

Whose Authority? Empire Versus International Legal Frameworks

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Abstract This paper delves into strategies for maintaining sovereign equality in the face of global challenges, particularly those posed by imperial ambitions and the constrained options outlined by Carl Schmitt. It argues for a robust reinforcement of international institutions and a significant enhancement of international law to safeguard state sovereignty and human rights. Concurrently, it emphasizes the need to nurture popular sovereignty and establish a global rule of law. The theoretical framework of this study advocates for a redefinition of sovereignty. It proposes moving away from the traditional concept that links autonomy with exclusivity, suggesting instead a relational model of sovereignty that recognizes the interconnectedness of states. This approach promotes a more inclusive and cooperative international environment. The paper outlines several practical measures to achieve these goals. Firstly, it calls for the universal application of sovereign equality as enshrined in the United Nations Charter, ensuring that all states, regardless of their power, are treated equally. Secondly, it underscores the importance of fostering internal democratization within states to enhance their legitimacy and stability. Thirdly, it warns against the trend of delegalizing international law, especially in the context of humanitarian interventions, which often bypass established legal frameworks and undermine the principles of sovereign equality. By advocating these measures, the paper argues for a concerted global effort to develop and uphold international law. This effort is crucial for preserving sovereign equality in an evolving global landscape and for preventing the emergence of a two-tiered system where weaker states are left at the mercy of more powerful ones. The proposed framework and practical steps aim to create a more balanced and just international order, where the sovereignty of all states is respected and protected.

Index Terms sovereign equality, international law, state sovereignty, human rights, popular sovereignty, imperialism

I. Globalization and Sovereignty: A Reassessment

Let's start by contrasting two notable occurrences:

On one hand, the world's dominant superpower has intervened in and taken control of Iraq. Meanwhile, Carl Schmitt's "Nomos der Erde" has just been translated into English, specifically American English. Is this simply a coincidence, or does it prompt us to reconsider pertinent questions once more? [1]

This article delves into the consequences of globalization on international law and discussions surrounding sovereignty. Over time, there has been a growing concern that the notion of state sovereignty is weakening. The transnational nature of contemporary challenges, ranging from environmental crises to terrorism, and including the illicit trade in weapons of mass destruction, highlights the perceived diminishing control of modern nation-states over their territories, borders, and the safety of their citizens [2], [3].

Moreover, significant political and legal decisions are increasingly being made beyond the realms of national legislatures. Various supranational entities, transnational private bodies, and transgovernmental networks are actively involved in regulatory activities and the crafting of rules, bypassing traditional state channels in establishing both binding and non-binding regulations. The apparent detachment of law from the territorial state suggests to many observers that not only has the state lost its political sovereignty but also its legal sovereignty [4].

This paradox has sparked the emergence of arguments regarding the transformation of international law. If the process of lawmaking is shifting away from the exclusive domain of states, then the conventional understanding of international law as agreements among states or customs upheld by states requires reassessment. The rise of human rights law, built on consensus, implies that a global cosmopolitan legal framework overrides the will of individual states and their treaty obligations.

In today's context, the very concept of "international" appears outdated. Consequently, the pressing question arises: What will shape the new "nomos" of the Earth, and how should we conceptualize a globalized legal system?

Legal scholars have indeed responded to this challenge over the past decade. Discussions around legal and constitutional pluralism, societal constitutionalism, transnational governance networks, and cosmopolitan human rights law enforced through humanitarian intervention reflect attempts to conceptualize the evolving global legal order. The overarching assertion is that the world is moving towards a cosmopolitan legal system, a transition that may go unnoticed or unaddressed if we do not relinquish

the discourse of sovereignty. Debates in this sphere revolve around how to conceptualize the legal structuring of the new world order [5].

However, an alternative interpretation of the shifts within the international system is worth considering. From a political standpoint, the sovereignty-centric model of international law seems to be giving way not to cosmopolitan justice but to a different endeavor to reshape global affairs: the project of empire. The idea that we are already in the epoch of empire has gained currency in various circles, evident in the popularity of works such as Hardt and Negri's volume on empire and the surge of literature and conferences addressing the topic.

