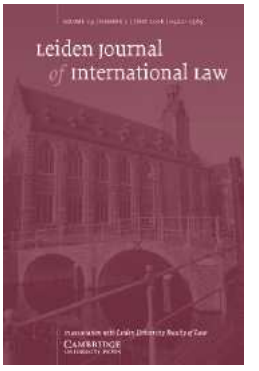

State-Centrism, International Law, and the Anxieties of Influence

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Leiden Journal of International Law / Volume 19 / Issue 02 / June 2006, pp 339 - 347
DOI: 10.1017/S0922156506003335, Published online: 13 July 2006

Leiden Journal of International Law, 19 (2006), pp. 339–347
 Printed in the United Kingdom doi:10.1017/S0922156506003335

State-Centrism, International Law, and the Anxieties of Influence

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Abstract
State-centrism is a key concept in discussions of sovereignty, justice, and the global political order and of changes within that order. Thus we routinely hear: 'that analysis is far too state-centric!' Or: 'earlier approaches were marred by excessive state-centrism, and need to be reconsidered in the light of contemporary circumstances'. Or even: 'I'm state-centrist and proud of it'. This article brings into focus some of the themes associated with state-centrism in international legal writing, and suggests something of the limits of this way of framing issues. It also raises the possibility that these themes may provide clues to certain characteristic and apparently deep-rooted, but not always clearly recognized, anxieties on the part of those who work in this field. Borrowing a phrase from Harold Bloom, the article refers to these as anxieties of influence.

Key words
anxiety of influence; empire; sovereignty; state; state-centrism

What does it mean to characterize an argument or outlook or approach as 'state-centric'? Quite obviously it can mean many different things. Sometimes it's a claim about the key agents or actors in the global political system – not just states, but also international institutions, multinational corporations, social movements, and terrorist organizations. Sometimes it's a claim about the kinds of power that count – not just political and military power, but also economic and cultural power. Sometimes it's a claim about the structure of the global polity – not just a system of inter-state relations, but a post-international order of networked interactions that also extend across, within, and above national boundaries. And sometimes it's a claim about the locus of political authority, the relative autonomy of governments, the political significance of nationalism, the moral significance of boundaries, the fate of territorial scale.

The list could go on, but whatever sort of claim is involved, four things seem tolerably clear. One is that state-centrism is a pejorative concept. To point to state-centrism is to criticize it. This is not to say that people never describe their own position as state-centric; it is simply to observe that, when they do so, it is in the spirit of appropriating and recoding a disfavoured category. Second, a charge of

* Fellow, Emmanuel College, Cambridge. This is based on a paper presented at Columbia University in April 2005, in connection with a meeting of the Conference for the Study of Political Thought. I am grateful to David Armitage and David Johnston for inviting me to take part, and to the participants for their comments. Warm thanks too to Matthew Craven, Andrew Lang, China Miéville, Sundhya Pahuja, and this journal's anonymous reviewer for very helpful suggestions.

state-centrism generally has both a descriptive and a normative dimension. On the one hand, there is a claim that the state really is less central than is being made out. On the other hand, there is also a claim that the state should become less central than is made out. Linked to this, a third feature concerns the standpoint from which charges of state-centrism are levelled. That standpoint typically associates itself with a progressive and enlarged angle of vision. Thus it represents itself as asserting authentic community against administrative artifice, universal humanity against nationalist particularism, a modernizing impulse against the *ancien régime*, and so on. Finally, there is the widely remarked feature that criticism of state-centrism is never quite what it at first seems, in that whoever denounces state-centrism also in some sense calls it forth.[1] Despite the descriptive and normative claims I have just mentioned, what is at issue is never simply a *response* to a reality in which the state is treated as appropriately central. Rather, that reality is partly *produced*, inasmuch as the outcome is always to reaffirm and hence strengthen the state as the central problematic with respect to which analysis and policy must be formulated.

