
The End of Geography: The Changing Nature of the International System and the Challenge to International Law

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Abstract

This lecture, inaugurating a lecture series in honour of Sir Elihu Lauterpacht, looks at the changing place of geography in the international system and the challenges that this poses to international law, from the central place of geography in the Westphalian legal order to its less certain place in the rapidly globalizing and diffuse international society of the present day. Examining these issues through the contrasting prisms of the principal political organs of the United Nations in New York, on the one hand, and the UN Specialized Agencies centred in Geneva, on the other, the lecture also explores these issues by reference to Thomas Friedman's thesis that The World Is Flat. The lecture concludes by identifying a number of areas of international law, and the international legal system, that will require creative thinking in the period to come to reflect the diminishing importance of geography.

It is a great pleasure and privilege to inaugurate this lecture series in honour of Sir Eli Lauterpacht. Eli, you know, or if you do not, you should know, of the warmth and immeasurable regard in which you are held by all those who have the privilege to know you. You have drawn so many of us into a magic circle of charm and intellectual vigour that has become for your many thousands of students over the years a calling,

* Sir Daniel Bethlehem QC, 20 Essex Street, London. This is a revised and footnoted version of a lecture delivered in Brussels on 22 November 2012 to inaugurate the Sir Eli Lauterpacht lecture series on *The Administration of International Justice* organized by Prof. Adnan Amkhan Bayno of MENA Chambers. The lecture was in turn a substantially revised and enlarged examination of a theme first explored by the author in a comment at the Biennial Conference of the European Society of International Law in Cambridge in September 2010 (published in J. Crawford and S. Nouwen (eds), *Selected Proceedings of the European Society of International Law* (2012), iii, at 21–25) and subsequently at the annual conference of the Canadian Council on International Law and in a roundtable discussion at the Council on Foreign Relations in New York, both in November 2011.

a pursuit of a life in the law. Unlike other areas of law, no one falls, through dint of circumstance or the happenstance of a case passingly referred, into the practise or teaching of international law. This is a calling that is chosen, and chosen so often, and certainly in the case of those who have come under your spell, because of the inspiration of a teacher and a guide.

Let me turn to my topic – ‘The End of Geography: The Changing Nature of the International System and the Challenge to International Law’. The topic is not self-evidently about ‘the administration of international justice’, the title of Eli’s 1991 monograph in the Hersch Lauterpacht Memorial Series of lectures that now also carries the name of this lecture series.¹ That was, and remains, an influential book about aspects of the settlement of international disputes. My topic is not about the settlement of disputes, or about the administration of international justice, but it has a connection with Eli nonetheless. The topic that I would like to speak about today is the system of international law, about aspects of its origins and its character, and about some of the challenges that present themselves for the future. This is an enquiry that is quintessentially Eli’s. A sense of the system of international law, and of its contours, and of the role and place of international law in the international system more generally, has been an ever-present theme in his work, whether as a scholar or practitioner, advocate or judge.

This said, notice of this lecture has been a cause of some concern around the world. On hearing of its title, Victor Prescott, the noted geographer from Melbourne University and author of a number of important works on boundaries and frontiers, felt sufficiently concerned to email Barbara Kwaitkowska to affirm that ‘with very great respect I must advise that the study of geography will continue into the indefinite future’. Kwaitkowska, also an expert on boundary matters, when circulating Prescott’s email, professed herself to be equally ‘shocked’ by the provocative title. In the nature of such authoritative polling, I anticipate that there will be many others out there who will be waiting either in readiness and with resolve to challenge whatever dangerous thesis may be advanced or to flee to high ground as the uncountoured and lawless topography of the future sweeps over the land.

There may, of course, be reason for such concern. This has happened before. We read, in the book of Genesis, that God saw ‘humankind’s evildoing on earth’² and, determined to correct this, that He brought a Deluge ‘upon the earth for forty days and forty nights’,³ such that ‘all high mountains that were under all the heavens were covered’.⁴ Perhaps we should be concerned about a re-visitation of this kind. But I come here today not as a meteorologist with dire climatic predictions but as a lawyer with an inclination to test the resilience of our Westphalian legal world. For it is a world that rests heavily on geography! And the question I would pose is whether this prism through which, despite protestations to the contrary, we continue to see

¹ E. Lauterpacht, *Aspects of the Administration of International Justice* (1991).

² Genesis, Chap. 6, line 5.

³ Genesis, Chap. 7, line 12.

⁴ Genesis, Chap. 7, line 19.

the international *system* is an appropriate controlling vision of international *law* as we move further into the 21st century. So, to Prescott, Kwaitkowska, and others, I do not come here to predict the end of geography. The discipline will remain and flourish, even for lawyers.

