

7 International law, citizenship, and changing conceptions of justice¹

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One classic starting point for any discussion of international law is John Austin's assertion in 1832 that "law properly so-called" is the command of a sovereign backed by coercive sanctions.² As international law lacks a higher authority, such as a world government, capable of issuing and enforcing such "commands", it cannot, authentically, be described as "true law". Numerous counter-arguments to Austin's position have appeared since then, but most focus upon the degree to which *states* may, in certain limited circumstances, be regarded as having legal obligations. Here the concern has been to explain how norms and rules may operate in an overall context in which states are seen as *sovereign* and *equal* actors and hence, by definition, subject to no superior authority. Inevitably this apparent conundrum has given rise to a long and complex debate, but one common starting point was the fact that law of any kind was a product of *society* and of what was inevitably required if the members of a society were to enjoy some measure of order, stability, and predictability. So debate about the reality of international law revolved around the degree to which – if at all – global politics took place within some kind of social context.

The idea of a *society of states*, which underpinned international legal thinking from the late seventeenth century, employed a mixture of pragmatic and legalistic reasoning. The highly influential Swiss philosopher and diplomat, Emerich de Vattel (1714–67), began by dismissing the possibility of an authority higher than states. While individual human beings living in society had, inevitably, to surrender some freedom to a superior authority, "nothing of this kind can be conceived or supposed to subsist between nations. Each sovereign state claims, and actually possesses, an absolute independence on all the others". This independence was not something to be deplored but was beneficial because it enabled each state to "govern herself in the manner best suited to her own circumstances" (Vattel 1834, xiv). States were, therefore, akin to individuals living in the complete freedom of a state of nature but, unlike the Hobbesian vision of individuals in such a condition, states could act with "more deliberation and circumspection" and arrive at agreed arrangements to promote order within their own society. As for the nature of rules among sovereign entities, these derived in the first instance from their

very sovereignty and the need to underpin this by, in effect, giving it a commonly accepted legal foundation. Hence, the rules applicable to the society of states could be deduced "from the natural liberty of nations, from the attention due to their common safety, from the nature of their mutual correspondence, their reciprocal duties, and the distinctions of their various rights, internal and external, perfect and imperfect". This had two implications in particular: that states needed to *consent* to their obligations as members of this international society and that states were entitled to enjoy their sovereign freedoms without interference from other states in their internal affairs. This principle of non-intervention in a state's internal affairs was repeatedly stressed by Vattel, who gave it a very broad interpretation, encompassing not just a state's freedom to choose its own government and religion but to be free from "manoeuvres" by other states "tending to create disturbance ... to foment discord, to corrupt its citizens, to alienate its allies, to raise enemies against it, to tarnish its glory and to deprive it of its natural advantages" (ibid. 1834, 41). Although, inevitably, countless developments in the last 250 years served to create a much more complex and multifaceted picture, we might, for our purposes, simply note that despite the horrors of the Second World War necessitating some acknowledgement of the need for international protection of human rights, Article 2.7 of the UN Charter states firmly that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state". Individuals were citizens of states, not of a world community, with such legal rights and obligations as they possessed deriving from that identity.

It is, however, crucial to note that this understanding of society was far from being the first to emerge in philosophical discussion of international relations and even, to some extent, in the actual conduct of states. Moreover, whereas the Vattelian interpretation focused almost entirely on what was necessary to achieve a modicum of *order* in a world of contending *states*, these earlier formulations were often founded upon a conception of society consisting of people rather than states and the pursuit of *justice* rather than order. As such they may be seen as forerunners of contemporary cosmopolitan thought, including ideas of global citizenship and a world polity.

