disputes.[18] In addition to these global organizations, a plethora of regional organizations have developed post-World War II, such as the European Union, the Economic Community of West African States, the African Union, the Organization of American States, the Association of Southeast Asian States, the Organization for Security and Cooperation in Europe, etc.[19] "The higher level of interaction among international law actors in the twentieth century seems to have produced a myriad of international and regional bodies charged with resolving state, and non-state actors' differences on substantive levels as well as providing an institutional forum where such actors can assert their grievances."[20] Moreover, one scholar has noted the following:

> Aside from these non-state actors of a private sort, globalization has also had a significant impact on the importance, nature[,] and emergence of international organizations. The existence of international organizations is an old phenomenon, dating back to at least the nineteenth century. The realization that some issues are inherently global, embracing inter-state but also internal and transnational matters has, however, had a considerable impact on those institutions that already existed and prompted the emergence of new ones. . . . Globalization has changed the nature of international organization. The UN system, in particular, has tremendously diversified its activities, which increasingly include interacting directly with non-state actors. Some regional organizations have evolved from fairly narrow mandates (e.g.: the European Communities) to very advanced forms of proto-federal integration.[21]

In the field of international criminal law, as the Part below discusses, there has been a proliferation of international, hybrid, regional, and other types of supranational tribunals in the post-World War II era. The Yugoslavia and Rwanda tribunals, hybrid institutions such as the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court—as well as internationalized domestic war crimes chambers—have been established during the last three decades, reflecting the international community's willingness

17. Sterio, *Evolution*, *supra* note 3, at 221.
18. *Id.*
19. *Id.* at 221–22.
20. *Id.* at 222.
21. Mégret, *supra* note 1, at 6.

to separate accountability from territorial state's jurisdiction.[22] The birth of these supranational institutions and accountability mechanisms is at least in part driven by globalization.

In addition to international organizations, globalization increased the role of non-state actors in the global legal order. Such non-state actors include trade organizations, corporations, and non-governmental organizations (NGOs), among others.[23] In addition, these non-state actors increasingly litigate in international courts—as direct participants, amici curiae, or victims' representatives.[24]

Finally, globalization also influenced the proliferation of legal norms, including the creation of a norms hierarchy. As Part II discusses, multiple humanitarian and human rights treaties were negotiated in the post-World War II era. Globalization has changed the conditions of the production of international law. In addition, customary law norms developed to supplement treaty law. A large number of international legal decisions stemming from various international tribunals, coupled with the writing of prominent scholars in the field of international law and international criminal law, complete this phenomenon of norm proliferation.[25] The increased presence of legal norms has also sparked the development of norm prioritization: "Globalization has created pressures on the relative status of international law norms. One of the most contentious debates of international law in the last decades—the issue of whether certain norms are of higher ranking than others—has been energized by transformations brought about by globalization."[26] Thus, globalization has contributed to both a proliferation of legal norms in the field of international law and international criminal law, and it has also advanced conversation about the hierarchy of such norms. The following section will focus on the field of international criminal law, and it discusses the impact of globalization on this field.

II. Globalization and International Criminal Law

After World War II, the allied powers created the International Military Tribunal at Nuremberg to prosecute Nazi leaders responsible

22. *See* Parts II and III, *infra*.

23. Sterio, *Evolution*, *supra* note 3, at 217 ("NGOs play a hugely important role on the international scene" as "[t]hey challenge traditional models of state sovereignty with regard to different areas of the law, and in particular human rights norms; they formulate global standards of corporate behavior; and they generally claim to represent some sort of a global interest," *id.* at 218).

