The Transformation of the International Legal System: The Post-Westphalian Legal Order

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Introduction

The rise of private rights and duties under national and international law enforced through universal jurisdiction and supranational trading systems both global and regional together mark the end of the Westphalian state system. The best way to understand the rise of private rights and duties of non-state actors under national and international human rights law is to see it as a function of the transformation of the Westphalian state system. The treaty of Westphalian promised to end the religious wars of the iron century (1600s). Ultimately it led to the idea of sovereignty, the unity of territory (eventually nation) and religion. Each state's religion would be determined by the religion of the sovereign. Each land would determine its own system of governance but would refrain from interfering in its neighbors' internal affairs. By linking state and religion and separating states from other states it was hoped that the divisive transnational religious and civil wars that tortured Europe would be ended. Peace would be preserved through the mutual independence of sovereign states essentially isolated from each other.

The Westphalian model of hermetic sovereign states promising not to intervene in their neighbors' purely internal affairs lasted roughly from 1648-1989. In this system, states were the sole subject of international law, having final and absolute authority within their sovereign territory. States in the Westphalian system were hermetically isolated from each other and granted a right to make war, even aggressive war, as a self help remedy. Skeptics could thus ask whether international law was law. The Westphalian system also left open the question...
of whether international law and national law were unitary, i.e., monist, or independent from each other, i.e., dualist.

Despite those shortcomings, the Westphalian system of nation-states roughly worked to preserve peace from 1684 to 1914. The end of the 17th century, the so-called "iron century," ushered in an era of trade and expansion which ultimately sparked the industrial revolution, perhaps because the Westphalian system assured a certain minimum of order in national and international affairs. However, the resulting industrialization and global trade brought an end to the unity of the economy, language, and religion in the (formerly) autarchic entity "the State." By the 1890s, German, British, and French goods were competing in a global market place. Now the unity of territory and economy under the heading "sovereignty," rather than guarantor of peace, assured that all conflicts over market share would be mutually reinforcing and zero sum: if one state gained territory it also gained market share - at the expense of its neighbors.

In a pre-industrial world, where international trade was limited, this linkage could be tolerated. But in the industrial world where global trade was possible and profitable, the linkage of trade and territory led to two world wars with millions killed and fortunes and empires destroyed. The religious wars that the Westphalian system were intended to replace were thus themselves replaced by wars for market share justified by nationalist ideology. The Westphalian system thus contributed to and, as a consequence, was transformed by two world wars because "sovereignty" was no longer a guarantor of peace but rather of war.

I. De Facto Transformation

Historically, the de facto breakdown of the Westphalian system can be traced to the first and second world wars. The system which had guaranteed peace and security failed catastrophically and resulted in the deaths of literally millions. This historical fact has changed the legal rules of the international system fundamentally.

The first de facto challenge to the system of nation-states and national empires was the idea of national self-determination. In a first wave of national liberation following the First World War, Europe's multinational empires were disband and re-aggregated into nation-states with a rough congruence of borders and ethnos. In a second wave following the Second World War national liberation movements sprang up throughout the third world leading ultimately to decolonization. However, these new states did not have a correspondence between nation (ethnos) and territory. National liberation and decolonization doubled the number of states in the international system, which now include several new micro-states. These facts further strained the logic and credibility of the system - particularly because many of the newly created states, such as Somalia or Afghanistan have failed, sometimes catastrophically, to maintain even the minimum order necessary for statehood - again undermining classical sovereignty.

At the same time, however, capital's tendency to be monopolized continued and even intensified. Multinational corporations (MNCs) have grown to the point of literally having a larger annual turnover than many third world states. Comparing corporate sales and country gross domestic products (GDPs) reveals that of the largest 100 economies in the world, fifty-one are corporations and forty-nine are states. The largest 200 corporations are estimated to account for 27.5% of world economic activity. With so much economic power, MNCs sometimes also exercise military power and have been known to hire mercenary armies. Arguably, the MNC enjoys limited international legal personality - certainly de facto, if not de jure. All of these changes are further challenges to the Westphalian order.

The transformation of the system of imperial states as a result of the problem of war also implied changes in the international system. Both the League of Nations and the United Nations resulted from a recognition that the international system required fundamental change. In the post-war world a number of regional trading blocs and an international trade system (first GATT then the WTO) arose. Technological changes are a main cause of these consequences. Instant global communication and cheap global transportation is a reality which explains why
power simultaneously is shifting to the sub-national and super-national level. 