Like proponents of cosmopolitan law, advocates of this perspective argue that discourses surrounding state sovereignty and public international law have become outdated. However, they contend that what is replacing the state system is not a pluralistic, cooperative global political order underpinned by a new, impartial rule of law, but rather a project of imperial domination. From this viewpoint, governance structures, soft law mechanisms, self-regulation initiatives, societal constitutionalism, transgovernmental networks, human rights discourse, and even the concept of humanitarian intervention serve as tools by which empire seeks to assert and legitimize its dominance, rather than as mechanisms to constrain and guide power through legal frameworks [6].

II. Revisiting Sovereignty: Navigating the Shifts in International Law and Political Choices

I acknowledge the emergence of something new. However, I'm not persuaded that abandoning discussions on sovereignty is necessary to understand and interpret these changes. Nor am I convinced that transitioning from an international to a cosmopolitan legal framework, devoid of sovereign states, has occurred or should occur. These two doubts are intertwined: I argue that relinquishing the concept of sovereignty and embracing the idea of state disaggregation, where international treaty organizations are overshadowed by transnational governance, would lead us to misunderstand the nature of contemporary international society and the political decisions we face.

If we assume the existence of a constitutional, cosmopolitan legal order that has replaced or should replace international law, along with its fundamental principles of sovereign equality, territorial integrity, nonintervention, and domestic jurisdiction, with cosmopolitan rights, we risk legitimizing imperial projects. Under current circumstances, this approach leads to the politicization of "law" (cosmopolitan rights) and the moralization of politics, rather than towards a global rule of law. I contend that today, we are faced with a significant political choice: We can either strengthen international law by updating it, explicitly acknowledging the particular conception of sovereignty upon which it is currently based and demonstrating its compatibility with cosmopolitan principles inherent in human rights norms, or we can abandon the principle of sovereign equality and the current rules of international law in favor of human rights, thereby removing a crucial barrier against the proliferation of imperial projects and regional attempts at Grossraum ordering by twenty-first-century great powers, who exploit and manipulate cosmopolitan rights as they advance [7]–[9].

Clearly, I advocate for the former approach over the latter.

The first project involves recognizing the existence and value of a dualistic world order, where the core remains the international society of states entrenched within international institutions and law, suitably reformed, but also incorporating significant cosmopolitan elements and legal principles (human rights norms) upon which the discourse of transnationalism and governance relies, albeit inadequately. In this approach (my own), legal cosmopolitanism is potentially tied to a project fundamentally distinct from empire and pure power politics: the democratization of international relations and the modernization of international law. This necessitates the bolstering of supranational institutions, formal legal reform, and the establishment of a global rule of law that safeguards both the sovereign equality of states based on a revised conception of sovereignty and human rights. The framing of the new, and its relationship with what preceded it, will be crucial [10].

Unlike proponents of cosmopolitan law and justice without state sovereignty, the paradox I argue for is that today, the rearticulation and democratization of sovereignty (both internal and external), configured within a multilayered world order with effective international institutions and updated international law, is essential for the emergence of a global "rule of law" and constitutes a significant component of a counterproject to empire. Without a global rule of law that upholds sovereignty as well as human rights, any discourse on "cosmopolitan" rights, especially the supposed right to militarily intervene to enforce human rights, is inherently questionable. Cosmopolitan rights can supplement sovereignty-based public international law, but they cannot replace it.

Nonetheless, I do not align with the Schmittian or "political realist" viewpoint. According to Schmitt and his adherents, any form of international law that articulates universal principles, along with any notion of cosmopolitanism, are dismissed as mere formalism, utopianism, or merely a set of moral platitudes cynically utilized to justify the power plays of superpowers or major nations against weaker ones [11]. In this perspective, international law is either disregarded as irrelevant or perceived as a tool wielded by the powerful. This skepticism extends to international law that seeks to criminalize aggression, safeguard human rights, or enforce sanctions through military or other means. For Schmittians, invoking humanity is seen as a deceitful tactic.

While global law and global right can indeed become superficial embellishments, it is not necessary to subscribe to Schmitt's theoretical assumptions concerning territory or spatial ordering to recognize this. Contrary to Schmitt's views, I argue for the

significance and independence of formal international and cosmopolitan law.

