

**How International Law Got Lost:
The New Geography of Global Governance**
(forthcoming 2021)

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For the better part of the past 250 years and, certainly since the end of WWII, international law has performed an admirable job maintaining international peace and security, advancing the shared interests of states, and promoting a broadly-held consensus of values. Yet, today, international law is becoming increasingly irrelevant to solving the major global challenges of the 21st century. *How International Law Got Lost* explains the declining relevance of international law today and charts a path toward reinvigorating the international legal system as a tool of global problem solving. The book explores how the decline of US leadership and the rise of China as a major global actor have limited the creation and enforcement of international legal rules. The book then considers how the most pressing challenges of the current moment—from climate change and migration to cyber security and COVID—are to an ever greater degree being addressed outside the traditional frameworks of international law. Unlike many of the global governance challenges of the 20th century, these 21st century challenges require action by a far broader range of actors than the traditional international legal system is equipped to engage. The book concludes with proscriptive guidance for how an alternate vision of the international legal system might reinvigorate the rules-based international order and advance solutions to the most pressing governance challenges of the day by more directly engaging the broad array of actors—from cities and other subnational actors to corporations and non-governmental organizations.

Part I: Retrenchment and Rise: The Dwindling Supply of International Law

The system of international law is fundamentally one of nation states, which must create, abide by, and enforce international legal rules. This state-based leadership of the international legal system requires, in turn, that some combination of powerful states be committed both to the international legal system as a tool of collective global action and to the values and interests embedded within that system. Over the past 70 years, the United States and a US-European values consensus have provided the vast majority of the political energy necessary to generate and enforce international legal rules. It is this commitment and consensus among the most powerful states in the system that has led international law to be a method of choice in resolving global challenges. The retrenchment of the US away from global leadership, Europe's continuing inward focus, and the rise of new power centers that have not shown themselves able or willing to animate the international legal system has resulted in both increasing exists from the international legal order and a dwindling supply of international legal rules.

Over the past decade, the US – European consensus around the interests and values of the international legal system has eroded at the same time that US and European power and influence have waned. Beginning under President Obama and rapidly accelerating under the Presidency of Donald Trump, the US has stepped back from global leadership. The tumult of Brexit and the rise of populist nationalism in parts of Europe have similarly undermined Europe's collective ability to drive the international legal system. Collectively, these hegemonic

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retrenchments have sapped the international legal system of its momentum as the political and economic will to generate and enforce legal commitments has dwindled. Growing populism and nationalism in the US and Europe are antithetical both to the globalism embodied by international law and the values embedded in many existing international legal rules. Not surprisingly, this period has been marked by exits from international commitments and agreements, even by liberal states which has previously served as the drivers of the international order. US exits from the TPP, the Paris Accord, UNESCO, the JCPOA (Iran Deal), the INF Treaty, the Open Skies Treaty, and the WHO over the past three years are emblematic of a broader race for the exits from the international legal system by the western liberal states that used to drive the system forward. And even where countries have remained formally committed to international legal rules or institutions, institutions such as the UN Security Council or even the G20 have become far less capable of responding to new threats and challenges.

While structural shifts in the distribution of power from the West to China might have offered an alternative source of political leadership for the international legal system, China has not chosen to play such a role. China is asserting itself within the international legal system, but it has neither developed the hegemony necessary to drive the system forward nor the political interest in assuming the costs of leadership. While the western liberal consensus long held that China's economic growth and political maturation would largely align China with the interests embedded in the international legal order, that assumption has not proved accurate. On a growing number of issues, from human rights to global public health, China's actions and interests auger for changes to, rather than reinforcement of, the international legal order. What emerges, then, is a leaderless system, without either the power nor consensus of interests necessary to supply international legal rules or rule enforcement.