In what follows I want to illustrate how this plays out in relation to international law. A rich seam of pertinent material can be found in recent debates about the way in which international law affects and is affected by the 'war on terror', and my main focus will be on those debates. Just as state-centrism can mean many different things, so too it takes many different forms in discussions of international law. I propose to review three such forms. In the first, state-centrism refers to a preoccupation with states to the exclusion of non-state actors. In the second, it refers to an interpretative posture that gives undue weight to state sovereignty, when what matters after all, is human beings. The third form is somewhat different, in that the concern is no longer with specific international legal institutions, procedures, and norms, but instead with the more general issue of international law's significance, its relationship to the world. Here state-centrism is associated with the idea that we live in a 'lawless world', in which power politics – or perhaps the politics of one uniquely powerful state – eclipse respect for international law.[2] In other words, state-centrism is counterposed in this third context to law-centrism; it refers to an imperious disregard for international law, or even for the international rule of law. Criticism of state-centrism in this sense is bound up with the self-perception of international legal practitioners and scholars. Involved in it seems to be their fear of irrelevance, their frustration at seeing international law sidelined in global affairs. Or should that rather be their fear of *relevance*, their anxiety about international law's *influence*? Is the problem finally lawlessness – or is it law?

1. Non-state actors

I begin, then, with arguments in which state-centrism is associated with the idea that international law is too preoccupied with states, and should pay more attention

1. See, e.g., D. Kennedy, 'A New World Order: Yesterday, Today and Tomorrow', (1995) 4 *Transnational Law and Contemporary Problems* 330, and K. Knop, 'Re/Statements: Feminism and State Sovereignty in International Law', (1993) 3 *Transnational Law and Contemporary Problems* 293.
2. I take this phrase from P. Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005).

to non-state actors. The category 'non-state actors' refers in the international legal field to a wide range of human groupings that includes corporations, activist organizations, religious associations, and (in some usages) indigenous peoples, along with more shadowy figures like mercenaries, drug runners, gun runners, people traffickers, wife beaters, and terrorists, who do not generally call themselves by these names. Depending on the particular non-state actor under consideration, the claim could be that international law should do more to control their activities, or simply to stop them. This is often framed in terms of the point that international law should not confine itself to regulating official or public action, but must regulate action in the private sphere as well. Or the claim could be that international law should do more to engage non-state actors in its processes of norm-making and enforcement. This obviously does not apply to mercenaries and the rest, but it is a long-standing theme where activist and other civil society organizations are concerned.

Already these few observations bring into relief two further features of the concept of state-centrism, to add to my list at the beginning. One is that the concept subsumes wildly disparate problems under a single category, in a way that often hampers our capacity to work out what those problems are and how best to address them. Beyond the truism that all kinds of 'centrism' (Eurocentrism, ethnocentrism, logocentrism, etc.) are bad insofar as they perpetuate arrogance, myopia, or simply monomania, we can never determine whether the state is too central or not central enough. We can only ever answer much more specific questions about specific contexts. The second feature takes us in a different direction, in that this has to do with the way in which phenomena that are enmeshed are made instead to appear separate. Again, what I am about to say is obvious, but its implications are not always fully pursued. When we counterpose the non-state to the state, we tend to obscure the extent to which each is already present within the other, governing its existence and defining its meaning. Thus we may be tempted to treat markets as if they were naturally occurring phenomena, as distinct from artefacts of state and law. Conversely, we may be inclined to regard states as though they had a reality and an agency all of their own, forgetting their character as historical products and institutions for the organization of relationships and interactions in society. Where international law is concerned, one consequence is that criticism of state-centrism often fails to flag up the extent to which norms and institutions are also bound up with the non-state domain. Thus we may be encouraged to treat wife beaters as if they were just out there, as opposed to men whose activities international law has facilitated through its doctrines of sovereignty, responsibility, and so on.[3] I will come back to this general point later on.

As I mentioned, I want to take as the main focus of my discussion the constellation of issues revolving around the question of how international law affects and is affected by the 'war on terror'. Let me turn to this now. Here the concern is with non-state activity in the shape of terrorism. I suggested earlier that criticism of state-centrism is always in a sense self-refuting (or, from another angle, self-fulfilling) in

3. The idea I illustrate here is elaborated with particular force and lucidity in the work of David Kennedy. See, e.g., *Dark Sides of Virtue* (2004), ch. 1, esp. at 26.