Forerunners of cosmopolitan thought

Even in the ancient world one may find more nuanced depictions of the key factors operating in international relations than Thucydides' famous Melian dialogue, when the Athenians respond to the Melians' appeal to honour, justice, and the gods with a blunt affirmation of the centrality of power: the goal of all men and the determinant of all outcomes in human interactions. It was certainly the case that power structures, such as monarchies, were coalescing around particular families which were anxious to find ways to consolidate the

possession of power in the hands of themselves and their descendants. One means of achieving this was to construct ever-more sophisticated legal systems. However, while one purpose of such legal systems was undeniably to underpin and enforce power, legality alone – then as now – always required some degree of popular acceptance, or, in other words, some measure of *legitimacy*, or moral authority, through claims that the laws embodied universal norms, especially fairness, protection of the weak, truth, honesty, and peace (Versteg 2002, 17–18). For example, one of the earliest known legal codes, that of the Babylonian king, Hammurabi, declared its purpose to be “to make justice appear in the land, to destroy the evil and wicked so that the strong might not oppress the weak” (Greengus 1995, i, 470). As the kings claimed their laws were the enunciation of universally applicable divine commands, their laws could even be seen as embodying a kind of primitive notion of cosmopolitan justice.

The first sophisticated attempts to elaborate an approach to law and justice that went beyond the imposition of rules upon the members of a specific community came with the natural law and Stoic philosophers of Greece and Rome. Their ideas were revived by sixteenth-century thinkers who, in part because of the challenges and opportunities posed by the discovery of the new world, were grappling with issues such as how the occupation and colonization of these territories could be given legal justification and what legal rights were possessed by the existing inhabitants. In the course of their discussions they began to develop the notion that all were part of the “great community of mankind”. In the words of the Spanish theologian and philosopher, Francisco Suarez, “The human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity, not only as a species, but also a moral and practical unity (as it were) enforced by the natural precept of mutual love and mercy: a precept which applies to all, even to strangers of every nation” (Suarez 1994, ii, 351).

In this case Suarez (a Jesuit priest) was drawing upon earlier conceptions of “Christendom” – the underlying unity of all Christians under the authority of the Pope. A similar formulation had emerged in the Islamic world, namely that all Muslims were part of a single community, or *umma*, with both conceptions undercutting – in theory if less often in practice – the idea of sovereignty.

These early attempts to work out how and why norms and rules could have a universal applicability were very far from arguing that nation states had no legal validity. Rather, they were trying to find grounds for arguing that states themselves were bound by rules and it is in that context that their attempts to find a societal basis for their assertions should be seen. In other words, they were not yet willing to move towards the central tenets of the law of a society of sovereign states, in which only states are given rights and obligations and where such laws serve essentially to confirm the sovereignty of states rather than constrain it, except in limited circumstances involving interaction with other states such as diplomacy, treaties and war. The idea at the heart of natural law that it was possible, by the exercise of reason, to work out

principles by which all were bound simply by virtue of their shared human identities had the great community principle at its heart but the members of this universal community included states and their rulers, it did not displace them. In Suarez's words:

although a given sovereign state, commonwealth or kingdom may constitute a perfect kingdom in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for these states, when standing alone, are never so self-sufficient that they do not require some mutual assistance, association and intercourse, at times for their own greater welfare and advantage, but at other times because also of some moral necessity or need.

(1994, ii, 348–9)

Suarez here is using both moral and pragmatic justifications to underpin his arguments in favour of legal and moral obligations applying universally. A later thinker, Grotius, while still employing the underlying idea of a society of men not states, was also careful to distinguish “the law of nations” from natural law and in so doing took one step closer to the society of sovereign states, whose positive consent is necessary for rules to apply: “this Law of Nations is not like Natural Law, which flows in a sure way from certain reasons; but this takes its measure from the will of nations” (1853, I, 1).³ Later writers continued to struggle with the tensions between the idea of a universal natural law and the consent-based law that was, in reality, what was emerging in the practice of states. Pufendorf, for example, was emphatic in his declaration that “the law of nature and the law of nations are one and the same thing, differing only in their external denomination” (Krieger 1965, 156). Similarly, Christian von Wolff, writing in the eighteenth century, argues that the “great society” and its fundamental laws which existed in a state of nature, remain in being after the formation of states, with natural law having the same binding force upon states that it has upon individuals:

If we should consider that great society, which nature herself has established among men, to be done away with by the particular societies which men enter when they unite into a state, states would be established contrary to the law of nature, in as much as the universal obligation of all toward all would be terminated; which assuredly is absurd ... individual men do not cease to be members of that great society which is made up of the whole human race, because several have formed together a certain particular society. ... After the human race was divided into nations, that society which before was between individuals continues between nations.

(1934, 12)

Even Wolff, however, could scarcely ignore that such order as did exist in the relations among states was not upheld by natural law but by the balance of power among them, although he added, rather sadly “if nations were to live by such a standard of ethics that they would perform for each other duties which by their nature they owe and if some would not injure others for their advantage, equilibrium among nations would be of no use as there would be no wars to be feared” (1934, 330).

A return to cosmopolitan principles in international law?

The sovereignty-based society of states easily beat off other contenders to a global social identity, with, in the nineteenth century, its most powerful members laying down a “standard of civilisation” which all candidates for membership needed to fulfil (and which, by pure coincidence, happened to suit their commercial and other interests).⁴ Although, as indicated earlier, the UN Charter and other post-war agreements acknowledged the importance of human rights, the Cold War and other factors prevented any serious movement towards an international legal structure in which individuals would have legal redress for violations of their human rights – or towards the great community of mankind (rather than the society of states) that the earlier thinkers were promoting.

For some, such as Geoffrey Robertson, QC, this sovereignty-based international order was, fundamentally, the reason why a genuine international legal system that could pursue justice for individuals as well as uphold the rights of states failed to emerge: “The movement for global justice has been a struggle against sovereignty – the doctrine of non-intervention in the internal affairs of nation states asserted by all governments which have refused to subject the treatment they mete out to their citizens to any independent scrutiny” (2002, xxx). However, while Robertson is not alone in pointing to the cynical and self-serving motives he sees as underpinning the insistence of states such as China on sovereignty, there are several counter-arguments that seek to refute the more idealistic assertions that amoral, power-seeking states are all that stand in the way of a global legal system capable of ensuring that those violating human rights can be brought to justice.⁵ For example, sovereignty embodies not just the self interest of states but principles such as self determination and the equality of states under international law that in themselves have some clear moral content. If justice is, as Rawls suggests, “the first virtue of social institutions” (1971, 3) can states, taken together, be seen as constituting a particular form of society, but one with the various norms that define justice – reciprocity, fairness, equality – applied to the society of states and deriving from their fundamental rights *as states*? Furthermore, can the basic norms of such a society evolve over time in ways that begin to incorporate individual rights? Could such an evolution be bringing about an even more profound shift in the global social order to a more cosmopolitan framework in which ideas like global citizenship

and the world polity are key components? These, in essence, are the questions that I will now consider in the context of international legal developments.

While the post-Second World War international legal order was based firmly and fundamentally on the principle of sovereignty, there were a few developments that may be seen as incorporating early conceptions of global citizenship. The Nuremberg and Tokyo war crimes tribunals referred to “crimes against humanity” (a term also used as the basis for a 1976 UN General Assembly resolution against apartheid). There were seven references to human rights in the UN Charter, and in 1948 the General Assembly adopted the Universal Declaration of Human Rights, although this had no legal force and whose eight abstaining countries included the Soviet bloc, South Africa, and Saudi Arabia. The Cold War also affected the attempts to incorporate human rights into legally binding Covenants, with one Covenant on Civil and Political Rights deriving from Western perspectives and activity, the other, on Social and Economic Rights, reflecting Soviet positions. It should be added that, although all these and similar documents, including the 1950 refugees convention, did embody various principles of justice, the regimes that they established were rather weak and also still firmly statist in their underlying structures.