Part II: New Global Challenges and a Changing Demand for International Law

Concurrently with these changes to the structure of the global order and the interests and values of the most powerful states within that order, the nature of the most urgent global challenges is changing fundamentally in ways that further limit the utility of international law. Traditionally, international law has provided a mechanism to resolve largely inter-state conflicts and to coordinate state-to-state cooperation. International law has been most useful with respect to coordination challenges largely within the purview and jurisdiction of national governments themselves. Arms control agreements, one of the great successes of 20th century international law, are illustrative of such state-to-state cooperation where national government commitments alone—if they were fulfilled—could address the relevant global challenge. The challenges facing the global community today, however, are far more complex, and require action by a wide range of actors beyond the states that comprise the international legal system. This need for activity by and coordination among a variety of actors at different levels of the governance system has reduced the demand for traditional international law as global governance itself has moved beyond the domains of national governments.

The major challenges facing the global community today—such as climate change, migration, cybersecurity, and pandemic disease—are complex, multi-actor and multi-stakeholder. Addressing these new challenges requires commitment by and coordination of actors at multiple levels of governance—from international organizations to nation states; from federal entities to cities and localities; from multinational corporations to non-governmental

organizations. In the traditional model of international law, legal rules apply to nation states, which must, in turn, ensure sub-state and non-state actors comply with the rules to which national governments have committed. In light of both the declining supply of international legal rule enforcement by national governments discussed in Part I and the changing nature of the current governance challenges, this traditional model of enforcement has proved grossly inadequate. Today nation states are often unable or unwilling to ensure other actor's compliance with international law. Those actors themselves are playing a much greater and more direct role in both the creation and implementation of international norms outside the boundaries of traditional international law. As a result, international law has become a less and less useful tool for addressing today's global challenges.

How International Law Got Lost proceeds to map the new geography of global governance through case studies of four of the most pressing governance challenges: 1) climate, change, 2) human movement, 3) cybersecurity, and 4) pandemic disease. Each case study explores how breakdowns in the traditional structures of international law have left growing governance gaps in which the political will and regulatory capabilities of international institutions and national governments have proved unable to respond to the magnitude of the challenges we face. The case studies explore the ways in which these sub-state and non-state actors are generating new normative commitments and their indispensable roles in implementing viable solutions to governance challenges.

In the area of climate governance, for example, cities and subnational actors are essential implementers of climate adaptation commitments and are often best placed to meet climate mitigation goals. So too, these substate actors are emerging as sources of political energy to advance climate commitments, even where national governments refuse to do so. With respect to human movement and migration, a complex interplay of international organizations, non-governmental organizations, localities and corporations must work with national governments to ensure safe transit and long-term assimilation of migrants. Effective cybersecurity today demands direct engagement with technology companies who have expertise, platforms, and capacities national governments may lack and who often have proprietary control of technology and pipelines. Similarly, addressing global public health challenges, such as COVID-19, requires state-to-state cooperation, but also close coordination of hospitals, pharmaceutical companies, and sub-national entities. Collectively, the case studies show an emerging geography of global governance that reaches well below the nation state and incorporates actors outside the ambit of international law making. As the action of global governance has moved toward this new geography, the relevance of international law itself continues to decline.

Part III: New Actors and a New Geography of Global Governance

The case studies at the heart of Part II also identify significant points of political energy and regulatory capacity below and beyond nation states that have the potential to fill, at least part, the void left by the retrenchment and withdrawal of the powerful liberal states that have, heretofore, animated the international legal order. Each case study provides evidence of growing global political activism and direct engagement with global norms by actors typically excluded from international law. Part III turns more directly to these new actors in global governance to better understand their roles in addressing international challenges and the parts they are playing in an emerging new geography of global governance. Ultimately, for international law to regain its relevance as an effective tool for addressing modern governance challenges, it must find new

and more effective ways to engage, harness, and at times compel these sub-state and non-state actors.