24. Mégret, *supra* note 1, at 9.

25. Sterio, *Evolution*, *supra* note 3, at 218.

26. Mégret, *supra* note 1, at 10 (emphasis omitted).

for the Holocaust.[27] Nuremberg has been widely portrayed as both the first modern-day international criminal tribunal and as one of the fundamental institutions of modern-day international criminal law. Additionally, Nuremberg is the precursor to more recent international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). It also is the origin of the notion that leaders of heinous regimes can incur supranational criminal responsibility[28]:

> Further developments in international law in the post-war years built upon the principle of individual accountability that had emerged from the Nuremberg trials. The principle was utilized in treaties that dealt with humanitarian law and some areas of human rights law. For example, the Geneva Conventions, dealing with humanitarian law, and the Genocide Convention, dealing with human rights law, both established individual international criminal responsibility for violations of their provisions. This further cleared the way for individuals to be held accountable at an international level for violations of humanitarian and human rights law that occurred within the territory of states.[29]

Post-World War II, globalization has further accelerated the development of international criminal law by delinking criminality from territory and by furthering legal norms regarding supranational jurisdiction in cases of atrocity crimes and other human rights abuses committed by state leaders. "Perhaps the most important criminality influenced by the globalization is the criminality of dictatorial regimes."[30]

One of the ways in which globalization eroded state sovereignty and expanded supranational jurisdiction and accountability is through the proliferation of human rights treaties and norms in the post-World War II era. "Globalization has arguably accelerated a number of processes that have been visible in the sources of international law for decades. The acceleration of the pace of normative production and the diversity of its sources has led to a relativization and transformation of customary international law."[31]

Directly after World War II, the four Geneva Conventions had the general aim of minimizing suffering during wartime; these conventions

---

27. Dastjerdi et al., *supra* note 6, at 4 ("Following the Holocaust and other crimes committed by agents of the Nazi Germany regime during World War II, the Allies created the international military court to punish the perpetrators.").

28. *See, e.g.*, Michael P. Scharf & Milena Sterio, *Introduction* to The Legacy of Ad Hoc Tribunals in International Criminal Law 1, 1 (Michael P. Scharf & Milena Sterio eds., 2019).

29. Jensen, *supra* note 7, at 172–73.

30. Dastjerdi et al., *supra* note 6, at 3.

31. Mégret, *supra* note 1, at 10 (emphasis omitted).

constitute one of the fundamental frameworks of the modern-day war crimes regime, present in the statutes of virtually all modern-day international criminal law tribunals.[32] The Genocide Convention, which was negotiated at around the same time, provided the definition of criminal genocide; this definition has been copied verbatim in the statutes of more recent international criminal law tribunals.[33] In addition, a series of human rights treaties developed in the post-World War II era; these treaties played a fundamental role in various supranational tribunals' ability to impose accountability on perpetrators of human rights abuses. Some of these human rights treaties include the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of all Forms of Racial Discrimination; and the International Convention on the Elimination of all Forms of Discrimination Against Women.[34] The proliferation of these human rights norms was accompanied, in some instances, by the creation of supranational courts, commissions, and institutions charged with monitoring state compliance with human rights norms or with providing a forum for individual grievances against states for such violations.

---

32. *See, e.g.*, Hortensia D.T. Gutierrez Pose, *The Relationship Between International Humanitarian Law and the International Criminal Tribunals*, 88 Int'l Rev. Red Cross 65, 69 (2006) (discussing the 1949 Geneva Conventions); *see id.* at 69–79 (discussing the application of various Geneva Convention provisions by the ICTY, the ICTR, and the ICC); *see also* Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

33. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; *See* Judge Silvia Fernandez de Gurmendi, President, Int'l Crim. Ct., The Importance of the Genocide Convention for the Development of International Criminal Justice: Remarks at Event Commemorating the Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide and the Genocide Victims Day (Dec. 8, 2017), https://www.icc-cpi.int/itemsDocuments/171208-ICC-President-remarks-at-Genocide-Convention-Commemoration.pdf [https://perma.cc/B78T-VEWM] (noting that the Genocide Convention "laid the foundation of modern international criminal justice and is inextricably linked to the Rome Statute of the International Criminal Court").

34. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 19, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85; International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, T.I.A.S. No. 94-1120, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

Examples of such institutions include the European Court of Human Rights, the Inter-American Commission on Human Rights, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Human Rights Committee, and the European Court of Justice.[35] These institutions "have obligated governments more than ever to control over the general and global rules that play a major role in shaping global and pluralist rights."[36]

Globalization has directly contributed to the erosion of state sovereignty and the development of human rights law. "Sovereignty will no longer operate as an excuse for violations of human rights norms against slavery, genocide, torture, or arbitrary confiscation of property."[37] As one scholar appropriately noted:

> The most fundamental point about human rights law is that it establishes a set of rules for all states and all peoples. It thus seeks to increase world unity and to counteract national separateness . . . . In this sense, the international law of human rights is revolutionary because it contradicts the notion of national sovereignty—that is, that a state can do as it pleases in its own jurisdiction.[38]

The development of the field of human rights law is another example of the erosion of state sovereignty, brought about by the forces of globalization. And the linkage of human rights protection with international criminal responsibility has contributed to the creation of more recent international criminal tribunals charged with prosecuting individuals who commit such human rights abuses.[39] As a scholar has observed:

> By accepting international treaties in the field of criminal law, governments restrict or abolish their absolute sovereignty in the field of criminality, punishment, prosecution, trial, etc. But by accepting the principles and institutions of the law in the international system of human rights, they revolutionize their criminal systems for the convergence, and in fact, they approach to each other.[40]

The field of international criminal law is less revolutionary than human rights law—the idea of individual international responsibility for criminal acts has been around for centuries.[41] Several centuries ago,

35. Dastjerdi et al., *supra* note 6, at 4.
36. *Id.*
37. Sterio, *Evolution*, *supra* note 3, at 231.
38. David R. Forsythe, Human Rights and World Politics 4 (1989).
39. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Court*, 10 Harv. Hum. Rts. J. 11, 39–50 (1997) (discussing the creation of new international criminal tribunals in the 1990s).
40. Dastjerdi et al., *supra* note 6, at 5.
41. Sterio, *Evolution*, *supra* note 3, at 232.

states agreed to recognize piracy as a universal crime and allowed for such universal punishment of piracy offenders.[42] In addition, as early as the fifteenth century, states have held trials for war criminals.[43] During the nineteenth century, states criminalized the slave trade—an individual act—through a series of treaties.[44] In the post-World War II era, however, the field of international criminal law proliferated to encompass additional violations related to attacks on human dignity. In order to facilitate the prosecution of such new violations of human rights norms committed by state and military leaders, the field of international criminal law further expanded to allow for the creation of new courts and new prosecutorial mechanisms:

> The individual became a subject of international law through the [Nuremberg] tribunal's observation that individuals could be held accountable for crimes against international law and could be punished accordingly. This observation raised the profile of the individual as a subject of international law and provided a springboard for the development of international human rights law, as "much of the international community came to conclude that a state's treatment of its citizens in peacetime was appropriate for general international regulation."[45]

In the 1990s, several new international criminal law tribunals were created. The ICTY and the ICTR were established through Security Council resolutions and tasked with prosecuting those responsible for atrocities committed in the former Yugoslavia and Rwanda, respectively.[46] The tribunals codified in their statutes the three main atrocity crimes already rooted in international treaty and customary law—genocide, crimes against humanity, and war crimes—and thereby specifically linked human rights norms to the notion of individual

---

42. *See, e.g.*, Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the of the International Criminal Court*, 11 Chi. J. Intl. L. 197, 203–04 (2010).

43. For a detailed history of war crimes prosecutions, see U.N. War Crimes Comm'n, L. Reps. of Trials of War Crims. (1949), https://www.loc.gov/item/2011525464/ [https://perma.cc/7XA3-T4Q8].

44. Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law*, Stanford L. Sch.: Stanford Lawyer (Oct. 28, 2011), https://law.stanford.edu/stanford-lawyer/articles/the-slave-trade-and-the-origins-of-international-human-rights-law-2/ [https://perma.cc/U6VA-X5M6].

45. Jensen, *supra* note 6, at 172 (quoting S.R. Ratner & J.S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy 6 (1997)).

