
The End of Geography: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem

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Abstract

This article responds to Daniel Bethlehem's assertions that globalization is diminishing the importance of geography, and thereby challenging the Westphalian order on which international law is constructed. It contends that international law does not take geography as it is but actively creates and sustains a state-based geography. It argues that the challenges Bethlehem identifies are not new but are inherent in international law's efforts to impose a state-based order on a global world. The question is not whether international lawyers will respond to these challenges, but how they will respond. Will they follow Bethlehem in reinforcing a statist order, or will they place sovereignty of states in the service of the global human community?

In his lecture 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law', reprinted in this volume, Daniel Bethlehem paints a vivid picture of a changing world and international law's challenge to remain relevant.¹ Though the metaphors chosen to paint this picture are somewhat mixed,² the underlying message is clear. The world is becoming flatter as

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¹ Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law', 25 *EJIL* (2014) 9.

² Several of the mixed metaphors give rise to apparent contradictions. International law simultaneously flows from principles such as sovereignty and flows around the rocks of sovereignty and territorial integrity: *ibid.*, at 14 and 20. International law both shapes the space within which those subject to the law operate and is rooted in notions of territorial space: *ibid.*, at 12–13. As international lawyers, we are described as viewing the world from a position rooted in territorial geography but also as passengers on a moving train: *ibid.*, at 17–18. These seeming contradictions are at the heart of the questions which this reply seeks to answer.

globalization removes or diminishes boundaries between states. Yet, international law remains wedded tightly to Westphalian concepts and principles of states and sovereignty which are increasingly of diminishing relevance to the system it purportedly regulates. If international law is to remain relevant and effective, it must reform and go beyond its traditional Westphalian notions.

Bethlehem identifies six broad areas of challenges which can be grouped into two categories. First, there are the challenges which come from our occupation of border-defying common spaces – the environment, the atmosphere, the electromagnetic sphere, and so forth. Secondly, there are the challenges which come from flows across borders – of people, animals, goods, and finance. These challenges are real, they appear to be growing in significance, and they go directly to the Westphalian conceptions of states, sovereignty, jurisdiction, and territoriality which underlie the international legal system. By focusing our attention on these challenges, Bethlehem highlights a disconnection between the world as it is and as it is seen from the perspective of international law. If international law is to be, as Bethlehem asserts, ‘the glue that holds the international system together’,³ then this disconnection should be worrying to international lawyers. For the law to keep pace, systemic reform is needed at all levels – in how we conceive the sources and subjects of international law, in its allocation of responsibilities between jurisdictions, and in the creation and enforcement of law by states, directly and through international organizations. While one may quibble with Bethlehem’s specific prescriptions (it is quite striking, for example, that in his programme for re-conceiving jurisdiction he focuses exclusively on jurisdictional forms linked to the state and omits the significant recent push towards universal jurisdiction), it appears difficult to argue with the general thrust of his argument. The global and trans-boundary challenges of the modern world are at odds with a world rooted in sovereign, independent states, and systemic reform is needed.

Yet, something fundamentally unsettling remains. If, as Bethlehem contends, international law is about how humankind organizes and manages the international society, how have international law and the society it organizes diverged? How has a globalized world come to grow and to flourish, with all the attendant benefits as well as challenges, despite this process of globalization being at odds with the precepts which organize international society? Looking to the future, if globalization is increasingly calling into question the validity of our Westphalian notions of territoriality, why does Bethlehem assert that the international community continues and will continue to be rooted in geography and to attach importance to principles of sovereignty, territoriality, and non-intervention?

The answer to these questions lies in a prescient observation made by Bethlehem but not pursued consistently. He notes, ‘the world looks different from Geneva than it does from New York’.⁴ How we see the world depends on where we stand. The fundamental question which Bethlehem sets out to answer is whether the view of the world from the perspective of international law adequately reflects law’s tasks and challenges.

³ *Ibid.*, at 12.

⁴ *Ibid.*, at 11.

To answer this question appropriately, one would need to step outside the perspective of the international lawyer or, at a minimum, closely to examine the fundamental assumptions and biases one brings to the table and which may colour one's perceptions of the world observed.⁵ While Bethlehem shows a greater willingness than many international lawyers to interrogate fundamental concepts of international law, he ultimately does so from a perspective firmly within the college of international law whose walls, far from being invisible, have long grown high and obscured the view outside. If one steps outside these walls, the perspective of the international system, the role of international law within it, the challenges the law faces, and the need for reform all take on markedly different characters.

In Bethlehem's world, international law and the international system occupy a two-dimensional plane of existence. Goods, people, services, and funds (and, one should add, ideas) flow across this plane while sovereignty and boundaries may act as impediments, impeding these flows and diverting them around (note, not over or under) state borders.⁶ When one looks at the world from such a two-dimensional perspective, it will inevitably look flat, not because it is flat but because other dimensions are hidden from view.⁷ States and other subjects of international law are treated, within their respective categories, as sovereign equals, eliminating any significant differences.⁸ All that can be seen are the flows across the plane, through and around borders. Dimensions such as class, race, religion, ideology, and gender which give rise to and structure these flows are obscured from view.⁹ If we are to understand international law and its role at a systemic level, we need to dig deeper into the roots of this two-dimensional topographical projection.

For Bethlehem, international law and the international system are rooted in geography, more specifically in the geography of a world of sovereign equal states. While individual states, like mountains, may come into and go out of existence, a world divided into sovereign states is taken to be eternal.¹⁰ Law, or at least any particular manifestation thereof, is ephemeral, representing the particular mode of organization of these states and other subjects at any one time. It 'defines and shapes the space within which those who are subject to the law operate'.¹¹ However, these subjects pre-exist the law, and their existence does not depend on the law.