I should add that my choice of title is inspired not so much by Francis Fukuyama's *The End of History and the Last Man*,⁵ with its vision of apotheosis, as it is by Thomas Friedman's *The World Is Flat: The Globalized World in the Twenty-First Century*.⁶ The issues I would address are those of globalization, the changing nature of the international system, and whether international law as we know it is fit for purpose in a world that, to use Friedman's language, has moved beyond the 'Globalization 1.0' of its state-driven origins, through 'Globalization 2.0', where the key agents of change were multinational companies, to the 'Globalization 3.0' world in which we now find ourselves.⁷ This is a world, Friedman proposes, in which 'the force that gives [this period – our time] its unique character – is the new found power for *individuals* to collaborate and compete globally'.⁸

This lecture might have been subtitled 'the world looks different from Geneva than it does from New York'. There are duelling visions of the international system. By New York I mean the New York of the United Nations (UN), of the General Assembly (GA), and the Security Council (SC) – rooted in states; in sovereignty and equality; in notions of domestic jurisdiction and non-intervention; in boundaries; in majority votes and vetoes; in hard power, soft power, and smart power, but power nonetheless; in geographic blocs, persuasion, and regional influence. This is classical Westphalia, albeit in a contemporary institutional setting.

There is a different vision of the world from Geneva. By Geneva I mean the world of the UN Specialized Agencies and similar organizations, not all of which are based in Geneva, but the shorthand will suffice. Here, while still rooted in states, the world looks different. Big Power politics is less frequently in evidence. Cooperation across boundaries, and despite them, is the *modus operandi*. The focus is technical – on climate, health, migration, telecommunications, trade, transport, travel, and more. The international system looks very different when it is seen through the lens of the Specialized Agencies and other organizations than it does when seen through the lens of the GA and SC. The websites of the World Health Organization (WHO) and the Food and Agriculture Organization (FAO), of the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO), of the World Trade Organization (WTO) and the International Telecommunications Union (ITU), of the UN High Commission for Refugees (UNHCR) and the International Organization for Migration (IMO), paint a very different picture of the international system, and of the challenges faced by international law, from that which is visible when we look through the New York

⁵ F. Fukuyama, *The End of History and the Last Man* (1992).

⁶ T.L. Friedman, *The World Is Flat: The Globalized World in the Twenty-First Century* (2005); references hereafter are to the updated and expanded edition, 2006.

⁷ See *ibid.*, at 9–11.

⁸ *Ibid.*, at 10.

Westphalian prism. These Agencies and organizations are at the sharp end of the world of the future – focused on cyber, on food security, on pandemic health scares, on the interconnectedness of the global trade and financial system. These two worlds intersect, of course, but their vantage points and visions are very different. And this is even before we get to the vastly more diffuse and decentralized world that Thomas Friedman describes in which the actors of influence are individuals and corporations engaging internationally under an umbrella of international, or transnational, law that is for all practical purposes increasingly remote and increasingly detached from states.

The US National Intelligence Council (NIC) recently published its long awaited *Global Trends 2030: Alternative Worlds* as part of its endeavour to inform the Obama Administration about what the world could look like in the future.⁹ As part of the process of preparing this report, there was an extensive series of public discussions on a wide range of topics from the role of the US in a multi-polar world to the impact of Chinese economic growth, the proliferation of advanced technologies to small regional and non-state actors, future trajectories of migration, and more. Initiating the online dialogue on these and other issues, Myron Brilliant, the Senior Vice-President for International Affairs at the US Chamber of Commerce, published an essay entitled ‘The World in 2030: Are we on the path to convergence or divergence?’¹⁰ The essay opens as follows:

For much of the last fifty years, the international system – its structure, operations and goals of its key institutions – remained remarkably stable. Now all that is changing. The international system – as we know it today and as represented by such organizations as the IMF, World Bank, WTO, WHO, OECD, United Nations and NATO – has to reform or the institutions at the core of the system will become marginalized or even obsolete. Moreover, we should expect new institutions to develop that will contribute to a reshaping of the global landscape with profound implications for America and the Western world in geopolitical, security and economic terms.

He goes on to observe that ‘[c]hange will be more evolutionary than revolutionary, but it will be significant’.

This is the glimpse of the horizon that I would like to explore from the perspective of international law. International law is the glue that holds the international system together and defines and shapes the space within which those who are subject to the law operate. There is considerable discussion about the shape of the international system over the next 30 to 50 years. There is not, however, the same robust review of the international *legal* system. It is wise, and necessary, that we – the college of international lawyers – begin to consider these issues more closely.

Against this background, let me step back a little to describe in broad-brush terms where we have come from and aspects of our trajectory into the future that will inform the comments that follow.

⁹ See <http://gt2030.com/>.

¹⁰ Available at: <http://gt2030.com/2012/05/27/the-world-in-2030-are-we-on-the-path-to-convergence-or-divergence/>.

Elements of international law have their roots deep in antiquity and in the principles and practices of the early Middle Ages. International law as we know it today, however, as a systematic body of rules, has its intellectual origins in the writings of the Dutch jurist Hugo de Groot, Grotius, in the early 17th century with works on the law of capture, freedom of the seas, and his seminal treatise of 1625 on the laws of war and peace – *De Jure Belli ac Pacis*. This, as Sir Hersch Lauterpacht was to describe it, became the foundation for all later developments in the field of international law. This remains the intellectual font of international law as currently conceived.

