

What is the Principal Object of the International Legal System?

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MATTHEW RICHMOND, APR 30 2014

To What Extent Have Individuals and International Organisations Replaced States as the Principal Object of the Contemporary International Legal System?

Following World War Two, international law has evolved. The world responded to the horrors in Nazi-occupied Europe with the Nuremberg Trials, the Universal Declaration of Human Rights and the 1949 Geneva Convention. The inception of these legal instruments signalled a deliberate shift in the 'scope and purpose' of international law, offering revolutionary protections to individuals and new International Organizations (IO).[1] Today, following further significant developments, the debate amongst legal and political scholars focuses on the dichotomous understanding of who or what is the principal object of international law. Some contend that despite this 'liberalization' of international law, states remain the pre-eminent actor in the global system. On the other hand, others cannot envisage a human rights driven legal agenda without the *individual* at the heart of contemporary legal order.

This essay will illustrate that recent developments offer a more prominent position to individuals and organizations in international law, and placing the state as the exclusive object (and agent) of law is no longer relevant in a globalized world. To do this, the essay will examine first theoretical assessments of international law that consider traditional theories to be obsolete. Second, the power retained by the state, in spite of this liberal trend, is discussed. Third, the impact of legal personality will be examined: using intervention to problematize the issue, and to illuminate how state consent can be bypassed with increasing ease. Fourth, the essay will draw on the Responsibility to Protect (R2P) and the International Criminal Court (ICC) to outline new methods of generating universally-accepted norms. Through this, it will be argued that although states still retain significant value in international law, individuals and organizations are increasingly becoming the focal point.

II. New Conceptual Approaches

The fundamental position of non-state actors in the legal system is reflected by contemporary theoretical and pedagogical interpretations of international law. This section assesses the conceptual response to long-established, realist theories of international law. Traditionally, theories of international law adhere to a strict state-based order. 'Classical' legal positivism dominated the 18th and 19th Century critical legal understanding.[2] This 'Austinian' concept characterizes law as 'a unified system of rules...that emanate from State will', implying a state-centric global legal order that is sustained only by hard law.[3] Paulus and Simma contend that the *Lotus* case cements the state's hegemonic position within the legal order.[4][5] Ago expands to claim that legal norms can only be generated by sovereign states, thereby limiting the influence non-state actors can exert on legal processes.[6] This rationale was relatively unchallenged – with most critics being labelled 'idealists' – until the Second World War.[7]

Following WWII, international law as a theoretical (and indeed pedagogical) entity demanded fresh conceptual understandings that readjusted the relationship between states and non-state actors. Reacting to notable advancements in liberal theory in international relations,[8] Slaughter began to apply the bottom-up rhetoric to legal theory.[9] International law began to be interpreted in different ways that invariably placed significantly more emphasis on non-state actors as the 'object' or, more aptly, the 'participant' in international law.[10] Simply, as

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human rights edged closer to a *jus cogens* norm, legal positivism was no longer able to provide an adequate analytical toolkit for the study of today's global legal agenda. Its inability to normatively engage with the future of international law, in conjunction with its difficulty aligning individuals and organizations alongside states in terms of the responsibility and power wielded, reinforces the idea that a state-centric system is outdated.[11]

That this theory is considered antiquated is constructive to the discipline and its participants. Orakhelashvili credits this enlightenment to universal recognition of 'humanitarian values and principles'.[12] In conflict with Friedmann's commitment to practicality, the post-war agenda demanded a perspective that is infused with liberal and cosmopolitan ethics that can offer different explanations, and can engage normatively with law.[13] Theorists like Slaughter advocate significant structural modifications to the international legal system: including strengthening IOs, obliging a doctrine of complementarity and holding states to greater account.[14] The last element is valuable, as despite their responsibility, states act irresponsibly. The *Mejia Egocheaga v. Peru* case demonstrated international law's capacity to override domestic legal systems, and to find States accountable to a claim brought by an individual.[15]

The human rights agenda demanded and deserved a new type of international law that constrains the influence of states within the legal system. This section illustrated the extent to which jurists are beginning to distance themselves from a legal positivist approach, constructing idealistic concepts that embrace the burgeoning power of *peoples* who are becoming aware of their own rights.[16] However, although this sentiment is generally well reflected in *practical* legal study, this next section will pinpoint the areas of international law where states retain a comparatively commanding position relative to non-state actors.