I would submit that Bethlehem's account inverts the deeper relationship between international law and geography. Fundamentally, law is not rooted in geography. Rather, law, international law in particular, creates its own geography.¹² While

⁵ See W. Twining, *Globalisation and Legal Scholarship* (2009).

⁶ Bethlehem, *supra* note 1, at 15, 20.

⁷ E.A. Abbott, *Flatland: A Romance of Many Dimensions* (1884).

⁸ See T. Adorno, *Negative Dialectics* (trans. E.B. Ashton, ed. Continuum, 1997), at 309.

⁹ See, e.g., Special Issue: 'The World is not Flat: Putting Globalisation in its Place', 1 *Cambridge J Regions, Economy and Society* (2008), at n. 3; Florida, 'The World is Spiky', *Atlantic Monthly* (Oct. 2005) 48.

¹⁰ Bethlehem, *supra* note 1, at 24; see also A. de Saint-Exupéry, *Le Petit Prince* (ed. Gallimard, 1999), at 60.

¹¹ Bethlehem, *supra* note 1, at 12.

¹² See Koller, '... and New York and The Hague and Tokyo and Geneva and Nuremberg and ... : The Geographies of International Law', 23 *EJIL* (2012) 97.

international law may make reference to physical characteristics of the world, its geography is that of a world of ideas which is imposed upon the physical world. International law does not merely regulate the interaction between states (and other actors). It creates them, defines them, and sustains them as a way of giving order to the world. It structures the flows of goods, services, people, and funds long before they interact with sovereign boundaries. At the root of this structuring is the concept of the state. By dividing the world into discrete territories, international law seeks to contain global flows within boundaries and to establish rules to regulate the crossing of these boundaries. It is this imposition of order on chaos which is the true function of international law.¹³

The challenges to international law described in Bethlehem's lecture reflect not so much a newly-changing world but the eternal and essential struggle of international law to impose a state-based order on a global world. Bethlehem describes the Geneva-based international organizations dedicated to the regulation of global flows as being 'at the sharp end of the world of the future'.¹⁴ Yet, these are among the oldest international organizations, long pre-dating the 1945 establishment of the 'classical Westphalia[n]' organs of the UN in New York. The International Telecommunications Union was established in 1865, the Universal Postal Union in 1874, and the International Labour Organization in 1919. The need to regulate trans-boundary flows goes hand-in-hand with a system of sovereign states.¹⁵ Problems of boundaries arise only and inevitably with the creation of such boundaries.

Faced with the inevitable clash between a territorially-rooted legal order and a global world, Bethlehem urges that 'we will have to move beyond our traditional notions of Westphalia'.¹⁶ However, his unquestioned attachment to the supposed geographical roots of the system limits his solutions to the reinforcement and modest reform of the system without addressing fundamental issues arising from the fetishism of the state. Bethlehem argues that international organizations will need to become less politicized and more accountable, that we need to expand our notions of jurisdiction beyond strict territorial limitations to other forms linked to the state, and that we need to integrate new subjects, sources, and agents into an international legal framework based ultimately on traditional inter-state law.¹⁷ These solutions all expand law's ability to deal with challenges to the presently perceived Westphalian order, but they do so by extending the reach of this Westphalian system. This reinforcement of the statist system will enhance order and ensure 'traditional' international law's relevance, but its cost may be to retard the realization of a global human community.¹⁸ The ability of international organizations to act independently and to influence

¹³ *Ibid.*, at 108–114.

¹⁴ Bethlehem, *supra* note 1, at 12.

¹⁵ *Cf.* UN Charter, Art. 63 (providing for bringing these specialized agencies into relationships with the UN and thus situating them firmly within the Charter's Westphalian structures).

¹⁶ Bethlehem, *supra* note 1, at 18.

¹⁷ *Ibid.*, at 22.

¹⁸ See Springer, 'Anarchism! What Geography Still Ought to Be', 44 *Antipode* (2012) 1605 (noting that the division of the world into states is preventing the realization of a global human community).

political developments without being held 'accountable' to the parochial interests of states, the emergence of the practice of universal jurisdiction holding all individuals accountable independently of any linkages to the state, the recognition of individuals as the primary subjects and objects of the law, and the emergence of new informal modes of law-making have all raised hopes (even if they have been as frequently swiftly crushed by the forces of state order¹⁹) for an international law accountable to the physically existing global human community and not to the whims and desires of mystical, metaphysical states.

We live in a world of overlapping legal orders – statist, communitarian, and cosmopolitan of all stripes.²⁰ It is increasingly apparent, even if it has always been the case, that there is no one perspective of international law. Bethlehem is right that the place of geography in the international system is changing, and that it presents challenges to international law. It always is, and it always does. New actors and patterns of behaviour will constantly emerge, threatening a tenuous Westphalian order which will seek to appropriate them while other forces of community and cosmopolis will seek to exploit them to their own ends. The question is not whether we will rise to the challenges, but how. Will we take up Bethlehem's call to reinforce a state-centric order which is seen to have eroded since 1648, or will we embrace other perspectives and other perceived legal orders which place sovereignty in the service of the human community?²¹

¹⁹ See, e.g., P. Allott, *The Health of Nations: Society and Law Beyond the State* (2002), at 311 (describing the corruption of human rights to serve the statist order).

²⁰ See Berman, 'Law and Globalization', 43 *Columbia J Transnat'l L* (2005) 485.

²¹ See, e.g., Peters, 'Humanity as the A and Ω of Sovereignty', 20 *EJIL* (2009) 513.