Even during the Cold War there were a few legal developments that, with hindsight, may be seen as early steps towards a more cosmopolitan outlook. For example there is a clear shift from the conservative approach of the International Court of Justice (ICJ) that prevailed in the 1950s towards a more activist and, arguably, progressive approach. In the 1970 *Barcelona Traction* case, the ICJ introduced the concept of *erga omnes* obligations – ones that apply to the international community as a whole, not just to the individual states involved in ICJ hearings. In its elaboration of what counted as such obligations, it explicitly referred to “the principles and rules concerning the basic rights of the human person” (Jorgensen 2000, 94). Later deliberations at the UN and elsewhere have tried to expand the remit of the *erga omnes* principle to include state obligations relating to climate change, development and international crime (Okawa 2006, 497). However the Court itself was generally cautious in its discussions of more ambitious claims invoking the principle. The same was true of the principle of *jus cogens* – compulsory law – introduced in the 1969 Vienna Convention on the Law of Treaties. This invalidated any treaty that conflicted with a “peremptory norm of international law”, which was defined as a “norm accepted and recognized by the international community of states as a whole”. In effect this limited the sovereign right of states to agree to anything they wished in a treaty by laying down a countermanning right of the “international community of states”.

Both *erga omnes* and *jus cogens* can be interpreted in relatively narrow, statist ways to refer to those basic rules, such as those relating to diplomacy, that are indispensable to the capacity for states to conduct their everyday business in an orderly fashion. Even here there is room for controversy, particularly

over the most commonly cited rule bearing a *jus cogens* character: the prohibition of force except in accordance with the UN Charter (Linderfalk 2007, 853–71). Most contemporary interpretations of *jus cogens* give it a clearly cosmopolitan emphasis, with a primary focus on human rights norms (Bianchi 2008, 491–508), although such norms are most often presented in terms of a state's obligations to its own citizens, thus retaining an underlying "society of states" framework. Similarly, several national courts and legislatures have acted as if they accepted *erga omnes* and *jus cogens* as imposing an obligation to apply universal jurisdiction in cases where an individual was accused of serious violations of human rights, most notably when the former Chilean head of state, Augusto Pinochet, was detained in Britain after a Spanish judge had called for his extradition to answer charges of torture, hostage-taking, and other acts deemed crimes under international law (Weller 1999, 599–617; Nolkaeper 2007, 760–99).

The end of the Cold War brought with it an end to the divisions between the superpowers that had effectively prevented the Security Council from implementing and enforcing any major new developments in international law. A more extensive system for monitoring states' observance of their human rights obligations was established, greater publicity was given to serious violations of rights and more effective means of investigating and fact-finding were set up (Forsythe 1991, 55–86). There were also several instances of "humanitarian intervention", where military intervention by the UN or NATO was justified at least in part by reference to the need to prevent extreme suffering following the breakdown of states or other threatening circumstances. These included Somalia (1992), Bosnia (1992), Kosovo (1999), and East Timor (1999). However the Security Council resisted acknowledging in any formal way what some perceived as a clear shift towards a more cosmopolitan approach to international law by ensuring that its resolutions referred to the original purpose of the UN, namely to deal with threats to *international* peace and security and that they indicated that each case was unique.

The ICJ showed greater willingness to appreciate that some more fundamental change might be under way. This was most explicit in its 1996 Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*, when it attempted to formulate the changed societal framework within which it saw international law as operating:

Despite the still modest breakthrough of "supra-nationalism", the progress made in terms of the institutionalization, not to say integration and "globalization" of international society is undeniable. As proof of this, one may cite the multiplication of international organizations, the progressive substitution of an international law of cooperation for the classic international law of coexistence, the emergence of the concept of an "*international community*". ... The resolutely positivist, voluntarist approach of international law still current at the beginning of the century ... has been replaced by an objective conception of international law, a law

more readily seeking to reflect a collective juridical conscience and respond to the social necessities of states organized as a community.
(Simma and Paulus 1998, 227)