In parallel with the development of this intellectual tradition was the emergence of the system of sovereign nation-states, ready to avail itself of these developing principles of law. The Peace Treaties of Osnabruck and of Munster, signed respectively in May and October 1648, which brought to an end the Thirty Years and Eighty Years Wars under the Peace of Westphalia, resulted in the redrawing of political boundaries in central Europe. It also resulted in the recognition of the rights of each sovereign prince to determine the internal elements of his state. And so was born the Westphalian system of inter-state law – a system of competing and interacting sovereign entities whose discourse and interaction was to be regulated by law.

Geography was and has remained to this day central to this system of law. Sovereignty, and the equality that flows from it, rests fundamentally on the notion of exclusive authority over discrete parcels of territory. ‘Independence’ – described by the Permanent Court of International Justice (PCIJ) in its advisory opinion on the *Customs Régime Between Germany and Austria* as having the ‘sole right of decision in all matters economic, political, financial or other’¹¹ – hinges on the ability to exercise such authority within the frontiers of the state. The very concept of statehood, as later expressed in Article 1 of the Montevideo Convention on the Rights and Duties of States of 1933, is rooted in a nexus between a defined territory and a permanent population, a government, and capacity to enter into international relations.¹²

Beyond these essential elements of a state, other concepts and principles of international law are also deeply rooted in traditional notions of territorial geography. The Principles at the heart of the Charter of the UN include the ‘sovereign equality’ of UN Members,¹³ the prohibition on the threat or use of force ‘against the territorial integrity or political independence of any state’,¹⁴ and the reserve domain of domestic jurisdiction into which intervention is not permitted.¹⁵ All of these are deeply rooted in the geography of the state. GA Resolution 2625 of 1970, the Friendly Relations Declaration,¹⁶ considered by the International Court of Justice (ICJ) as reflective of

¹¹ *Customs Régime Between Germany and Austria*, Advisory Opinion, 5 Sept. 1931, Series A/B No. 41, at 12.

¹² LNTS No. 3802. Article 1 reads: ‘The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.’

¹³ UN Charter, Art. 2(1).

¹⁴ *Ibid.*, Art. 2(4).

¹⁵ *Ibid.*, Art. 2(7).

¹⁶ GA Res. 2625 (XXV) of 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

customary international law, at least in part,¹⁷ gives greater granularity to the principle of non-intervention in matters within the domestic jurisdiction of any state, including that '[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. ... No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.' While the principle of non-intervention goes beyond the physical territory of the sovereign, the geographic reach of the sovereign in territorial terms is at the heart of the principle.

Flowing from sovereignty comes also the principle of state jurisdiction, that is, the authority of a state to govern persons, conduct, and property by its municipal law. Jurisdiction, although it has non-territorial dimensions, is largely manifest in territorial terms. Indeed, the territoriality, nationality, passive personality, and protective bases of jurisdiction, as well as notions of extra-territorial jurisdiction, are all hinged to a greater or lesser extent on geographic linkages, affiliations, and effects. Regulation, accountability, and the income-raising authority of states through taxation are also largely, even if not exclusively, rooted in the geographic and tangible reach of the state.

So, geography stands at the very core of our contemporary international legal order and is everywhere deeply embedded in the most fundamental principles of our legal system.

It is no part of my thesis that states are on the verge of disappearing or that these traditional principles, rooted in geography, that stand at the heart of the system of international law, are withering away. On the contrary, we see everywhere an inclination towards independence and an assertion of sovereign rights over territory – in South Sudan and Kosovo, by the Palestinians and in Somaliland, by separatists in Quebec and in Scotland. Borders and title to territory continue to matter, as we see in the South China Sea, with competing claims to that maritime space and to the islands by China, the Philippines, Vietnam, Malaysia, and Brunei. There are live territorial and boundary disputes in every part of the world, from Chile and Peru, and Belize and Guatemala, in South and Central America, to those in Africa, such as that concerning Morocco's claims over Western Sahara or between Malawi and Tanzania over the waters of Lake Malawi; in the Middle East, between Israel and Syria; or in Asia, for example, between India and Pakistan over Kashmir, or between China and Japan over the Senkaku/Diaoyu islands. Issues of geography remain vital and fundamental in all of these matters and will be so for the foreseeable future, driven by both national aspirations and claims to natural resources.

The geography of statehood – the physical space of a state; the extent of its territory; its topography – will also continue to be an important determinant of comparative advantage in the economic sphere. The emerging power of the BRICS in the global economy – Brazil, Russia, India, China and South Africa – is not happenstance. In

¹⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment [1986] ICJ Rep. 14, at para. 191.

addition to their developing industrial base and sizeable populations, it derives from their vast territories. These five countries make up over a quarter of the world's land mass. And with geographical extent invariably also comes natural resource riches. So, geography is hugely important to power, both economic and political, and will remain so.