III. State Control

Despite the undeniable trend towards a more equal footing between states and non-states, the interests of states can still permeate parts of the global legal system. This section will analyse the extent to which states can subvert the liberalized system, and also the suggestion that non-state actors are undermined due to the noteworthy role states play in their formation.

Guzman asserts that the 'state is and should remain the key political unit' in the world order.[17] This conclusion is reached due to the sustained importance of state consent. Traditionally, consent underpins the state's relationship with international legal order, and offers them protection from rules to which they did not explicitly agree.[18] This buttresses the 'participant' position of the state twofold: both in the creation of international law and the responsibilities extended to it. Firstly, treaty-based law – *pacta sunt servanda* – is the principle method of building hard law with built in enforcement measures.[19] This ensured that only states generated meaningful international law with genuine geopolitical consequences. Although now the United Nations Security Council (UNSC) can make binding legal decisions, its 'burdensome' and protracted decision-making process, in conjunction with the veto powers endowed to the five permanent members, undermine its ability to alter the legal order.[20] As the principal 'actor' that can create hard law, states retain a powerful position. Organizations on the other hand, despite their growth and technocratic expertise, are restricted to soft law – guidelines, declarations and other 'suggestions' void of the requisite 'teeth' that could oblige sovereign states to follow rules.[21]

Secondly, consent offers states a decisive 'opt out' provision when it comes to new 'laws'. States gain legitimacy by their democratic quality. The fact that this legitimacy is not transferred to unelected IOs can act as justification for when states choose to ignore established rules and principles[22] – even if their intent is peace-building. Moreover, further strengthening the state's position relative to organizations, is the 'consent principle'.[23] Commentators are quick to highlight the success of organizations such as the WTO in generating success with its non-unanimous voting system.[24] This hints at a transition to a legal order that offers organizations a more prominent role. However these claims might be overzealous. Yes – the consensual decision-making process in the WTO overrides state consent to a degree, but this essay contests that as the WTO's and national interests are in alignment, it is hardly a paradigm-shifting change in international law. State sovereignty is threatened notably less when states relinquish control of a norm or process, only for that norm to retain the same overarching direction and objective. Would – for example – the US retain its membership if the WTO had unilateral authority to establish global neo-liberal economic policies? No –

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they would surrender their membership, thus severing their obligation to carry out its decisions. As states are central in the creation of organizations, they ensure the institutional setup allows for states to retain control of its direction.[25]

It is impossible therefore to claim that states are no longer intrinsic to international law. States, especially Western states, are masters of preserving their interests – and by keeping consent central to the process allows them – to some extent – to decide their own fate.

This section has outlined how, in the face of growing organizations and enlightened individuals who are asserting their human rights, states can retain some control of the international legal process. That being said, the next section will highlight how consent is increasingly easy to bypass, and how legal personality is fortifying non-state actors.

IV. Circumventing consent

Although structures and procedures in international law permit states to avoid (sometimes altruistic) obligations, the contemporary global system makes this stubborn remnant of pre-war legal mentality increasingly simple to sidestep. The strength of state consent in law making is troubling. In his dissent to the *Lotus* case, Judge Loder found the rigid system of state consent to be ‘at variance with the spirit of international law’.[26] This essay agrees – especially if cosmopolitan understandings of international law are applied. Simply, there are too many divergent national agendas for an international law that best fosters ‘global justice’.[27] Normatively then, international law *should* be more flexible about state consent for its lofty objectives to be achieved. This section will examine how state consent can be circumvented, challenging even the most staunchly defended legal norms.