Warfare has also changed. National military strength is no longer the primary index of state power as the collapse of the U.S.S.R. illustrates. Instead, economic power is the primary index of state power. Military power is less and less relevant because conventional war is impossible due to nuclear proliferation. Nuclear weapons make conventional war among nuclear powers suicidal not only for masses but also for elites. Thus nuclear weapons are of little use - for what is the difference between a weapon which does not exist and a weapon which you cannot use? Some argue that nuclear weapons even make conventional war less relevant. As a consequence of these facts guerrilla warfare, terrorism, and proxy warfare are the preferred methods of fighting war in the contemporary world. Thus the primary threat to physical security today in the first world is terrorism. However, terrorism is an essentially unstoppable unconventional threat. Large conventional armies are inadequate to stop terrorism. This highlights once again the fact that military power is of only limited utility in the contemporary international arena. Just as terrorism routinely ignores state boundaries and defies solution, so also do the related problems of international arms dealing, (both legal and illegal) and international drug dealing undermine the claim of the state to sovereignty. Terrorists, arms merchants, and drug dealers simply ignore the boundaries of the state. And though a refugee seeking a better life in the first world is certainly no criminal, the instant global mobility which permits migrants from Sri Lanka to emigrate (legally or not) to France shows one more stress on the concept of the "sovereign" (nation) state. While some argue that we now live in a global village, that is not so realistic when one considers that villages are usually peaceful places and the world is far from peaceful: space and time have been largely abolished, but institutions for peaceful governance, though constantly growing are still lacking.

All this leads to the conclusion that state boundaries are increasingly irrelevant and that conventional military power, the flywheel of the Westphalian system, is no longer the primary instrument of state power. Violence is of course still a daily reality for the international system, however in the age of sail or even steam, violence could be controlled by distance. In the jet and nuclear, age it cannot. Force can destroy world order. But it probably can't build it. Destructive power has become so cheap that the only way to maintain peace is to assure prosperity for all.

These facts - permeable borders and the irrelevancy and inefficacy of violence - imply that the Westphalian system, which has already twice failed to preserve global peace, is no longer relevant and cannot be relied upon to shape global peace. The Westphalian system is literally obsolete, surpassed by technologies which did not exist when it was created. It did not prevent two world wars in which millions died and may contribute to the risk of a third which would probably extinguish the human race. The world must outgrow the presumptions which led to the failure of the Westphalian system to prevent two world wars.

II. De Jure Transformation: Self Contradictions in the Foundations of International Law

For the reasons mentioned above, it is clear that we are now, factually speaking, in a very different world than that described by the flawed realist presumptions reflected in the failed Westphalian system. Realism sees the world as a struggle for power - essentially, a zero sum game. Norms, for realists, are enforced for practical reasons of state. However, though states do clearly seek to protect and maximize their interests, they do not always act out of purely self interested motives. Furthermore, commercial relations are generally positive sum. Thus the realist's world view is essentially flawed. As a consequence, it could not prevent two world wars and indeed vast changes in the international system have occurred as a consequence of that failure. What exactly are these changes?

Judicially speaking, we can briefly characterize the immediate post-war changes in international law as a recognition of human rights, a legal order founded on the pacific resolution of disputes and on national self determination. However, the principles of national self determination and human rights contradict the Westphalian concept of sovereignty. This contradiction cannot be harmonized because the competing poles tend toward mutually exclusive outcomes.

Mediate changes in the post-war international legal system - which have only accelerated since the end of the cold war -
Because these changes present contradictions to the international legal system and represent a break from the Westphalian state system, we must examine them briefly.

A. The Illegalization of Wars of Aggression

The first legal breach in the armor of Westphalia occurred with the Kellogg Briand pact (1928) outlawing wars of aggression among its signatories. The illegality of aggressive war is reaffirmed in the United Nations Charter. Next, during the second global war, states recognized "exile governments" - governments with no territory (one of the defining characteristics of statehood), but with a claim to govern.

Next, following the Second World War, the U.N. was formed to prevent future wars of aggression. War, except in self-defense or collective self-defense, is now illegal either under customary international law or under the U.N. charter and probably both. But at the same time, the former colonial powers were forced to recognize a legal right to national self determination of peoples under international law (a right which had roots in the post-war dissolution of the Austro-Hungarian, Russian, and Ottoman Empires and perhaps even going back to the liberal revolutions of the 18th century in the Americas). Thus insurgent movements have been accorded certain rights and duties under international law. However, the right to national self determination raises a serious contradiction within the international legal system: the principle of the pacific resolution of disputes and the principle of national self determination are mutually contradictory at least where the right of national self determination includes a right to rebel.

B. International Legal Personality for Non-State Actors

Exile governments and insurgencies are not the only examples of limited international legal personality granted to non-state actors breaking from the Westphalian principle of sovereignty. Though states remain the center of the international system, the periphery is increasingly important. International organizations, such as the U.N., N.A.T.O., and the E.U., also have limited international legal personality. Multinational enterprises, non-governmental organizations (NGOs), and even individuals may now have rights or duties under international law. That is perhaps the greatest theoretical and practical challenge to the lex ferenda which is the post-Westphalian system: non-state actors, including individuals and religious entities, may have rights or duties under international law. The recognition, caveat lector, of limited international legal personality for non-state actors is clearly an emerging trend and lex ferenda. It is also the mirror image of the rise of international organizations with limited international legal personality which is one more de jure challenge to the Westphalian order.