However, I also do not merely echo the arguments of moral cosmopolitans or, less charitably, contemporary human rights activists. If the political realist errs by oversimplifying strategic interactions based on self-interest, the moral cosmopolitan errs in the opposite direction. The former fails to acknowledge the significant impact of existing international law on states and their understanding of self-interest. On the other hand, the moral cosmopolitan, focused on global justice and human rights, often disregards existing international law and rejects legal reform through established means. Like political realists, moral cosmopolitans view sovereignty as a matter of power politics but advocate for prioritizing justice over sovereignty and formal international law, which they equate with "legalism." They argue that sovereignty should not impede rescue operations in response to severe human rights abuses, advocating for the abandonment of sovereignty in favor of human rights protection [12].

While I cannot fully address the arguments of moral cosmopolitans within the scope of this article, my aim is to defend the discourse of sovereignty and international law against its detractors. In the subsequent discussion, I focus on two recent attempts to conceptualize the new world order through decentered legal cosmopolitanism. I then critique this framework based on empirical and normative considerations. Furthermore, I explore the assertion that we are entering an era of empire and demonstrate how this perspective, despite its critical intentions, obstructs crucial reforms in the international system. Finally, I propose an alternative, dualistic conception of the "new" world order and suggest reforms.

III. Navigating from Global Governance to a Decentralized World Order: Beyond Traditional Sovereignty?

Two narratives assert the emergence of a decentralized cosmopolitan world order, diminishing the relevance of sovereignty discourse. One narrative scrutinizes political institutions, while the other delves into legal evolutions. Both suggest a shift away from the conventional international society of states and its legal frameworks toward decentralized global governance and cosmopolitan legal norms. They cite the individualization of international law, the recognition of *jus cogens* principles indicating obligatory human rights norms, and the rise of transnational decision-making bodies as evidence of this transformation [13].

The first narrative spotlights the rise of new transnational governance mechanisms, supplanting unitary states as principal global actors. This viewpoint, both epistemological and empirical, urges a departure from conceiving the international system as a mere assembly of sovereign states. Instead, it advocates for adopting the notion of separation of powers, traditionally applied domestically, to understand global politics. This conceptual shift reveals the emergence of horizontal and vertical transgovernmental networks as the primary drivers of global governance and law-making, sidelining traditional diplomatic channels.

According to this perspective, the state has fragmented into autonomous components, each operating independently within the global political system. Intergovernmental interactions now predominantly occur through a multitude of horizontal networks, connecting officials across different transnational regulatory and legislative channels. These networks, along with vertical governmental linkages between national and supranational bodies, form the core of contemporary global governance, bypassing traditional state-centric approaches [14].

Horizontal regulatory governmental networks, exemplified by bodies like the G-7 and G-20, facilitate information exchange, enforcement cooperation, and rule harmonization among regulatory authorities. Meanwhile, vertical networks involve relationships between entities such as the European Court of Justice and national courts, where adjudication responsibilities are shared, departing from traditional international law adjudication models.

This evolving landscape emphasizes the breakdown of sovereignty and the advent of a networked global political system, challenging the traditional state-centric view. It advocates for discarding sovereignty discourse, which once served as a useful conceptual tool but now obscures the interconnectedness and interdependence characterizing the contemporary international system. Instead of sovereignty as autonomy, this perspective highlights global interconnectivity and networked governance as defining features of the new world order [15].

The second narrative posits the existence of a cosmopolitan legal framework regulating global politics, constituting a constitutionalized world order. Advocates argue that international society has transcended its state-centric origins, shifting towards a system characterized by functional differentiation and global interconnectedness. This perspective underscores the proliferation of legal norms, independently of state consent, as indicative of a constitutionalized global legal system [16].

From this viewpoint, the focus shifts to the internal legal perspective, emphasizing the production of legal validity and the role of transnational judicial networks in shaping global legal norms. Courts, rather than sovereign entities, are central to this legal system, tasked with ascertaining legal validity and resolving disputes over legal norms.