And there is every sign, as these emerging economies begin to flex their political muscles globally, that they will seek to do so within, and to maintain, the framework of the traditional Westphalian system, emphasizing sovereignty, independence, non-intervention, and the reserve domain of domestic jurisdiction. The geographic citadel of statehood is therefore, at some level, likely to be reinforced in the period to come. Andrew Hurrell, the Montague Burton Professor of International Relations at Oxford University, in a lecture appraising the performance of international law in the period following the end of the Cold War and looking to the future, suggested that 'the complex, hybrid and contested character of international society' today is a 'society that faces a range of classical Westphalian challenges ... but one that faces these challenges in a context marked by strong post-Westphalian characteristics ...'.¹⁸ On this view, the international system is set to maintain many of its traditional attributes.

But – and this is my thesis today – this systemic continuity is only part, and an increasingly small part, of the picture. While the geography of statehood is likely to remain at the root of the international system, it is becoming increasingly less important as people, goods, services, and funds flow across borders; as individuals and corporations engage directly with one another without the intermediation of states or of their paraphernalia; as virtual space takes on dimensions and an importance that rivals physical space in the world of transactions, communications, and other engagements; as regional and multilateral integration arrangements between states reduce the importance of boundaries; as international and non-governmental organizations proliferate and operate transnationally on the basis of technical mandates that transcend, or endeavour to transcend, narrow sovereign interests. On this vision of international society, sovereignty and boundaries are like rocks in a river. They may impede the flow, and even perhaps, on occasion, dam up the water. More usually, however, they simply act as an impediment to the directionality of the flow of the water, which eventually finds a new pathway on its free-flowing gravitational course.

Let me give you a few tangible examples of the developments that suggest that we may want to look at the geography of international law differently.

In the period since the end of the Cold War, the world's population has grown by about 1.7 billion people, 1.6 billion of whom were born into the developing world. In the next 40 years or so, to 2050, the current world population of around 7.1 billion is projected to grow, on median estimates, by a further 2.2 billion, to reach about 9.3 billion, with virtually all of this population growth, on a net basis, taking place in the developing world. At the higher end of these estimates, population growth will

¹⁸ Hurrell, 'International Law 1989–2010: A Performance Appraisal', in Crawford and Nouwen (eds), *supra* note *, at 9.

reach 10.6 billion by 2050, about 9.1 billion of whom will be born into the developing world.¹⁹

Population growth does not, of course, of itself challenge traditional conceptions of an international system rooted in geography. But it leads to consequences that do. For example, according to the Geneva-based International Organization for Migration (IOM), there are some 214 million migrants worldwide today, up 43 per cent in real terms on the figures of 10 years before. Migration is now more widely distributed than ever before, with the total number of migrants being greater than the population of the fifth most populous country in the world.²⁰

The remittances of migrants back to their home countries have increased exponentially over the 10 years from 2000 to 2010, from US\$132 billion to US\$440 billion, an increase of well over 300 per cent.²¹ This figure would be considerably larger if unrecorded funds flows could be factored in. These levels of migration, together with their associated financial flows, are set to increase over the coming years.

Considerable numbers of people are also forcibly displaced – about 42.5 million, on current UN High Commission for Refugees' figures, some 15.2 million of whom are refugees, and around 27.3 million internally displaced.²²

These flows of people – both voluntarily migrant and forcibly displaced – and of the funds associated with these flows move across boundaries and sovereignties, even if it is to other bounded and sovereign spaces.

Looking at the transboundary movement of goods, UN figures record an almost tripling of world trade, in value terms, in the decade to 2011, with imports and exports up to US\$18 trillion.²³

And then we come to the global health scares. The pages of the website of the World Health Organization dealing with health and international travel open with the following statement: '[m]ore than 900 million international journeys are undertaken every year. Global travel on this scale exposes many people to a range of health risks.'²⁴ The website goes on to provide 17 different disease distribution maps showing transboundary disease risks.

Amongst these transboundary health risks, the H5N1 (avian flu) and H1N1 (swine flu) pandemic risks are perhaps the most well known. Given the very high levels of

¹⁹ See *World Population Prospects, the 2010 Revision* produced by the Population Division of the UN's Department of Economic and Social Affairs, available at: <http://esa.un.org/unpd/wpp/index.htm>.

²⁰ International Organization for Migration and 'About Migration', 'Facts and Figures', both available at: www.iom.int/cms/en/sites/iom/home/about-migration/facts--figures-1.html See also Population Division of the UN Department of Economic and Social Affairs, *International Migration Report 2009: A Global Assessment*, ST/ESA/SER.A/316, Dec. 2011, available at: www.un.org/esa/population/publications/migration/WorldMigrationReport2009.pdf.

²¹ See the texts referred to in the preceding footnote.

²² UNHCR, *Global Trends 2011*, at Table 54, available at: <http://unstats.un.org/unsd/syb/syb56/SYB56.pdf> and UN International Merchandise Trade Statistics, *2012 International Trade Statistics Yearbook*, 'World Trade Tables', available at: <http://comtrade.un.org/pb/>.

²³ UN, *Statistical Yearbook 2009*, at Table 58, available at: http://unstats.un.org/unsd/syb54/SYB54_Final.pdf, and UN International Merchandise Trade Statistics, *2011 International Trade Statistics Yearbook*, 'World Trade Tables', available at: <http://comtrade.un.org/pb/>.