C. The International Legal Personality of Non-State Actors

1. Multinational Corporations

Multinational corporations (MNCs) are increasingly influential on the world stage and are only one of several non-state actors challenging the role of the state in international law. MNCs are extremely influential in world politics.
They are loyal only to profit and engage in business activity on several continents. MNCs undermine the hermetic model of Westphalian sovereignty which saw states as isolated and as the principle object of loyalty of their subjects. Capital mobility also undermines the state as primary and ultimate object of power and loyalty on the international stage because it defies the power of the state to regulate its own currency and interest rates. It is hardly surprising that some have gone so far as to ask whether MNCs are or should be subjects of jus gentium. In fact, corporations, like other non-state actors, do have directly applicable duties and rights under international law. Thus to that extent corporations may be said to have limited international legal personality.

2. Individuals

Individuals also increasingly have human rights and duties both under national law and international treaties. Evidence of the limited international legal personality of non-state actors includes the U.N. Declaration on the Elimination of All Forms of Racial Discrimination, the U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the Rio Declaration on the Environment and Development, inter alia. These conventions state explicitly or implicitly that "private actors have both negative and positive duties in respect of socio-economic rights" and recognize the limited international legal personality of multinational corporations. Thus human rights can be enforced against corporations.

3. Limits on the International Legal Personality of Non-State Actors

There are, however, limits on the international legal personality of non-state actors. Although corporations certainly have great de facto influence in international relations, they do not have a constitutive power in the formation of international law. Non-state actors such as individuals, corporations, and the world bank can, however, contribute to the formation of customary international law by aiding in the process of elaborating norms even if sometimes only as observers.

4. Conclusion

As ordinary as directly enforceable rights and duties held by non-state actors under international law may seem today, that is a radical departure from the Westphalian system. The increasingly common imputation of rights and duties to non-state actors under international law is partly because of the integration of world trade and capital mobility, i.e., globalization. This shift of rights and duties from states to non-state and super-state actors defines one aspect of the transformation of the Westphalian state system.

D. The Right of Humanitarian Intervention

The rights of humanitarian assistance and humanitarian intervention pose another legal challenge to the Westphalian model of sovereign states, for they directly contradict the Westphalian general principle of non-interference but are clearly a part of state practice. These rights also contradict the principles of non-intervention and the illegality of war. Non-intervention, though remaining a general principle of international law, now admits derogations. The principle of "humanitarian intervention" and the related (and possibly independent) concept of droit de l'ingerance is more recent in time than the increasingly ignored principle of non-intervention. What are the implications of these legal contradictions for sovereignty?

Though the authority of the sovereign within his own borders still exists, sovereignty is no longer seen as absolute. Thus, though it is premature to speak of the death of sovereignty, we can speak of an erosion and transformation of the sovereign power from a unitary hierarchy to multiple poles of competing influence, often determined functionally. One can thus properly speak of the deterritorialization and disaggregation of the state through a transformation of spatiality.
E. Individual Accountability for Human Rights Violations

A final de jure challenge to the Westphalian state system is the rise of individual and corporate liability for violations of international law. The direct imputation of individual rights and duties is clearly in contradiction to the former principle that only states had rights and duties under international law. This change has occurred because international facts such as cross border business transactions and cross border pollution no longer correspond to the reality described by the Westphalian system. Consequently, it is clear that the Westphalian international legal order has fundamentally changed. These contradictions also present interesting paradoxes for the unilateralist-universalist tension in human rights law.

Conclusion

All of these developments allow us to speak meaningfully of the transformation of the Westphalian legal model. What does that mean for international human rights? Where and how far will this transformation go?

[*45] The contours of the post-Westphalian system are increasingly clear. These are: 1) limited international legal personality for non-state actors; 2) qualified sovereignty for state actors, partly but not exclusively due to a) devolution of sovereignty to local or private entities (localization and privatization) and b) sublimation of sovereignty into transnational international organizations. These transnational organizations, which basically all date since 1918, are a defining feature of the post-Westphalian system. There examples are legion: the E.U., NAFTA, ASEAN, MERCOSUR. There are even global entities such as the W.T.O. and the U.N. All these organizations together comprise a system of global governance predicated on free trade and the belief that free trade encourages peace. That is the definition of the post-Westphalian international system. At the same time as the nation-state is declining in importance, individual rights and duties under international law are increasingly important. This leads to the conclusion that we are now in a different legal landscape than that described by realist state theory and the Westphalian state system.