This approach identifies several indicators of global constitutionalism, including the recognition of human rights as *jus cogens* principles, the existence of *erga omnes* rules obligating all states, and the growing prominence of transnational judicial networks. However, critics caution against premature assertions of a fully-fledged cosmopolitan legal system, citing challenges such as limited global remedies and unresolved jurisdictional issues.

Furthermore, they warn against undermining the principle of sovereign equality of states, essential in international law, in the pursuit of legal cosmopolitanism. Blindly discarding sovereignty discourse could inadvertently bolster imperial agendas,

exploiting cosmopolitan principles to justify unilateral interventions and disregarding state sovereignty [17].

In essence, while acknowledging the evolving nature of global governance and legal frameworks, it's crucial to tread carefully, avoiding premature declarations of a post-sovereign world order and ensuring a balanced approach that upholds both cosmopolitan principles and state sovereignty within the international arena.

IV. Critical Examination of Contemporary Legal Cosmopolitanism

A. Navigating Empirical Realities

The assertion of a fully-fledged global, networked, constitutionalized political order appears exaggerated upon closer scrutiny. While states have ceded some authority to supranational and transnational bodies, and there is a growing presence of non-state governance and rule-making, it's premature to declare the replacement of traditional international law rooted in state consent. Undoubtedly, there's a notable trend towards recognizing individuals as legal entities with inherent rights under international law. Violators of these rights can now face international tribunals directly, circumventing national legal systems, eroding claims of sovereignty or domestic jurisdiction [18].

However, it's debatable whether these developments signify the establishment of a cosmopolitan legal order superseding traditional international law. Legal cosmopolitans often depict these changes as a transition from internationalism to cosmopolitanism. Yet, it's unclear which version of international society or model of sovereignty is being supplanted. The notion of moving from Westphalian sovereignty to a cosmopolitan legal order is somewhat misleading, as the former has evolved over time, and several principles associated with it have been redefined.

For instance, the principles of sovereign equality, nonaggression, and nonintervention, enshrined in the UN Charter, are not remnants of the traditional Westphalian order but rather represent a new conception of sovereignty applicable to all states. This shift has facilitated the emergence of a more egalitarian international system, albeit with constraints on state sovereignty. While the Charter introduces collective security measures, sovereignty, redefined as sovereign equality, remains foundational, despite increased cooperation among states and the expansion of human rights discourse [19].

These principles should be viewed as part of a broader project to democratize sovereignty rather than abolish it. The international community must redefine the boundaries of state immunity amidst growing international cooperation and emphasis on human rights. While some aspects of sovereignty have been delegated to supranational bodies, representative government remains intact, underscoring the enduring significance of public international law and institutions.

B. The Dualistic Nature of the Global Political System

The core of the world political system continues to be the "international society of states," albeit undergoing significant transformations. The global political landscape is characterized by dualism, with sovereign states coexisting alongside international law, non-state actors, and consensual cosmopolitan elements. While functional differentiation has emerged, segmental differentiation persists, leading to potential conflicts between different aspects of the global political order [20].

Indeed, clashes between human rights principles and traditional principles like nonintervention and domestic jurisdiction are not uncommon. What's needed is the articulation of new legal norms to navigate and regulate these clashes effectively. Whether this multifaceted order should be viewed as inherently contradictory and transient, necessitating a wholesale shift to cosmopolitan society and law, or as a new phase of international society requiring legal reform and coordination with existing principles of international law, remains a normative and political question [21].

C. Preserving the Discourse of Sovereignty

Cosmopolitan theorists and human rights advocates often critique sovereignty as emblematic of unchecked power, hindering necessary legal and political actions to enforce human rights. However, this perspective overlooks the normative and symbolic significance inherent in the concept of sovereignty. Even as one sovereignty regime may decline, another can emerge, maintaining continuity at a normative level [22].

The absolutist view of sovereignty, equating it with unchecked power, has long been abandoned. Modern constitutional democracies, with their separation of powers and checks and balances, demonstrate that sovereignty and constitutionalism are compatible. Sovereignty embodies both the enactment and the restraint of law, serving as a dynamic principle balancing law and politics [23].