46. *See, e.g.*, Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability – The Role of International War Crimes Tribunals*, 2 J. Nat'l Sec. L. & Pol'y 111, 118–19 (2006); Sterio, *Evolution*, *supra* note 3, at 234; *see also* Davis B. Tyner, *Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia's Folly in* Tadic, 18 Fla. J. Int'l L. 843, 853 (2006) (discussing the formation of the ICTY specifically).

criminal responsibility.[47] Globalization heavily influenced this type of linkage of human rights norms and individual criminal responsibility. As noted above, criminal law and criminal responsibility had traditionally been relegated to domestic law and state authorities. For example, if an Italian citizen murdered a French citizen in Italy, traditionally the murder prosecution would be limited to Italy.[48] The only extraterritorial recourse relied on petitioning the French government to issue a diplomatic protest to the Italian government.[49] Similarly, if a dictator abused her own citizens within her country, such acts would be seen as matters of domestic jurisdiction. "So long as a state did not cause harm outside its territory, international law had little to say about what a state did internally."[50] An offending dictator could be prosecuted domestically if the concerned state chose to impose accountability. However, this rarely happened and did not start occurring until international criminal law, driven by globalization forces, expanded to impose supranational responsibility on human rights offenders.[51] With globalization and the developing notion that international law encompassed more than interstate relations, international criminal law developed the idea of individual criminal responsibility on a supranational level. "The creation of international tribunals was a logical step in that direction, as it provided specific jurisdictions to handle criminal prosecution of individuals accused of international offenses."[52] Following the creation of the ICTY and the ICTR, several additional supranational tribunals were created to impose individual criminal responsibility on political and military leaders who commit atrocities. These tribunals have included the Special Court for Sierra Leone, the Extraordinary Chambers in the

47. *See, e.g.*, Alexandre Skander Galand, *The Systemic Effect of International Human Rights Law on International Criminal Law*, *in* Human Rights Norms in 'Other' International Courts 87, 90–94 (Martin Scheinin ed., 2019).

48. *See, e.g.*, Charles Doyle, Cong. Rsch. Serv., 94-166, Extraterritorial Application of American Criminal Law 1 (2016) ("Crime is ordinarily proscribed, tried, and punished according to the laws of the place where it occurs."); *see also* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.").

49. *See generally* J. L. Brierly, The Law of Nations 276–87 (Humphrey Waldock ed., 6th ed. 1978) (discussing state responsibility, including so-called diplomatic protection).

50. L. Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 Am. Indian L. Rev. 291, 296 (2007).

51. Sterio, *Evolution*, *supra* note 3, at 235 (noting that domestic prosecutions of human rights offenders rarely took place "for a variety of reasons, including: fears of regional instability; lack of democracy in the new regime; need for national reconciliation; and lack of recognition of international criminal norms").

52. *Id.* at 235–36.

Courts of Cambodia, and the Special Tribunal for Lebanon.[53] In addition, several internationalized domestic war crimes chambers have been created, including the Iraqi Special Tribunal, the Bosnian War Crimes Chamber, and, most recently, the Kosovo Specialist Chambers.[54] While hybrid tribunals and internationalized domestic war crimes chambers are linked to state authority and, in many instances, particular state-governed territory, these jurisdictions remain supranational because they employ international judges and lawyers, may be governed by international agreements, may prosecute extraterritorial crimes, and receive assistance and supervision by the international community.[55] Thus, globalization has contributed to the proliferation of supranational criminal tribunals, such as the ICTY, the ICTR, and the above-mentioned hybrid tribunals and internationalized war crimes chambers. This allowed for the development of international criminal law and the imposition of individual criminal responsibility for supranational crimes.