In conclusion, the implication of these changes is the necessity for legal and international relations theory to develop new conceptual tools to integrate these new empirical facts into a cohesive theory. Only with a coherent synthesis of these empirical facts will states be able to react to the new realities confronting them. Until such theories are developed states will, like Gulliver, continue to lash out at thousands of unseen enemies with no comprehension of the cause or cure of their ills.

Legal Topics:

For related research and practice materials, see the following legal topics:
International LawSovereign States & IndividualsHuman RightsTortureInternational LawSovereign States & IndividualsHuman RightsTerrorismCivil ProcedurePartiesInterventionRight to Intervene

FOOTNOTES:

n1. J.D., from St. Louis University, D.E.A., Universite Paris II (Pantheon-Assass); D.E.A., Universite Paris X (Nanterre); LL.M.Eur., Universit<um a>t Bremen. The author maintains a personal website at http://www.lexnet.bravepages.com with links to on-line law resources. His other writings can be found either on his web-site, on Lexis/Westlaw or via Google. He is a research fellow at the Center for European Legal Policy at the Universit<um a>t Bremen, where he teaches courses in United States tort law and international human rights law.
Sovereign states, originally defined as entities subject to no external authority or control, now increasingly find themselves subject to international regulation that has radically diminished the areas where they are free from external influence... states no longer dominate the international landscape, as international organisations and private actors (e.g., multinational corporations, non-governmental organisations (NGOs), and even individuals) exercise increasing influence in the creation, implementation, and enforcement of international norms.

Id.

Sovereignty consists of two principle elements: territorial sovereignty (dominium) and personal sovereignty (imperium). Territorial sovereignty is final authority over all persons objects and acts within the territory of the state. Personal sovereignty is final authority over the state's citizens. Marks argues that this Westphalian concept of sovereignty has been replaced by a sovereignty which is conditioned on compliance with international norms.

Id.


n6. Plouffe, supra note 5, at 54 (Sovereignty requires and implies: (1) a permanent population and exclusive jurisdiction over territory; (2) the duty of non-intervention; and (3) duties under treaty and customary international law).
n7. This principle is summarized in the Latin maxim "Cuius regio, eius religio" which was agreed at the Peace of Augsburg in 1555 between Charles V and the Lutherans. See, e.g.: "Peace of Augsburg", Columbia Encyclopedia (6th ed. 2003), available at: http://www.infoplease.com/ce6/history/A0805318.html


n10. Glen Kelley, Multilateral Investment Treaties: A Balanced Approach To Multinational Corporations, 39 Colum. J. Transnat’l L. 483, 525-26 (2001). (States have capacity to enter into treaties with each other, to exercise jurisdiction over their territory, and have a right of self preservation and a right and duty of non-intervention).

n11. See Christopher Atkinson, The Thirty Years War, at http://www.pipeline.com/<diff>cwa/TYWHome.htm (providing a brief summary of the history of the thirty years war); see also Virtual Library, History - The Thirty Years War, at http://www-geschichte.fb15.uni-dortmund.de/fnz/thirty.html

n12. Petersen, supra note 4, at 874.

n13. Plouffe, supra note 5, at 53 (defining a state as an entity with a territory, permanent population, functioning government, and capacity to enter into relations with other states).

n14. Id. (Although "sovereignty was not formally recognised in scholarship until the Sixteenth Century.")

n15. Stephan Hobe, The Era Of Globalisation As A Challenge To International Law, 40 Duq. L. Rev. 655, 657 (2002) (sovereign’s rights included the right to make war; sovereignty derived from treaties of Osnabruck and Münster).

n17. Oona A. Hathaway, Do Human Rights Treaties Make A Difference? 111 Yale L.J. 1935, 1937-1938 (2002). This classic debate of legal philosophy can be seen as a tension between the realists (e.g. Thucydides) vs. the liberals and/or transformationists.

Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time....This view long coexisted with a much more skeptical conception of international law among international relations scholars - a conception that holds that, in the immortal words of Thucydides, 'the strong do what they can and the weak suffer what they must,' with little regard for international law.

Id. (quoting Lewis Henkin).


n21. See Henry Kamen, The Iron Century: Social Change in Europe 1550-1660 (Praeger Publishers 1971) (arguing that the century preceding the treaty of Westphalia was impoverished due to war).

n22. For a discussion of the origin and evolution of the idea of sovereignty in law, see Luzius Wildhaber,


n25. Kelly, supra note 20, at 235.

n26. For a brief history of the idea of sovereignty, see Col. Michael Wansink, Whither Sovereignty? National Defense University Executive Research Project S19 at: http://www.ndu.edu/library/ic6/95-S19.pdf (traces the history of sovereignty and, surprisingly, argues that environmental challenges are security issues but escape the Westphalian conception of sovereignty; also argues that the most technologically advanced societies will be first and best able to adapt to a post-Westphalian world).