²⁴ Available at: www.who.int/ith/en/.

migratory bird movements, and of human travel and migration, these risks have pre-occupied the WHO and the FAO, as well as others. The challenges, not only to human health but also to animal and plant health, and to global food security, are considerable. And in all this one of the most interesting issues from the perspective of the international lawyer is the developing international legal framework that addresses such matters, and the challenges that it faces.

Let me give you a real-world example of these challenges, arising out of the events in 2007 when Indonesia refused to share the strains of the human H5N1 avian flu virus that it had gathered, following the significant outbreak of the disease there, with the network of WHO-linked laboratories on the Global Influenza Surveillance Network (GISN).²⁵ This Network of laboratories collects and analyses flu viruses, selects the strains to be included in vaccines, and provides them to manufacturers. Given the frequent mutations of the DNA of flu viruses, the international sharing of samples is crucial to keeping track of those mutations and to selecting the best strains for purposes of the manufacture of vaccines. Without this sharing of viruses, there can be no vaccines. And Indonesia refused to share its virus strains, potentially the most important in the network, given the scale of the Indonesian outbreak, because it wanted to patent the viruses and address issues of sharing in the context of discussions about financial recompense and questions about vaccine availability in developing countries.

Subsequent discussions in the WHO were deadlocked for a considerable period. It was only with a greater realization of shared vulnerabilities that came in the wake of the H1N1 (swine flu) outbreak in Mexico that appreciations began to change.

My purpose in highlighting this issue is not to make a judgement on the matter – which engages other complex considerations that I have not touched upon – but simply to highlight the risks and challenges associated with it and to observe, first, that this is not a challenge that is well suited to Westphalian solutions, and, secondly, that there is already a very considerable technocratic post-Westphalian world out there that is largely invisible to most of us.

The proposition of the end of geography is of course a caricature. But, even though it is a caricature, it is intended to pose a serious question. From a vantage point that is still largely rooted in a Westphalian system, are we – the lawyers – seeing the world sufficiently clearly, and is the system of international law with which we are so familiar, a system still so heavily rooted in notions of territoriality – sovereignty, jurisdiction, regulation, accountability – adequate to the challenges that will face us over the coming period?

²⁵ This issue is discussed by Fidler in 'Negotiating Equitable Access to Influenza Vaccines: Global Health Diplomacy and the Controversies Surrounding Avian Influenza H5N1 and Pandemic H1N1', 7 *PLoS Medicine* (2010), Issue 5 (available at: www.plosmedicine.org). See also Res. WHA60.28 of the World Health Assembly, at 102ff of http://apps.who.int/gb/ebwha/pdf_files/WHASSA_WHA60-Rec1/E/reso-60-en.pdf, the 18 May 2009 Report of the WHO Director General on 'Pandemic influenza preparedness: sharing of influenza viruses and access to vaccines and other benefits', available at: http://apps.who.int/gb/ebwha/pdf_files/A62/A62_5Add1-en.pdf, and other associated documents available at: <http://apps.who.int/gb/pip/>.

My response here is to suggest that there is a risk that we are seeing the evolving international system like passengers on a train that is travelling at considerable speed such as to blur our vision of the landscape as we look out of the window. From this vantage point, as we attempt to identify the landscape across which we are travelling, we resort to images and recollections from the last station at which we stopped, and we project to the next point at which we hope to draw breath by reference to the views and atmospheric conditions of the last. And in doing so, there is a real danger, as we take stock of the international legal system and attempt to assess its robustness and fitness for purpose for the future, that things will already have moved decisively past us and we will be caught in a constant cycle of catching up.

As we look to the future and consider the shape of the international legal system and its adequacy to meet new challenges, I would highlight six broad areas of challenge that have a self-evidently transboundary, geography-defying quality. They are:

- (a) the international environment, shared spaces, the atmosphere, and global commons;
- (b) the movement of people, both forcibly displaced and voluntarily migrant, and the economic and financial flows, and the challenges of civic and social integration that go with them;
- (c) the challenges to human, animal, and plant life and health, and to global food security, that come from a growing and already massively interdependent world and the migratory movements of both people and animals;
- (d) the enormous and increasing growth in global trade and financial flows and the symbiotic interconnectedness, and potential for systemic vulnerability, of the global economic system;
- (e) the dramatic increase in the global use of the electromagnetic sphere and the practical challenges and risks, and opportunities, that this presents, including for regulation and in the areas of the internet, including of an economic nature, and issues of security, ranging from cyber systems security to child prostitution and more widely; and
- (f) the transboundary challenges to security that have emerged more clearly into the light over the past decade or so, even if they have long been with us, from non-state actors that operate across boundaries and beyond the control of states.

This is a pretty formidable array of challenges, which in many respects, and certainly in scale, go beyond Westphalian conceptions of society and Westphalian conceptions of international law. While states will continue to be key instruments of international interaction, organization, and law-making for a considerable time to come, and notions of sovereignty, jurisdiction, and territoriality will continue to inform our approach to new challenges, we will have to move beyond our traditional notions of Westphalia if we are to engage effectively with these challenges.