III. Globalization and the International Criminal Court

In addition to the creation of the above-mentioned ad hoc, hybrid, and supranational tribunals, the only permanent court in the field of international criminal law, the International Criminal Court (ICC), was established in 2002.[56] The ICC was created to exercise jurisdiction over the most serious crimes of international concern: genocide, crimes against humanity, war crimes, and the crime of aggression.[57] As one scholar noted, "[i]nternational law has long recognized that each of these crimes is so serious that it warrants the universal condemnation of all members of the global community and consequently, all states have a shared interest in ensuring that the perpetrators of them are brought to justice."[58] However,

53. *See* Milena Sterio, *The Future of Ad Hoc Tribunals: An Assessment of Their Utility Post-ICC*, 19 ILSA J. Int'l & Comp. L. 237, 240–44 (2013) [hereinafter Sterio, *Future*] (discussing the creation of hybrid tribunals in international criminal law).

54. *See id.* at 244–46; Dominique Bilde, Kosovo Specialist Chambers, Eur. Parl. Doc. E-001577/2021, (Apr. 12, 2021), https://www.europarl.europa.eu/doceo/document/E-9-2021-001577_EN.html [https://perma.cc/PTJ5-UGZT] (discussing the creation of the Kosovo Specialist Chambers).

55. For a general discussion of how these hybrid tribunals play a role in the field of international criminal law, see Sterio, *Future*, *supra* note 53.

56. *See, e.g.*, Amy McKenna, *The International Criminal Court*, Britannica, https://www.britannica.com/story/the-international-criminal-court-icc [https://perma.cc/37JB-L9CH].

57. *See, e.g.*, Milena Sterio, *Seeking the Best Forum to Prosecute International War Crimes: Proposed Paradigms and Solutions*, 18 Fla. J. Int'l L. 887, 895 (2006) (discussing the creation of the ICC).

58. Jensen, *supra* note 7, at 178.

globalization has accelerated the formation of specific supranational tribunals, such as the ICC, where such crimes of universal concern can be prosecuted at the supranational level.[59]

It is important to emphasize how the ICC differs from national criminal courts and how its creation reflects the influence of globalization on the field of international criminal law. In general, nation-states are responsible for trying and punishing criminals. As noted above, typically, the state where the crime was committed has jurisdiction over offenses committed on its territory. For example, if someone commits a crime in Italy, it is up to the Italian courts to try to punish that person.[60] However, when crimes are committed within the context of a conflict, the post-conflict government may not wish to prosecute those who committed offenses because many offenders may have connections to the ruling party.[61] "Thus, when a state is not willing or not able to prosecute people accused of gross violations of human rights, the ICC can step in."[62] The creation of the ICC exemplifies the international community's determination to create accountability for human rights offenders at the supranational level because such accountability was not possible at the state level.[63] In other words, the post-World War experience had demonstrated that leaders who committed human rights violations faced no serious accountability, and the world became a more interconnected universe through globalization; thus, the idea of supranational accountability for such leaders, exercised by a supranational organ, gained traction and ultimately gave birth to the ICC.[64] But for the powerful forces of globalization, the ICC would not have been

59. Aimee Mackie, *Perceptions, Politics, and Peace: The Limits of Globalization in Legitimizing the International Criminal Court*, 30 Macalaster Int'l L.J. 132, 141 (2012) ("Globalization has aided in the formation of a common international criminal court and universal agreement on crimes that must never be committed.").

60. *See* Jensen, *supra* note 7 and accompanying discussion.

61. *See, e.g.*, Off. of the U.N. High Comm'r for Hum. Rts., Rule-of-Law Tools for Post-Conflict States, Vetting: An Operational Framework, U.N. Doc. HR/PUB/06/5, at 7, https://www.ohchr.org/sites/default/files/Documents/Publications/RuleoflawVettingen.pdf [https://perma.cc/7KPR-EY8Y].

62. Jo-Anne Wemmers & Anne-Marie de Brouwer, *Globalization and Victims' Rights at the International Criminal Court* 279, 281 *in* The New Faces of Victimhood, Studies in Global Justice (Rianne Letschert & Jan van Dijk eds., 2011).

63. For a discussion about the factors influencing the creation of the ICC, *see* Stuart Ford, *The Impact of the Ad Hoc Tribunals on the International Criminal Court*, *in* The Legacy of Ad Hoc Tribunals in International Criminal Law, *supra* note 28, at 307, 313 ("[T]he establishment of the ICC required both the period of global cooperation that followed the end of the Cold War and the precedent set by the establishment of the ad hoc tribunals.").