Two of the most dramatic developments in recent years that some saw as major steps towards a more cosmopolitan legal order, with individual human beings rather than states being prioritized, were the creation of the International Criminal Court (ICC) from 1998 to 2002 and the enunciation and application of the Responsibility to Protect doctrine (R2P) from 1999 to 2013. The ICC was an attempt to create a permanent and universal version of the various international criminal tribunals that had been established in the 1990s to prosecute political and military leaders accused of crimes against humanity in the conflicts in Rwanda and former Yugoslavia. These had brought to trial individuals, including former leaders such as Slobodan Milošević and Charles Taylor, and the intention was to create a standing court that could issue arrest warrants and bring to trial individuals charged with crimes against humanity, genocide, war crimes, or aggression anywhere in the world. In 2009 the ICC went so far as to issue an arrest warrant against a current, rather than former, leader, the President of Sudan, Omar al-Bashir. The Court is currently considering cases against 18 individuals in eight countries – all in Africa.

In 1999 and 2000 UN Secretary-General Kofi Annan called for humanitarian intervention to be taken a stage further to a point where the international community accepted a legal *obligation* or *responsibility* to intervene in cases which involved “gross and systematic violations of human rights that affect every precept of our common humanity”.⁶ In response to this the government of Canada and a group of major foundations established the International Commission on Intervention and State Sovereignty, which, in 2001, set out key principles that it saw as involved in the R2P concept. At the heart of these was the assertion that, although states were still sovereign, their sovereignty comprised responsibilities as well as rights, and that “where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect” (<http://responsibilitytoprotect.org/ICISS%20Report.pdf>).

This had no legal force at the time and initially was regarded with suspicion by some African states who believed that the doctrine primarily had them in mind. However, in 2005 a UN General Assembly summit meeting formally adopted these principles, thus bringing them into the category of “soft law” – norms without the binding legal standing that long practice (“custom”), treaties, or Security Council resolutions brought but which embody widely accepted beliefs about how states should behave (Shelton 2011, 68–80). The R2P principle was cited in a Security Council resolution of 2011, authorizing intervention in the armed conflict going on in Libya in the form of

establishing a “no fly zone” to prevent Libyan state forces from using air power against civilians. It was also cited in an emergency debate in the British Parliament on 30 August 2013 when Prime Minister David Cameron attempted – unsuccessfully – to secure parliamentary backing for an intervention in the Syrian conflict after an alleged use of chemical weapons by the state forces there.

Globalization and global citizenship

Numerous writers from many different perspectives have pointed to developments such as those outlined briefly here to argue that a fundamental change is under way in which states are no longer the only, or even the principal, determinants of outcomes in world politics. If we restrict ourselves to the narrow international legal context, at one end of the spectrum even some “realist” International Relations scholars have argued that there has been a shift away from the very limited role traditionally allocated to international law in a world dominated by power-seeking sovereign states in permanent competition with each other. For example, a special issue in 2000 of the journal *International Organization* suggested that there had been an – admittedly uneven – shift in state practice towards greater reliance on formal legal obligations in their relations with each other (Goldstein *et al.* 2000). Similarly, some advocates of the “English School”, which was founded on a conception of states interacting within an international society, have argued that a shift is under way from a “pluralist” notion of international society, which argues that only minimal cooperation to ensure orderly coexistence is possible between states, to a “solidarist” understanding in which the state members of international society are coming increasingly to act on the basis of a shared and constantly expanding set of values and interests.