n29. The idea actually may have earlier roots. Interestingly, one of the first recognitions of a right of national self determination under international law can be found in the Treaty of Amity and Commerce between His Majesty the King of Prussia and the United States of America, The Avalon Project at Yale Law School, 10 Sept. 1785, available at: http://www.yale.edu/lawweb/avalon/diplomacy/germany/prus1785.htm The treaty also included rights of free trade and residence for at least commercial purposes.


n32. For a sketch of the historical development of national self determination see Kelly, supra note 20, at 221.

n33. Id. at 216 (1999).


n37. Elisa Westfield, Globalization, Governance, And Multinational Enterprise Responsibility: Corporate Codes Of Conduct In The 21st Century, 42 Va. J. Int'l L. 1075, 1083 (2002) ("many MNEs' revenues today surpass the gross domestic products of several independent nation-states... . General Motors is now bigger than Denmark and three-and-a-half times the size of New Zealand; the top 200 corporations" combined sales are bigger than the combined economies of all countries minus the biggest ten.").

n38. Kelley, supra note 10, at 508 ("The 100 largest MNCs are larger in terms of revenue than most states' economies.").

n40. Kelley, supra note 10, at 509. ("The domestic law of several countries permits large MNCs to pay the costs of posting official police forces near their facilities and in local communities. In several states such forces have been accused of gross human rights violations.")


n44. Stephen Kobrin, Back to the Future: Neomedievalism and the Postmodern Digital World Economy, Journal of International Affairs, 361 (1998) http://www-management.wharton.upenn.edu/kobrin/Research/hartrev2.pdf (arguing that national markets are too small to serve as economic units and that technology, especially information and telecommunication technology, has driven economic integration and deterritorialized commerce).

n45. Shelton, supra note 35, at 275.

n46. The transformationists can point to repeated efforts not only at peacekeeping but also at peacemaking. For an essay of transformationist theories of conflict resolution as an example of this fact, see John Galtung, Dietrich Fischer, Peaceful Conflict Transformation and Nonviolent Approaches to Security (1999) (Working paper available at: http://www.globalsolidarity.org/pdf-files/bk.pdf).
n47. Plouffe, supra note 5, at 85 (arguing that once economic power is lost, a loss of military power will follow).

n48. Id. (linkage of economic and military security)

n49. For an incisive argument that military power is outmoded but has been replaced by financial power which is more subtle and effective than direct control see: Susan George, The International Geo-economic System p. 275 in Human Rights in Perspective, Asbjorn Eide, Bernt Hagtvet, Oxford: Blackwell (1992).

n50. See Christopher B. Stone, Signaling Behavior, Congressional-Executive Agreements, And The Salt I Interim Agreement, 34 Geo. Wash. Int’l L. Rev. 305, 305 (2002) (quoting former President R. M. Nixon) (It was clear to me by 1969 that there could never be absolute parity between the U.S. and the U.S.S.R. in the area of nuclear and conventional armaments ... Absolute parity in every area of armaments would have been meaningless, because there is a point in arms development at which each nation has the capacity to destroy the other. Beyond that point the most important consideration is not continued escalation of the number of arms but maintenance of the strategic equilibrium while making it clear to the adversary that a nuclear attack, even if successful, would be suicidal.)


n52. See generally Stone, supra note 50, at 305.

A single individual willing to die for a cause is virtually unstoppable. The fabric that holds diverse societies together is an uncompromising defence of individual rights and civil liberties. Security arrangements can prove dangerous if they target or harm specific segments of a population, driving people to extremism. Retaliation, unless surgically precise, will always create a mushroom affect - new men and women willing to die if their loved ones are slaughtered. We see it now in the United States: thousands of Americans willing to die to exact vengeance on those responsible for Tuesday's attacks. We are doomed to an ongoing cycle of terror unless the struggle Americans are willing to die for is one for justice - not revenge.

*Id. at 433.*


n58. See, e.g., Stephen Kobrin, Sovereignty@Bay: Globalisation, Multinational Enterprise, and the International Political System, in Alan Rugman and Thomas Brewer, eds., The Oxford Handbook of International Business, Oxford University Press 2001) available at: http://www-management.wharton.upenn.edu/kobrin/Research/Oxford%20rev2%20print.pdf (Describes a "post-Westphalian system". Kobrin argues that although multinationals are creations of national law, sovereignty is being held in check. Most notably he ascribes the impetus for the circumscription of sovereignty as technological changes which empower non-state actors such as multinational enterprises).


n60. Sergio Galvez, The Future of Regionalism in an Asymmetrical International Society in R. Macdonald, supra note 22, at 661. However in the 15 years since that was written the process of globalisation has intensified:
capital now moves freely as do goods (W.T.O.) and even labour (E.U.). Not only have the trends that the author there already identified not abated they have intensified due to technologies such as the internet which literally make instant global communication possible.

n61. Id. at 668.