Against this background, let me highlight a number of areas of international law and the international legal system that will require creative thinking in the period to come to reflect the diminishing importance of geography. There are five areas that I would identify as follows: (1) international organizational reform; (2) re-conceiving

notions of jurisdiction; (3) law-making and legal reform; (4) the subjects of international law; and (5) re-conceiving the sources of international law. Before I do so, however, let me return briefly to Thomas Friedman's vision of a Flat World, as it is a view that challenges, or ought to challenge, our appreciation of international law into the future.

Friedman's thesis is about globalization. Through globalization the world is being flattened. Flattening, for him, is about the greater connectedness and interoperability of people. Individuals have greater access and outreach. Flattening reflects the dramatic increase in personal empowerment as individuals are able to connect with one another directly, without regard to geography, for reasons of commerce, politics, social engagement, and more. The *Flat World* is a world dominated by individual actors who are able to engage with one another anywhere without the intermediation of states or of other traditional entities.

Friedman's *Flat World* sketches three eras of globalization. The first – which he calls 'Globalization 1.0' – spanned the period from 1492 to 1800. It was an era of discovery and the opening up of the world. It was an era of countries and muscle, of power-driven integration. The second era – 'Globalization 2.0' – spanned the period from 1800 to 2000. This was the era in which multinational corporations were the principal agents of change. It was an era of technological innovation that witnessed the emergence of the global economy. The third era – 'Globalization 3.0' – is our time, running from 2000 into the future. In this period, the principal agents of change are individuals, with their ability to collaborate and compete globally without intermediation. It is an era in which the drivers and actors of change are geographically diverse and dispersed. It is a period – my words now – in which geography and the structures and powers of the state are becoming less and less significant. Important elements of geography and municipal law oversight remain, of course. Domestic criminal law still addresses offences committed within the jurisdiction of the state and state agencies are still the instrumentalities of regulation and enforcement. Municipal law still regulates contracts and governs torts. But the ability, and actuality, of individuals engaging directly with one another across boundaries, on the basis of an increasingly globalized legal framework that almost goes unnoticed until some issue of enforcement arises, is manifest and, in volume terms, quite remarkable. How many of us read through the contracts into which we enter online almost every day whenever we download some software program or music track or film? Very few, if any, I would venture to suggest. We simply click the button marked 'I agree'. How many of us give a thought to the multiple jurisdictions that we traverse whenever we send an email internationally, and the legal edifice of international law and possibly multiple national laws that makes this possible. Internet Service Providers located in one country routing packets of data through ISPs in another country, on the basis of international telecommunications agreements and other legal arrangements that increasingly address conduct in virtual space, rather than geographic space.

The sceptics amongst you will immediately say that this is all, or at least mostly, the domain of private international law, of the conflict of laws. This is not the public international law as we know it that addresses and regulates the conduct of states. This is

nothing new, you may add, other than in volume terms, but certainly not in terms of the structures of the law. International law remains – sovereignty, independence, jurisdiction, non-intervention, etc.

And at some level you would be right. My contract with Google or Microsoft or Apple iTunes, every time I do an internet search or send an email or download a film, will be governed by the law of some or other US state, or English law or Belgian law, etc, as the case may be. International law, insofar as it is relevant, is relevant as it always was – because it provides a foundation on to which various municipal legal frameworks are grafted.

But, at least in my view, this is only a part, and an increasingly small and largely transactional part, of the story. The Law of Nations, in terms of volume and importance, certainly as measured in economic terms, is increasingly being pressed into the service of private actors, to facilitate their engagements and transactions. The states may still be the legislators, but they are now only seldom the intended and ultimate subjects of this globalized, and globalizing, law as it trickles down and forms into rivers of legal principles that flow round the rocks of territorial sovereignty and national boundaries and independence that only momentarily cause a diversion in the directionality and quantum of the private engagements that the law is ultimately designed to serve. And the question in all this is whether international law is adequate to the task. Are its still largely Westphalian structures sufficiently nimble to address this flowing river of global interaction? Are its conceptions of organization, of jurisdiction, of law-making, of sources of law, appropriate to the challenges that it will face?

And as we consider these questions, it is interesting to graft on to Friedman's globalization matrix – his Globalizations 1.0, 2.0, and 3.0 – the shape of international law. His Globalization 1.0, running from 1492 to 1800 – the era of discovery, of countries, and state-power driven integration – is the era of the origins of international law. It is the era of Grotius and the Peace of Westphalia. It is the era of states, of the emergence of a developed notion of domestic jurisdiction, and of sovereignty. It is an era of happy concordance between the drivers of globalization and the law that regulated their conduct.