Far more radical interpretations flow from the notion of “globalization” and its consequences for the state, including the emergence of a global civil society comprising vast numbers of non-state actors and processes which fundamentally undermines any claims that states alone determine what happens in world politics. In the legal context this view argues, essentially, that we have made a decisive shift towards a cosmopolitan order in which the search for justice for all members of the “great community of mankind” prevails over the far more limited quest for some degree of order among separate sovereign states. We are, slowly but surely, groping our way towards a world in which international law is founded on an underlying conception of global citizenship. In Michael Reisman’s words, “it is the people’s sovereignty rather than the sovereign’s sovereignty” (1990, 866). Apart from the developments outlined here, cosmopolitans might point to the steady expansion of the UN’s human rights regime to incorporate specific areas like racial discrimination, women’s rights, the rights of the child, minority rights, etc. A related argument is that the increasing consensus about the serious potential damage emanating from climate change has imposed upon states the need to see the world as a

112 *David Armstrong*

community of people rather than states because environmental threats do not observe national boundaries. Furthermore, environmental negotiations have witnessed some measure of “distributive justice”. For example the 1997 Kyoto Convention had relatively strong requirements for all to implement their commitments in ways that minimized the social and economic impacts on developing countries and for new technological and other resources to be provided to meet the costs of developing countries. Finally one might note the degree to which some regional organizations, especially the European Union, have gradually displaced or limited in various ways the absolute control by states of their own affairs, with “citizenship” and its rights deriving from the regional rather than national identity.

A degree of scepticism is in order when considering some of the more idealistic cosmopolitan claims. Three reservations in particular need to be noted. First, are the “universal values” invoked by cosmopolitans in reality purely Western values? One leading cosmopolitan thinker, David Held, argues that it is simply the linkages made in many poorer countries between Western culture and their past experience of Western imperialism that makes them resist Western values (Held 2002, 319).⁷ While this is certainly a factor, it is also the case that many simply disagree with those values – over gay rights, the rights of women, abortion, capital punishment, for example. Second, power remains of crucial importance in determining the outcome of events in world politics. This is not simply a matter of two permanent members of the UN Security Council, Russia and China, tending to veto moves that they perceive as undermining the sovereign rights of states but also of the strongest power, the USA, ignoring ICJ findings when they conflict with US interests or when the USA refuses to join the ICC or when its responses to the 9/11 attack include measures seen by many as violations of human rights norms in Guantánamo Bay and elsewhere. Finally, an effective global system to implement and enforce human rights standards would cost many billions of dollars to establish.

On the other hand, it would be hard to maintain that the world has not undergone fundamental changes in the last hundred years. Power may still be the ultimate determinant but all players in the many games of global politics – state and non-state alike – are engaged in ongoing and complex interactions and discourses in which processes of argument, learning, and persuasion are always more in evidence than simple assertions of power. The permanent five on the Security Council will retain their veto over judicial intervention in cases where they perceive a vital national interest and there is not the remotest prospect of any of their leaders appearing before an international tribunal, much as some fantasize about that. Yet, while, ultimately, they all remain willing and able to employ their military might even in the face of widespread condemnation, they are also conscious that they are performing on a world stage whose underlying rules and values have radically changed from those of a century ago, when individual justice was considered a purely domestic matter of no concern for the international community and when a state’s international reputation was closely related to its

proress on the battlefield rather than its moral standing (Armstrong and Montal 2014, 142).

Notes

- 1 Parts of this chapter are drawn from Armstrong (2011, 2121–36).
- 2 I discuss Austin's views and some counter-arguments to them in Armstrong *et al.* (2012, 9–15).
- 3 I discuss these different conceptions of international society more fully in Armstrong (1993, 12–41).
- 4 Gong (1984) develops this perspective.
- 5 I develop these arguments more fully in Armstrong and Montal (2014, 125–46).
- 6 This paragraph is drawn from my detailed discussion of R2P in Armstrong *et al.* (2012, 144–6), together with a brief consideration of developments relating to the Syrian conflict in August to September 2013.
- 7 I discuss this in more detail in Little and Williams (2006, 121–40).

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114 *David Armstrong*

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