n63. Cassese supra note 31, at 22.

n64. Id.

n65. Id.

n66. For a good summary of the competing positions of transformationism and realism in the contemporary world and a summary of the processes which characterise post-war IR see David Held, Anthony McGrew, Globalisation, Regionalisation and the Transformation of Political Community, PSA-UK (2000) http://www.psa.ac.uk/cps/2000/Held%20David%20McGrew%20Anthony.pdf (concluding that the world is indeed evolving into interdependent entities and implicitly affirming the transformationist theses).

n67. In IR theory this led first to "regime theory" then to "institutionalism" as competing with or complementing realist theory. Anne-Marie Slaughter Burley, International Law And International Relations Theory: A Dual Agenda, 87 Am. J. Int’l L. 205, 206 (1993).

n68. E.g., in the U.K. devolution of former Crown functions to Scotland and Wales. Kelly, supra note 20, at 228.
([A] downward shift of power has occurred from national capitals to intermediate and local government level. Broadly speaking, the northern European democracies have proceeded by the merging and strengthening of existing local governments: in the Napoleonic states of southern Europe, lower levels have been left unreformed and a new level of elected government inserted at the regional tier.).

n70. Oliver Gerstenberg, Justification (and Justifiability) of Private Law in a Polycontextural World, 9 Social and Legal Studies 421.


n72. See Abusaharaf, supra note 55, at 20-22.


n75. Sloane, supra note 16, at 170-71.

n76. "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 other states." Orlow, supra note 24, at 117.
Article 1 of the Montevideo Convention stipulates that a state's international legal personality requires
(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with
other states." These criteria imply, respectively, a stable community, occupying a reasonably well-defined
territory, administered by a competent government, which is capable of entering into relations with other states.
Possession of each criterion may not be indispensable; nor, by the same token, does possession of all, ipso facto,
establish statehood. Under the Montevideo Convention, however, their existence creates a presumption in favor
of statehood.

Sloane, supra note 16, at 115-116 (citation omitted).

However, nothing in the U.N. charter impairs the right of self-defense. Hendrickson, supra note 74, at
210.

Sloane, supra note 16, at 108-09. (arguing that recognition is no longer the exclusive province of
sovereign states, due to legitimacy based in national self-determination). Again, the fact that non-state actors can
be recognised and possibly even have the power to grant recognition, represents a major break from the
Westphalian system.

David Wippman, Hearing Voices Within The State: Internal Conflicts And The Claims Of

"The very creature that has helped transform once large empires into smaller nation-states,
"self-determination,' has developed a multi-faceted aspect that alternatively or simultaneously attacks the
sovereignty of the nation-state as a viable political entity." Kelly, supra note 20, at 211.

A. Maniruzzaman, International Development Law As Applicable Law To Economic Development
Agreements: A Prognostic View, 20 Wis. Int'l L.J. 1, 13 (2001) (arguing that international organisations,
insurgents, and even individuals may have some form of international legal personality).
n83. Even the idea that only states may be the source of customary international law is now in question. See Ralph Wilde, NGO Proposals for an Asia-Pacific Human Rights System, *Yale H.R. & Dev. L.J.* 137, 137 (2001) (arguing that NGOs participate in elaboration of international norms by proposing rules in human rights laws), available at http://www.yale.edu/yhrdlj/vol01/ND_Ralph_Wilde_YHRDLJ.pdf. See also Hobe, supra note 15, at 662 (proposing that multinational corporations could be a source of customary international law); Michael Byers, Custom, Power, And The Power Of Rules Customary International Law From An Interdisciplinary Perspective, *17 Mich. J. Int'l L.* 109, 157-158 (1995) (arguing that MNCs have only limited rights under international law but should be granted limited international legal personality).

n84. "States remain the primary subjects of international law, but during the twentieth century states began to apply international law directly to natural persons and public international corporations. In addition, states have granted a limited form of international legal personality to international organisations such as the United Nations." Kelley, supra note 10, at 526 (emphasis added).

n85. "The international legal community is made up of all subjects of international law - sovereign states, states enjoying a limited international legal personality, intergovernmental organisations, peoples and minorities, belligerent parties, individuals, as well as special entities like the Holy See." Bardo Fassbender, The United Nations Charter As Constitution Of The International Community, *36 Colum. J. Transnat'l L.* 529, 597 (1998).

n86. "States remain at the epicenter of international law - their activities continue to dictate not only what the law is today, but also who determines what the law is tomorrow." Duncan B. Hollis, Private Actors In Public International Law: Amicus Curiae And The Case For The Retention Of State Sovereignty, *25 B.C. Int'l. & Comp. L. Rev.* 235, 237 (2002), available at http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/25_2/04_TXT.htm

n87. Robert L. Bledsoe And Boleshaw A. Boczek, The International Law Dictionary 75-76 (1987) (Defines international organisations as established by treaties between two or more states with transnational functions and having limited international legal personality).