What of Friedman's Globalization 2.0, running from 1800 to 2000, in which the principal agents of change and integration were corporations? There is, of course, an important body of law that addresses these actors and their transactions. Interestingly, however, this is a still emerging body of law, very largely over quite recent years. The international law of corporate social responsibility, for example, is still a subject in its relative infancy. Questions remain, and are much discussed in lecture halls, about whether corporations are properly to be regarded as subjects of international law. International dispute resolution mechanisms – in the span of the history of this era – have only relatively recently begun to recognize corporations as litigants in their own right, and not all such mechanisms yet do so. Corporations may be able to proceed against states under the ICSID Convention – the Convention for the Settlement of Investment Disputes – and the growing body of Bilateral Investment Treaties, but they have no direct access to the ICJ or to the panels and Appellate Body of the World Trade Organization (WTO). Municipal law remains the mediator of corporate obligations

today, even in respect of corporate conduct internationally. So, as regards this era of Friedman's globalization matrix, the unavoidable sense is that the Westphalian structures of international law are beginning to lag behind the globalizing international system.

What then of our era, Globalization 3.0, in which the principal agents of engagement and integration are individuals, collaborating and competing with one another directly and globally? Where is international law here? And the answer must surely be that it is a very long way behind all of these real world developments. There is little international law of any significant effect addressing the issue of climate change. The international law, and organizational framework, dealing with issues of human, animal, and plant life and health is developing at a rapid rate through the technocratic leadership of the WHO and the FAO. There is more to be done. The international law dealing with cyber space is in its infancy, even if there is a detailed legal framework that addresses other uses of the electromagnetic sphere under the auspices of the International Telecommunications Union. The financial collapse of recent years, since 2008, has highlighted shortcomings in the international financial system. How best to address transboundary security challenges remains a major preoccupation, including at the level of international law.

These are all issues of substantive law that fall to be addressed at the level of primary rules. So, for example, issues of climate change could be more fully addressed by way of substantive instruments of international law – a more muscular version of the UN Framework Convention on Climate Change and its Kyoto Protocol, for example.²⁶ In similar vein, the regulation of cyber space might appropriately be addressed in a multilateral treaty. This is the day-to-day stuff of international law. Although we might hope that greater progress would be made on this or that issue, I am less concerned with these elements of lag within the system than I am with issues that engage those more systemic questions of international law. And here I return to the five areas of international law, and of the international legal system, that I mentioned earlier as requiring creative thinking in the period to come to reflect the diminishing importance of geography – international organizational reform, re-conceiving notions of jurisdiction, law-making and legal reform, the subjects of international law, and re-conceiving sources of international law. Let me say something very briefly about each, more as a kite-flying exercise, to throw out some thoughts that might be developed more fully another time.

Looking first at international organizational reform, this has long been a focus of attention, although with little evident progress having been achieved. Myron Brilliant's remarks, in the context of the US National Intelligence Council's *Global Trends 2030* that I noted in opening, go directly to this aspect. Let me return to what he said: '[t]he international system – as we know it today and as represented by such organizations as the IMF, World Bank, WTO, WHO, OECD, United Nations and NATO – has to reform or the institutions at the core of the system will become marginalized

²⁶ See www.unfccc.int.

or even obsolete.’ This is undoubtedly the case, as also would be the loss to the coherence and effectiveness of the international system if such issues were not adequately addressed. International organizations are at the vanguard of our move into the future. They need to be better enabled, more accountable, and less politicized. Issues on the reform agenda range from representation to decision-making to accountability to bureaucratic management and oversight. Problems of politicization, not only at the New York end of the organizational spectrum but elsewhere as well, often trump progress on what might appropriately be addressed in technical terms.

On re-conceiving notions of jurisdiction, as I have already suggested, our current conception of jurisdiction is overwhelmingly territorial in character, even in its non-obviously territorial dimensions. It is rooted in analyses of the 1930s that have developed little since then. While the challenges of the future may continue to be squeezed into this framework, with greater or lesser adequacy and effectiveness, this is not ideal. Issues of cyber, of the global environment, and of other transboundary matters could do with some creative thinking about how we approach questions of jurisdiction. Let me suggest some possibilities that might take jurisdiction beyond traditional notions of territoriality. Might there be mileage, for example, in seeking to develop a consensual approach around the notion of ‘deemed jurisdiction’ – a notion that, for certain given forms of conduct, jurisdiction will be deemed to rest with *x* or *y* or *z*, or with some configuration of all of them. An approach along these lines might be particularly appropriate, for example, in respect of cyber activity, given the challenges of saying with any clarity where, in geographic space as opposed to virtual space, such conduct occurs. Developing a concept of ‘deemed jurisdiction’ appropriate to cyber activity would move past the traditional approach that international law has taken to jurisdiction, around what F.A. Mann described as ‘linking factors’ to the state.²⁷ A deemed jurisdiction approach could craft a flexible conception of jurisdiction that may be more appropriate to the virtual geography of the medium.

In similar vein, there may also be mileage in thinking creatively around other conceptions of jurisdiction that are already a feature of international legal life, although not always as well developed as perhaps they might be – concepts such as shared jurisdiction, overlapping jurisdiction, delegated jurisdiction, functional jurisdiction. All of these notions move, to a greater or lesser extent, beyond geography and towards purpose and, in so doing, may also help to move the competence that is asserted closer to the technical and away from the political.