The argument presented in the previous section – that organizations are weaker and are simply the marionettes of states – is reasonable. It goes some way to suggesting that the ‘legal personality’ accrued by IOs does not impact upon the state-based legal order – and especially upon non-members States within an IO (as they are not bound by its decisions).[28] However in the *Reparation for Injuries* opinion, the ICJ found that as a significant portion of the international community were members of the UN, it had sufficient ‘personality’ to impose claims on Israel – a (then) non-member state.[29] This demonstrates the distinctness between states and organizations, diluting the argument that states cannot *really* be accountable to a supranational organization, and that state consent can override the law-making abilities of organizations.

This legal ‘apartheid’ is accentuated by Higgins’ suggestion that it is customary for states to endow organizations with ‘immunities’ to further juxtapose the rights and responsibilities of the contrasting polities.[30] Since the *Reparation* case, states have felt the ‘bite’ of organizations empowered by the customary international law that endows them with legal personality: even the US were the victims of this authority in *International Tin Council v Amalgamet Inc.*[31] Legal personality distances organizations from the control of states. All organizations therefore are to be definitively considered as objects or ‘participants’ of international law, and the range of powers they possess strongly challenges the previously untouchable legal position of ‘sovereign’ states.

Further stretching previously inalienable state’s rights is the phenomenon of foreign intervention. Heywood believes non-intervention to be a fundamental norm of sovereignty. Non-interventionism is reflective of a pre-war international relations mindset, where states avoided intervention at all costs and had not reached the level of interdependence that we see today.[32] Now though, intervention has become central both to government foreign policy and international law.

In 1999, allied forces confronted Serbian forces in Kosovo in the form of a military intervention.[33] This was in conflict with the UN Charter Article 2(4) that prohibits the use of force. Also, the UNSC refused to legitimize a foreign intervention – China and Russia both vetoed a Resolution authorizing force.[34] Perhaps fifty years earlier that would have been the end of the matter. Supported with public will and armed with humanitarian rhetoric however, the allies bypassed the state-consent system in the UNSC by turning to NATO.[35] NATO, citing the need to avert a humanitarian disaster, launched Operation Allied Force which ultimately ended the Milosevic regime.[36] This intervention represents the transition from original laws of war – designed to protect state sovereignty, towards

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humanitarian intervention – designed to protect individuals. This then highlights how organizations are equally important to the legal system as states in generating law. Despite its customary nature, the development of humanitarian principles and human rights have eroded the concept of state sovereignty, leaving Kofi Annan to suggest a revision from state sovereignty to ‘responsible sovereignty’.[37]

This section has shown how attaining ‘legal personality’ is crucial to enhancing one’s responsibility in international law. Although state consent remains an important characteristic of international legal decision-making, the growing stature of Organizations allows them to permeate this norm. Organizations are not the only beneficiaries of a distinct legal personality. This next section will unravel the place of individuals in the world order, as both law makers and participants.

V. Towards Constitutionalization?

Certainly, the *Courts of Danzig* advisory opinion was significant in bequeathing legal rights to individuals.[38] However, human rights have been driven by much more than case law. The previous section alluded to the rise of humanitarianism and the obligations *erga omnes* of states to protect against *jus cogens* violations; this coincided with humans beginning to recognize themselves as ‘rights bearers’.[39] This recognition resulted in an unprecedented new function for individuals in international law. This section emphasizes the exclusivity of the individual in international law, and also their part in transforming principles into law.