n88. Kelley, supra note 10, at 527(emphasis in original)

(In the Reparations Case the International Court of Justice found that the United Nations enjoyed international legal personality but did not have the same rights and duties as a state under international law. This principle of limited international legal personality could be applied to MNCs as well. A duty for MNCs to uphold selected human rights, created by an investment treaty, would be enforceable by states under international law without expanding the rights of MNCs under international law.)

n90. R. Macdonald, supra note 22, at 809.

n91. Kelley, supra note 10, at 526 (MNCs have limited international legal personality).


n94. The examples of this fact are numerous. See, e.g. Amanda Bixler, Private Enforcement Of International Human Rights Laws: Could A Small Church Group Successfully Combat Slavery In The Sudan?, 3 Chi. J. Int'l 511 (2002)(arguing that private citizens can, and sometimes do, have remedies under international law for human rights violations).

n95. For a discussion of the different theoretical bases of the emerging international legal personality of non-state actor see James E. Hickey, Jr., The Source Of International Legal Personality In The 21st Century, 2 Hofstra L. & Pol'y Symp. 1, 12 (1997).

n97. Id. at 14 (Although the recognition of international legal personality of non-state actors is lex ferenda, literally every type of non-state actor can credibly claim to enjoy a recognised but limited international legal personality).

n98. Hickey, supra note 95, at 3-4

(From the Peace of Westphalia in 1648 until the second half of this century, the source of international legal personality was, for the most part, relatively easy to determine. States were subjects of international law with international legal personality and other entities were not, unless either states specifically conferred personality on them (through some discernable legal principle, a municipal law statute, or an international law instrument such as a treaty), or states by acquiescence accepted their personality. The evolution of international legal personality for non-state entities has focused principally on international organizations, specialized agencies, regional organizations, and human beings).


n100. Maniruzzaman, supra note 95, at 14.

n101. Paust, supra note 93, at 51 (private individuals have duties under treaties and customary international law including human rights and duties).

n102. A. Maniruzzaman, supra note 82, at 10. Maniruzzaman concludes “States are the main subjects of international law” Id. Notice that Maniruzzaman chooses the word “main” and not ”sole”, ”only” or ”unique” implicitly accepting the limited legal personality of non-state actors.

n103. Maniruzzaman speaks of “a lesser claim for ”limited international legal personality' of individuals” Id. at 12-13.

n105. International organizations with international legal personality are subject to international law proportional to their object and nature. See Malcolm N. Shaw, International Law 913-914 (4th ed. 1997).


(Though the international human rights obligations of international organizations is a contested concept there are three avenues to argue that they hold such obligations: (i) as organizations with international legal personality bound by general norms of international law; (ii) as specialized UN agencies, bound by the UN charter; and (iii) through the international human rights obligations of member states.)

n108. "Economic globalisation has been accompanied by a marked increase in the influence of international financial markets and transnational institutions, including corporations, in determining national policies and priorities." Shelton, supra note 35, at 276.

n109. See id. at 104.


n112. The preamble to the Universal Declaration of Human Rights provides that:

> every individual and every organ of society shall strive ...to promote respect for these rights and freedoms and... to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction. Corporations are creations of the state and thus are addressees of this norm because of that and also because the preamble states "universal" observance i.e. observance by all actors in all times and places.


n113. Shelton, supra note 35, at 301-02 ("international law is increasingly regulating non-state behavior directly").


While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organisations, civil society organisations, as well as the private business sector - have responsibilities regarding the realisation of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.

Id.

n115. Louis Henkin, The Universal Declaration at 50 and the Challenge of Global Markets, 25 Brook. J. Int'l L. 1, 25 (1999). ""Every "individual' includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all." Id.

n116. Of course the majority view is that transnational corporations do not enjoy any form of legal


n119. "No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs." Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of Resolution 36/55 (1981) United Nations at Art. 1,2 available at: http://www.church-of-the-lukumi.org/Resolution%2036-02.htm


n122. Article 2 of the Charter of Economic Rights and Duties of States states that multinationals are not to interfere with the internal affairs of a host country. This implicitly recognizes the (limited) international legal personality of multinational corporations. Charter of Economic Rights and Duties of States, adopted 12/12/1974 A/RES/3281 (XXIX).

n124. Hollis, supra note 2, at 246

(At the World Bank, NGOs or groups of individuals may request an Inspection Panel to investigate claims of injury arising out of an act or omission of the Bank resulting from its failure to follow operational policies and procedures with respect to the design, appraisal, and/or implementation of a Bank project).

n125. However non-state actors do play a marginal role in the formation of customary international law. Hollis, supra note 2, at 243 (“Looking at the activities of individuals, and more specifically NGOs, one finds evidence of an influence both in the formation and the application of international law, albeit one that is qualitatively and quantitatively less than that of states and international organizations”).