64. For a detailed background about the development and creation of the ICC, see Rome Statute of the International Criminal Court, Overview, https://legal.un.org/icc/general/overview.htm [https://perma.cc/9KQG-DZRT].

created.[65] Although the ICC is a feature of the globalized world, it is important to note that the Court's design also reflects concerns for preserving state sovereignty.

Two features of the ICC warrant further discussion because they illustrate the tension between globalization and state sovereignty, and exemplify globalization's particular influence on the institutional design of the Court. These two features are the principle of complementarity and the victim participation regime. First, the ICC is founded on the principle of complementarity—the Court's jurisdictional prerogative ceases to exist if the relevant (most often territorial) state is willing and able to investigate and potentially prosecute a case.[66] Complementarity thus ensures that the Court does not unduly encroach upon state sovereignty in matters of criminal law:

> [Complementarity is] designed to ensure that the ICC will be able to penetrate the shield of impunity that has often been used by states to protect the perpetrators of humanitarian and human rights violations . . . [while also] respect[ing] the prerogative rights of states, under international law, to exercise police power and penal law through their own systems of law enforcement and national courts. This balance is ostensibly a concession to the sovereign interests of states because it maintains the centrality of the criminal justice systems of states in the investigation and prosecution of the crimes falling within the jurisdiction of the ICC.[67]

In other words, an essential feature of the complementarity principle is its commitment to allowing states the opportunity to first investigate and prosecute cases that fall within the subject matter jurisdiction of the ICC. The Court "exists primarily as a control mechanism, influencing the activity of states by encouraging them to make a genuine and tangible commitment to ensuring that the perpetrators of the most serious crimes of international concern are brought to account."[68] At the same time, it was envisaged as an institution committed to the respect of state sovereignty.[69] Thus, the ICC intervenes only if a state is unable or unwilling to genuinely honor

65. *See* Wemmers & de Brouwer, *supra* note 62, at 279 ("Globalization has brought with it not only new types of victimization, [but] it has also introduced new, international criminal law and international criminal justice institutions such as the permanent International Criminal Court . . . .).

66. *See, e.g.*, David Tolbert, *International Criminal Law: Past and Future*, 30 U. PA. J. INT'L L. 1281, 1288–89 (2009); *see also* Sterio, *Future*, *supra* note 53, at 240 (discussing the complementarity principle).

67. Jensen, *supra* note 7, at 180.

68. *Id.* at 182.

69. *See* Rupert Elderkin, *The Impact of International Criminal Law and the ICC on National Constitutional Arrangements*, 4 GLOB. CONSTITUTIONALISM 227, 238 (2015).

its commitment to bring perpetrators of heinous crimes to justice.[70] As we have witnessed over the last decade, the ICC has applied the "unable or unwilling" standard liberally by allowing states to pursue their own investigations.[71] And in the recent ICC investigation involving Afghanistan, the ICC has appeared willing to placate the United States' sovereignty concerns by limiting its investigation into alleged crimes not committed by American forces.[72] Thus, the ICC focuses both on encouraging and enabling states to end impunity at the domestic level, as well as imposing individual criminal responsibility on those who commit atrocity crimes at the international level. As such, the ICC reflects particularly well the tension between sovereignty and globalization.

---

70. *See* Carla Ferstman et al., The International Criminal Court and Libya: Complementarity in Conflict, Chatham House 2 (Sept. 22, 2014), https://www.chathamhouse.org/sites/default/files/field/field_document/20140922Libya.pdf [https://perma.cc/WF2N-9DU2].