Turning to issues of law-making and of legal reform, for a variety of reasons, law-making in the international space has become ever more cumbersome and complex. The number of independent states, with often competing political imperatives, has almost quadrupled since the establishment of the UN. The interaction between the international *legislative* space and the domestic *implementation* space has become more tricky to navigate. What might be described as multilateral legislative fora

²⁷ F.A. Mann, *Studies in International Law* (1972), at chap. 1, ‘The Doctrine of Jurisdiction in International Law’, and *Further Studies in International Law* (1990), at chap. 1, ‘The Doctrine of Jurisdiction Revisited After Twenty Years’.

– international organizations that either have an independent law-making competence of some form or that simply operate more traditionally as a forum for states to come together to make laws in a specialized context – have proliferated, although not always accompanied by a depoliticized effectiveness and efficiency. While international law has developed flexible rules and practices of interpretation, it has neither an effective approach to legal revision and reform nor a well-developed concept of desuetude. The result is that increasingly aged treaties and other crystallized rules of international law are left to carry the burden of addressing conduct, and of shaping an international system, that may bear little relation to the conduct and system for which the rules were originally crafted.

This is ultimately unsatisfactory. The pace of change in the international system over recent years has been rapid. It is projected to be, if not revolutionary in years to come, then at the very least significant. If international law is not to become a drag on the international system, it will need to come up with ways that better allow the efficient and effective revision and reform of the law to meet changing circumstances. In some form or other, this is increasingly likely to require a delegation of law-making authority from states to international organizations, with all of the political grit that this is likely to entail. This aspect will go hand-in-hand with the first of the challenges I outlined: that of the reform of international organizations.

The issue of the subjects of international law speaks for itself. Pushing the boundaries of international legal personality has been on the active agenda of international law for more than 60 years, with the *Reparations for Injuries* advisory opinion of the ICJ of 1949 opening the gateway to creative thinking about this topic.²⁸ But, while there has been some movement in the way in which international law conceives of individuals and corporations, this movement and the mechanisms and structures of the law in this area have not kept pace with the developments in the international system more widely. In the era of Globalization 3.0, in which the principal agents of change are individuals and corporations, international law needs to develop a more sophisticated appreciation of international legal personality and of subject-hood of international law, and more inclusive, responsive, and efficient mechanisms to address the interests and voices of these subjects. Questions of standing before international tribunals – an issue addressed by Eli Lauterpacht more than 20 years ago in his *Aspects of the Administration of International Justice* – will have to be revisited with greater resolve, as will other elements that touch upon this aspect.

Turning finally to the issue of re-conceiving the sources of international law, my inclination is that traditional public international law, if it is going to maintain a relevance and an effectiveness, is going to have increasingly to take account of and find ways of incorporating what is sometimes described as transnational law: the law that applies internationally to the conduct of private persons. An initiative to this end emerged years ago out of the field of transnational commercial law, in the form of

²⁸ *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ, advisory opinion of 11 Apr. 1949 [1949] ICJ Rep 174.

the *lex mercatoria*. This now has a life of its own, even if the concept has not become a fully formed feature of mainstream international law. There may, however, be scope to build on this notion, and to combine it with more traditional appreciations of customary international law, to develop a more creative and expansive conception of sources of law that will address the circumstances and conduct of the Globalization 3.0 world. Perhaps, for example, there may be scope to conceive of a *lex congregato* – a law of society – with the following features: first, an instrument of traditional inter-state law that would act as a platform on which would stand a second tier set of protocols and principles addressing the application and mutual recognition of rules and standards relevant to particular conduct; thirdly, a further tier of industry-driven and derived minimum standards of conduct; and all this finally held together by a basic principle that actors are bound by what they accept – whether by their conduct, by the click of a mouse button on an “I agree” icon on a software program, or in some other manner. This is a still raw thought that, if it is to be at all useful, would have to move beyond parallels with EU law, even if there may be some ideas to be garnered in this direction. The appreciation that it is intended to convey is more prosaic – it is simply that international society is on the move and that international law, if it is to remain relevant and effective, will have to develop new notions of sources of law.

Let me conclude by going back to geography. There is a lovely chapter in the 1943 novella *Le Petit Prince – The Little Prince* – by Antoine de Saint-Exupéry in which the Little Prince has a conversation with ‘an old gentleman who wrote voluminous books’, a geographer.²⁹ It is full of charm and wonder, and has lovely imagery about planet Earth, which, it is said, has ‘a good reputation’. It also contains the following lines: “[g]eographies,” said the geographer, “are the books which, of all books, are most concerned with matters of consequence. They never become old-fashioned. It is very rarely that a mountain changes its position. It is very rarely that an ocean empties itself of its waters. We write of eternal things.”

Geographers have a good fortune that lawyers are denied. The law is not about eternal things. It is about the here and now. It is about how humankind organizes and manages its society. We hope that the law is of consequence, and it is our calling to work to this end. But the law can become old-fashioned. Mountains may only rarely change their position, and oceans only very rarely empty themselves of water. But the law is both more vulnerable and more adaptable. The place of geography in the international system is changing. It presents challenges to international law. These are challenges to which we must all rise.

²⁹ A. de Saint-Exupéry, *The Little Prince*, chap. 15, ‘The Little Prince Visits the Geographer’.