n126. For example, in the North American Agreement on Environmental Cooperation, Sept. 8-14, 1993, arts. 14-15, 32 I.L.M. 1482 (1993) [hereinafter NAAEC] permits private parties to petition the NAAEC Secretariat where those petitions are aimed at enforcement rather than at harassing industry. The Secretariat may request a government to respond to the allegations, and in cases where two of the three states’ representatives agree, prepare a factual record and release it to the public. NAAEC arts. 14(2), 15.

n127. Hollis, supra note 2, at 244.

n128. Gamble, supra note 42, at 33 (argues that the second half of the 20[su'th'] century was propicious for human rights).

n129. Westfield, supra note 37, at 1108.

n130. Plouffe, supra note 5, at 79 (“The strongest reason advanced by the United States for its intervention
[in Haiti] was the human rights violation. Emerging principles of international law tend to recognize this reason as legitimate justification for intervention’); see also, Petersen, supra note 4, at 882 (arguing for a right to humanitarian intervention in the face of massive human rights violations, a fortiori in cases of genocide, and that the sovereign right of states is limited).


n132. Robert M. Cassidy, Sovereignty Versus the Chimera of Armed Humanitarian Intervention, 21 Fletcher F. World Aff. 47 (1997); see also, Kelly, supra note 20, at 227 (noting that "state irresponsibility has become a justification for international intervention").


n134. Thomas Buergenthal argues that the Westphalian principle of non-interference, a valid principle of international law prior to the Second World War, has been abandoned as evidenced by the adoption of universal human rights conventions. Thomas Buergenthal, Codification and Implementation of International Human Rights, in Human Dignity: The Internationalisation of Human Rights, (Alice Henkin ed. 2000).


n137. Points to humanitarian interventions in Iraq, Somalia, Haiti, Rwanda, and Bosnia as leading to the conclusion that sovereignty, though not subservient, is also no longer absolute. Petersen, supra note 4, at 873.


n139. See id. at 264.


n141. For a traditional definition of sovereignty see Schlochauer, supra note 19, at 278.

n142. Petersen, supra note 4, at 872. (U.N. Charter based on the principle of sovereign equality and non-intervention.)


n144. See Kahn, supra note 51, at 7 (regarding post-Westphalians as visionaries but noting that "it is too early today to proclaim the death of the state").
n145. Jose E. Alvarez, The New Treaty Makers, 25 B.C. Int'l & Comp. L. Rev. 213, 216-217 (2002) (noting proliferation in treaties and that the proliferation of treaties is accompanied by the rise in international organisations; admitting sovereignty has been eroded but noting that sovereign acts such as treaty making led to that erosion Alvarez; also noting there are exceptions where international law imposes norms either expressly, e.g. in Iraq, or implicitly - states which do not object to customary law are bound thereby). For a different view see Kelly, supra note 20, at 227 (sovereignty has steadily and irrevocably eroded in the 20[su'th'] century.).

n146. Aman, supra note 43, at 782. See also Hobe, supra note 15, at 663 (decentering of the state through economic and technological processes; states will not be abolished, rather their functions will be ever more permeable).


a State is not the sole possessor of sovereignty under international and domestic law. To be properly understood within the framework of international law, sovereignty is a compound doctrine that is best understood by examining the relationship between the sovereignty of a State and the sovereignty of peoples, i.e., the sovereignty of nations.

Id.


n150. Aman, supra note 43, at 772(decentering of state through economic and technological processes).

n151. Aoki, supra note 126, at 455-456 (decentering of state and multiplication of space through, inter alia, mass culture).
n152. Aman, supra note 43, at 785 (States adapt to changes in technology, economy, culture and as a result will subsist).

n153. Id. at 784 (Geographic decentering of the state not only due to imports but also due to exports).


n156. Id. at 786.

n157. The rights and duties of corporations and individuals under national and international law are explored at length in part II, supra.

n158. Paul, supra note 133 (arguing that there is an asymmetry of U.S. retreat from multilateral regimes and affirmation of universal jurisdiction under U.S. law but appears to ignore that both trends are unilateralist).

n159. Aoki, supra note 147, at 444 (1998) (Classical sovereignty no longer exists and has been replaced by decentered multiple spaces, permeable boundaries and shifting sources of power).


n161. Some describe or predict "tribalism", i.e., the dis-integration of the nation state into constituencies. Martha Minow, Rights And Cultural Difference In Austin Sarat And Thomas Kearns Eds., Identities, Politics
And Rights, 355 (Ann Arbor: Univ. of Michigan Press) (1995) (the failure of the nation state to correspond to the needs of people has led to the rise of fundamentalism, either religious - whether Hindu, Christian, Jewish or Moslem - or nationalist. In both cases fundamentalism is more often than not sullen, violent, and intolerant).