71. For example, in the case of Libya, the ICC issued arrest warrants for Saif Al-Islam Gaddafi and Abdullah Al-Senussi in 2011. In the case of Al-Senussi, the ICC's Pre-Trial Chamber accepted Libya's admissibility challenge on grounds of complementarity despite findings that the defendant's due process rights would be seriously undermined at the national level proceeding. *Id.* at 3. The Appeals Chamber confirmed this; it held that the admissibility determination "does not involve an assessment of whether the due process rights of a suspect have been breached per se." *Id.* at 4. As another example, in 2020 the ICC closed its investigation into violations allegedly committed by United Kingdom (U.K.) forces in Iraq on complementarity grounds, as the United Kingdom had set up a domestic process to investigate such potential abuses. The United Kingdom's process has only resulted in one prosecution over the last two decades, despite credible evidence of numerous abuses committed by U.K. forces. Thus, some have argued that the ICC was wrong in deciding to close this investigation on complementarity grounds. *See, e.g.*, Clive Baldwin, *The ICC Prosecutor Office's Cop-Out on UK Military Crimes in Iraq*, Human Rights Watch (Dec. 18, 2020, 10:00 PM), https://www.hrw.org/news/2020/12/18/icc-prosecutor-offices-cop-out-uk-military-crimes-iraq [https://perma.cc/9RXG-CVQ7] ("[T]he [ICC Office of the Prosecutor] has chosen to gloss over the broader picture of the UK's institutional failure on accountability for war crimes, and to give the UK government the benefit of the doubt, despite all the evidence that it is actively obstructing justice."); Owen Bowcott, *ICC Abandons Inquiry into Alleged British War Crimes in Iraq*, Guardian (Dec. 9, 2020, 12:44 PM), https://www.theguardian.com/uk-news/2020/dec/09/icc-abandons-inquiry-into-alleged-british-war-crimes-in-iraq [https://perma.cc/E892-TYA7].

72. Teri Schultz, *Afghanistan: Why Has the ICC Excluded the US from War Crimes Probe?*, DW (Sept. 30, 2021) https://www.dw.com/en/afghanistan-why-has-the-icc-excluded-the-us-from-war-crimes-probe/a-59367096 [https://perma.cc/BP6A-7GRL] (explaining the ICC's investigation in Afghanistan, including the new Prosecutor Khan's decision to limit his office's probe into crimes committed by the Taliban and Islamic State Khorasan Province forces, deprioritizing the investigation into crimes committed by U.S. (or Afghan) forces; noting also that the implication of this decision is that powerful states, like the United States, can influence the court and thereby jeopardize the ICC's legitimacy); *see also* Alice Speri, *How the U.S. Derailed an Effort to Prosecute Its Crimes in Afghanistan*, Intercept, Oct. 5, 2021, https://theintercept.com/2021/10/05/afghanistan-icc-war-crimes/ [https://perma.cc/88N8-VVX5] ("U.S. officials have put extensive pressure on the court, the Afghan government, and U.S. allies in an effort to derail any investigation of American crimes.").

Second, the ICC's victim participation regime exemplifies another way in which globalization has impacted state sovereignty. The ICC, unlike its predecessor ad hoc tribunals, has a full-fledged victim participation regime, which is embedded in the Court's Rome Statute.[73] The ICC's victim participation regime includes three types of rights: participation; protection; and reparation.[74] Through this regime, victims participate in official proceedings and play an important role in imposing accountability on perpetrators of atrocities.[75] Moreover, the ICC victim participation regime protects victims' rights through special categories of protective measures aimed at 1) protecting victims from the accused and her counsel (so-called anonymity measures); 2) protecting victims from the press and the public (so-called confidentiality measures); and 3) protecting victims from re-traumatization (such as avoiding face-to-face confrontations with the accused).[76] Finally, the ICC has provided reparations to the victims through the establishment of the Trust Fund for Victims.[77] "The Trust Fund for Victims . . . not only implement[s] reparation awards from the Court, it may also . . . implement programs that will assist victims of mass crimes in terms of physical and psychological rehabilitation as well as material support."[78] Victims—either individuals who have themselves suffered abuses, their representatives, or NGOs representing more global victims' interests—are non-state actors who have, through the design of the ICC, been given a prominent voice and role in the process of imposing criminal accountability. As mentioned above, one of the features of globalization has been the proliferation of non-state actors in international law. Globalization has also influenced international criminal law through the institutional design of the ICC, where such non-state actors have been granted a crucial role.[79]

In sum, globalization has contributed to the ICC's creation and some of its features. Although there had been war crimes prosecution precedent in the international arena, globalization strongly

73. For a detailed discussion of ICC's victim participation regime, see generally Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 Int'l Rev. Red Cross 409 (2008).