Since 2000, both the R2P and ICC are integral to international law and politics. Their functions of protecting and prosecuting hold the individual at the heart of moral concern. First, the R2P is the pinnacle of soft law. Despite its cosmopolitan aims and NGO-inspired construction, the R2P commands near-universal respect by states and organizations alike.[40] Coupled with its rhetorical charm, 2011 saw its principles deployed in practice. After being invoked by the UNSC regarding Libya, the norm gained legitimacy.[41] Its acceptance by states suggests *opinio juris*, and reveals states’ recognition of the importance of the individual as a recipient of international law. The success of this norm is detrimental to proponents of a state-centric legal order, as the norm attracted universal approval before it was indoctrinated into (hard) law. The R2P provides half of the onus on the individual as an object or participant of international law, the other half can be derived from the ICC.

Like the R2P, the scope of the ICC is fixed exclusively on individuals. The ICC does not, however, have immediate jurisdiction over legal matters; a case would be inadmissible for example if the state’s domestic court investigated the case reasonably.[42] Conversely, the ‘complementarity’ element of the ICC’s jurisdiction allows the ICC to investigate and prosecute if the state’s court is unwilling to pursue the case responsibly.[43] This extends to the ICC an ‘overseer’ position, legitimizing its role as an entity to which states are accountable. Neo-colonialists might claim that the ICC’s jurisdiction is thin, as they cannot prosecute nationals of non-signatory states – including the US and Israel – leaving a body that seems to target African leaders.[44] Moreover, due to the voluntary jurisdictional clauses demanding a case be referred by the UNSC (of which the US is a P5 member), it appears unlikely that the ICC would ever target the US – for example. This supports the idea that the *object* of international law remains to be *some* states.

However, there are clever provisions within the ICC that splinter this principle. Article 12(2a) has been invoked recently by the Comoros in reference to the Israeli attack on the MV Mavi Marmara – a Comoros-registered vessel. The ‘loophole’ requires ‘the State of registration of that vessel’ to be that of a signatory state for the ICC to have jurisdiction.[45] Hence, Comoros is within its rights to formally refer the attack to the ICC, where Israelis could be prosecuted.[46] The crucial aspect is that Israelis *could* be held accountable to a body to which Israeli is not a party – thereby undermining its sovereignty, and its consent. This illustrates the power of independent organizations, and the renewed value of individuals in the international legal order.

Together then, the R2P and ICC are both reactive bodies that prioritise, and can be influenced by, individual human beings. The R2P in particular shows how soft law can permeate the global system, and how principled norms can be championed by NGOs and civilians, before being incorporated into existing law by states and IOs. This leads to the idea of constitutionalization. Norms driven by common humanity can develop organically, slowly transforming into

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customary law before gaining universal acceptance. Norms such as human rights and humanitarian intervention have become instilled into humanity's psyche, in spite of the lack of hard law that advocates them. Cosmopolitan thinkers note the need for a higher level of law that transcends states. Habermas neatly articulates this concept as a global constitution.[47] Constitutionalization of humanity-driven regimes represents the perfect end to the norm-cycle that places individuals at the heart of international law. It also represents its ideal normative direction. In Europe a supranational constitution was only narrowly defeated, suggesting there is appetite for this extra level of law among 'We, the People'.[48] A global constitution, inspired by humanistic principles, may be what is needed for international law to fulfil its more idealistic ambitions of maintaining global peace and stability.

This section has outlined the R2P and ICC to be more effective protectors of individuals than treaties that further liberate international law from the chokehold of state control. It has advocated a deliberate move towards a global constitution that protects individuals, empowers organizations and constrains an antiquated system of a horizontal, state-based order.

VI. Conclusion

In conclusion, this essay has argued that the status and position of individuals and organizations under international law has been significantly enhanced in the last seventy years. It has done this by charting the development of international law theoretically, and by outlining the strengths of consent – and its consequent vulnerability when confronted with stronger organizations and soft-law instruments. The essay has explored the debate amongst scholars that the state is no longer dominant in the legal order, and how the legal system must adapt when enlightened publics champion humanitarian principles. Although states have not been replaced *completely* by non-state actors, if the trend towards something resembling a global constitution continues, states may find their influence to be fatally compromised with individuals, groups and organizations forming the crux of the new public international law.

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