From a juridical perspective, sovereignty allocates authority and jurisdiction. Politically, it signifies autonomy and the relationship between a citizenry and its government. Sovereignty implies that political power is public and impersonal, exercised through law and consensus-building, with citizens as its ultimate reference point.

Externally, sovereignty defines the autonomy of political communities in a pluralistic world. International law and institutions both recognize and limit state sovereignty. Sovereign equality remains foundational, despite the emergence of supranational bodies and transnational jurisdiction [24].

In the contemporary global order, sovereignty and human rights can coexist productively. Resolving tensions between them requires developing new legal distinctions that accommodate evolving values and complexities. Sovereign equality and human rights, rooted in egalitarian universalism, can be complementary if international legal rules are updated accordingly.

However, sovereignty should not be contingent upon internal political arrangements like constitutional democracy. Popular sovereignty is a regulative principle, not an individual right. Upholding sovereignty does not preclude promoting democratic ideals but emphasizes the importance of mutual recognition and respect among sovereign states [25].

V. Challenging the Notion of Global Law Without the State

In assessing the concept of global law divorced from state authority, a critical lens reveals ideological underpinnings reminiscent of empire. Proponents like Schmitt suggest that sovereign equality inherently masks inequality, serving only the interests of a select few. The historical Eurocentric *jus publicum europaeum*, while eroded, paved the way for global power shifts post-world wars [26].

Schmitt's three proposed alternatives reflect the evolving landscape of global dominance. The current U.S. stance, marked by disdain for international agreements and institutions, mirrors a departure from collaborative global governance. Embracing a unilateral approach, the U.S. seeks to assert hegemony under the guise of moralistic interventionism, disregarding established legal frameworks.

This trend toward unilateralism and militarism heralds an imperialist agenda. While theorists like Hardt and Negri posit a decentered empire, denying U.S. centrality, their characterization lacks clarity. Decentralized "imperial sovereignty" contradicts the essence of sovereignty itself, replacing it with amorphous governance structures and undermining political autonomy [27].

In this context, the notion of a cohesive global legal order becomes tenuous, overshadowed by imperial aspirations. The imperative lies in scrutinizing such agendas and reaffirming the principles of sovereign equality and international cooperation to counteract unilateral dominance and preserve global stability.

VI. Preserving Sovereign Equality in a Global Context

In countering the trajectory towards empire and the limited options presented by Schmitt, there exists an alternative path. Strengthening international institutions and enhancing international law can safeguard state sovereignty and human rights while promoting popular sovereignty and a global rule of law. Several theoretical and practical steps can facilitate this endeavor [28].

Firstly, dissociating autonomy from exclusivity is crucial. By abandoning the absolutist concept of sovereignty in favor of a relational model, international law can penetrate the state without compromising its autonomy. States, through agreements and cooperation, can enhance their sovereignty rather than diminish it.

Schmitt's analysis highlights the importance of a balanced relationship among sovereign states for effective international law. Mutual recognition, balance, and institutionalized cooperation form the basis of feasible and meaningful international law. Formal equality, coupled with material equality among states, prevents any single state from imposing its will on others [29].

Generalizing the conception of sovereign equality to all states under the UN Charter fosters a shared culture of mutual respect and accountability. The democratization of external sovereignty, backed by international law, underscores transformative developments since World War II, wherein states renounced impermeability to international law.

Furthermore, fostering the internal democratization of all states is essential. Political autonomy within states facilitates popular sovereignty and democracy, contributing to a more equitable international order. This internal dimension of sovereignty aligns with the principles of self-determination and constitutionalism [30].

Lastly, halting the trend towards deformalization of international law, particularly in humanitarian interventions, is imperative. The proliferation of exceptional rescue operations undermines respect for the rule of law and sovereignty. Clear, coherent rules must be articulated to regulate humanitarian intervention while upholding the principle of sovereign equality.

In conclusion, while a global rule of law remains elusive, concerted efforts to develop and uphold international law can preserve sovereign equality amidst evolving global dynamics. Formalizing rules through public deliberation and consistent application is essential to prevent a two-tiered system that leaves weaker states vulnerable to powerful ones [31].

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