74. Wemmers & de Brouwer, *supra* note 62, at 290.

75. *See* Int'l Crim. Ct. [ICC], *Victims Before the Court*, ICC-PIDS-FS-02-001/18_Eng, https://www.icc-cpi.int/sites/default/files/Publications/VictimsENG.pdf (last visited May 7, 2023).

76. *Id.* at 294.

77. *Id.* at 296.

78. *Id.*

79. *See generally* Wemmers & de Brouwer, *supra* note 62 (discussing globalization and the victims' participation regime at the ICC).

contributed to the rapid development of the field of international criminal law in the 1990s, including the creation of its institutions, such as the ICC.

IV. Conclusion

As this Article has discussed, globalization has influenced and shaped the development of the field of international criminal law—from contributing to a proliferation of norms and institutions in this field to solidifying the notion of supranational accountability through the linkage of human rights norms and individual criminal responsibility. Globalization has thus profoundly affected state sovereignty and the role of the state as the principal actor in international law, and in international criminal law. Some concluding thoughts on the subject are in order.

First, tensions between state sovereignty and globalization remain within the field of international criminal law. "Increasingly, international criminal justice is governed by tensions—between sovereignty and international criminal justice, between shared norms and need for enforcement, between international and national jurisdictions."[80] The following examples illustrate such tension. The United States and other superpowers have been able to exercise influence and leverage over some tribunals, including the International Criminal Court, thereby precluding such tribunals from completing investigations.[81] Moreover, states have refused to cooperate with tribunals. For example, although the ICC issued an arrest warrant against former Sudanese President Al-Bashir in 2005, he has, to this date, not been transferred to The Hague.[82] As one scholar has noted, "[s]tate sovereignty has also stood against the forces of globalization in other ways. As an illustration, an individual for whom the Court has issued an arrest warrant can continue to live in security within the bounds of his state, should he be aligned with the politically powerful."[83] Finally, the very regime of complementarity, upon which the ICC is designed, exemplifies the tension between globalization and state sovereignty. Therefore, arguments that globalization has completely diminished state sovereignty or that states no longer play an important role in international affairs are without merit.

---

80. Ba, *supra* note 14.

81. *See supra* note 72 and accompanying text.

82. *Al Bashir Case*, Int'l Crim. Ct., https://www.icc-cpi.int/darfur/albashir [https://perma.cc/VPG2-T3XV].

83. Mackie, *supra* note 59, at 141.

Second, despite the everlasting presence of state sovereignty, globalization is overall a positive factor, as it has shaped and molded international law so that it corresponds better to our understanding of the needs of the global rule of law system. Thus, globalization forces have influenced the creation of international human rights norms and their linkage to a system of universal individual criminal responsibility. One scholar noted the following:

> One of the lessons to be learnt from globalization historically is the remarkably plastic and adaptable nature of international law, as a law less wedded to certain objectives than it is a supple system of regulation designed to make the most of any epoch's priorities. A natural and often mooted vocation for international law in a globalized age might be to seek and tame some of the excesses of globalization, by standing for a certain form of global distributive justice, sustainable development, and the protection of all those who have most to lose from globalization.[84]

Through globalization, international law and international criminal law will continue to evolve in order to mirror global progress on human rights norms and protections.

Finally, globalization is here to stay. The world has become more interconnected over the last decades, and such connections are unlikely to disintegrate in the near future. It is thus best to acknowledge this and to work alongside the forces of globalization to make sure that international law and international criminal law, as well as their institutions, are developing in the most positive manner.

84. Mégret, *supra* note 1, at 13.