Part III offers a deep analysis of two types of non-state actors essential to today's governance challenges and that could potentially provide new energy to drive the international legal order: cities (and other substate actors) and multinational corporations. Two parallel chapters examine how cities and multinational corporations are assuming greater roles in global governance and, even, in international law making and compliance. Both cities and multinational companies are already engaging in activities that, if undertaken by states, would fit closely with the traditional models of international law. From mayoral declarations on climate change to corporate codes of conduct on cyber issues, cities and multinational corporations are making normative commitments that, at times, rival traditional international law. So too, cities and multinational corporations are implementing commitments that often advance global governance objectives beyond what nation states themselves are willing to do. Finally, cities and multinational corporations have interests, incentives and political activism that could, if properly deployed, mitigate the declining state leadership of the international legal order. Ultimately, the future effectiveness of international law may turn on the legal system's ability to harness this energy and directly engage these sub-state and non-state actors in rule creation, compliance, and enforcement.

The book concludes with a proscriptive argument for how international law and international lawyers can regain their utility in designing and implementing solutions to today's global governance challenges notwithstanding the limited supply of international legal leadership by nation-states and the changing nature of governance challenges today. In a maximalist vision, non-state and sub-state actors could be given a limited version of international legal personality commensurate with their willingness and ability to advance solutions to global challenges. To do so, international law must find ways to directly engage and regulate a broader range of actors that are essential components of global governance today. It might even need to look to such actors as sources for law creation and compliance. In select areas—from human rights to investment law—cracks in the state-centric approach of international law are already evident and could be further expanded to open the international legal system to broader participation. So too, there is already precedent in existing judgments of the International Court of Justice for a version of international legal personality based on functional need and contribution. That functionalist version of international legal personality would have to be both expanded and circumscribed to account for both the potential contributions sub-state and non-state actors can make to global governance and the ways their interests might diverge from those of nation-states alone.

While nation-states will and should retain a special category of international legal personality, there are a host of ways that the international legal system could be opened to more direct engagement of and with sub-state and non-state actors. Such a new approach to international legal personality might include, for a start, the direct imposition of obligations on corporations, NGOs, and sub-state actors. It might allow international law to consider commitments by sub-state officials or even corporate leaders as part of the corpus of international law. It could look to actions by sub-state actors—and perhaps even corporations—as a form of *opinio juris* and state practice in the formation of customary international law. It might involve cities and federal entities having seats and circumscribed voting privileges in international negotiation fora, such as the UNFCCC. And it could include transnational enforcement of international legal claims amongst a wide variety of actors.

This shift to a functionalist vision of international legal personality, while a bold break from international law theory, solves two key problems facing international law today: the lack of political will among nation states to advance collective solutions to global challenges and the need to coordinate multiple layers of authority in solving those problems. The case studies examined in the book reveal meaningful political energy to address global governance challenges beyond nation states. A functionalist approach to international legal personality offers a way to harness this potential and fill the political void left by the retreat of national governments from international law. So too, this approach responds to the changing nature of governance challenges themselves by offering a path toward more direct coordination of the multiple actors and authorities needed to implement solutions to the challenges of the day.

Of course, expanding our conception of the international legal system to directly engage a far broader array of actors presents both practical challenges and real dangers. It upends notions of sovereignty and international legal personality. It blends domestic and international legal regulation in new ways. It opens the door of international law to new interests and potentially divergent values. Mostly, however, it suggests a complex system of multilevel global governance that is in fact already operating in response to the governance challenges we face today. Such a system will have far more voices and far more interests, potentially making coordination more difficult. So too, it may change, in ways both good and bad, the interests and values represented in international law.

When we recognize, however, what the new geography of global governance already looks like, it is probably too late to revert back to the classic state-centric model of international law. The question is not whether new actors should be allowed to operate on the global stage, but rather how best to coordinate those actors and harness their energy and capacity to address global challenges. Even modest steps in opening the international legal system may go far toward adapting international law to more effectively operate in this new geography. So too, such steps are essential to renewing international law's efficacy.