that it always ends up reaffirming the state as the central problematic with respect to which analysis and policy must be formulated. When it comes to terrorism, this is very clear. One longstanding approach to counter-terrorism within international law is the adoption of treaties under which states parties commit themselves to making certain acts criminal under their national law, and to ensuring that anyone in their territory who has committed these crimes anywhere in world is either prosecuted or extradited to another country for prosecution there. This is the so-called 'prosecute or extradite' rule, and it has been applied to acts that range from aircraft hijacking to the financing of terrorist organizations. Under the Terrorist Financing Treaty, adopted in 2000, especially wide powers to criminalize conduct, and also to seize assets, are envisaged.[4] Alongside these moves to promote counter-terrorism through national criminal justice systems, there is additionally the possibility that subversive violence may be subject to prosecution before the International Criminal Court (ICC), if it can be considered a crime against humanity within the terms of the Court's constituent treaty, and if the other jurisdictional criteria in that treaty are met. At first sight this does not seem to bear out the self-refuting dynamic I just recalled. Here things seem indeed to be moving away from the state. However, for all its status as an icon of internationalism or perhaps 'post-statism', the International Criminal Court is not set up as a substitute for national criminal proceedings, but rather as a 'complement' or fall-back, and to many observers the most significant message associated with the ICC's establishment is that *national* courts can and should be used to prosecute those responsible for international crimes.

Shortly after 9/11 the United Nations Security Council adopted a resolution obliging UN member states to take steps to combat terrorism in a variety of ways, and to report to a new committee of the Council on the action they have taken.[5] Since then laws and administrative changes have been introduced in many countries expanding very considerably the authorities' powers of surveillance, detention, and deportation. This, of course, has drawn sharp criticism, not least from international human rights organizations and institutions, which have expressed disquiet at the use of terrorism as a pretext for the abuse of human rights. According to these organizations and institutions, a proper balance must be maintained between national security and human rights, and counter-terrorist measures become objectionable when they tilt the balance too heavily in favour of national security. From one side, then, the international system adds impetus to counter-terrorist initiatives; from another, it seeks to challenge and restrain them. What is common to both sides, and likewise manifest in other international engagements in this sphere, is an assumption that we confront something called terrorism, and that the issue is how most appropriately to respond to it.

Certainly, it is recognized that a definitional question arises. Within the UN General Assembly there is a very long-running debate about how terrorism should be defined. Driving this debate is a well-founded concern to pin the concept down,

4. See International Convention for the Suppression of the Financing of Terrorism, adopted 10 Jan. 2000.
5. UN Security Council Res. 1373, adopted Sept. 28, 2001. See also the subsequent work of the Counter-Terrorism Committee: www.un.org/Docs/sc/committees/1373/.

and so prevent vague and potentially very broad usages which threaten to shut down the avenues of non-violent dissent. At the same time, the difficulty of the negotiations testifies to the intensely, and perhaps essentially, contested character of the terrorism concept, inasmuch as it is bound up with the legitimacy of recourse to violence in particular contexts. Clearly, not all subversive violence is illegitimate, for many national heroes were armed rebels. Beyond this definitional controversy, however, there is the evident fact that terrorism is simply *presupposed* in these discussions. It is presented as something 'confronted', something to be 'responded' to. Like markets and wife beaters, suicide bombers are made to appear as if they were already there when the state came along and the law was brought to bear. Instead of being invited to consider how state policies may have lent fuel to political violence, and how legal stipulations may have contributed to the conditions in which that violence could occur, we are encouraged to make terrorism the departure point of our analyses; we are encouraged to treat it as a given fact or thing which menaces the state while defying historical explanation. Through the logic of state-centrism, subversive violence thus becomes a phenomenon we must fight, but cannot hope to understand.[6]

2. State sovereignty

Fighting terrorism is my cue to move to the next form which state-centrism takes in discussions of international law. Here what is at issue is not so much particular kinds of agent and their control by, or participation in, the international legal system, but rather the way in which international legal norms become valid and are applied in particular situations. A state-centric approach is one that places too much emphasis on state sovereignty in the validation and application of international legal norms. This argument has many variants, with ramifications for many different aspects of international law, but the reason I say that fighting terrorism is my cue for it is that one variant is a claim that has been made in connection with the 'war on terror'. This is the claim that state sovereignty should not be allowed to prevent intervention in a state's territory by the military forces of another state or other states, where this is necessary to avert very serious abuses of human rights. In other words, criticism of state-centrism is linked in this context to the justification of so-called 'humanitarian intervention'.

The concept of humanitarian intervention was very prominent in international legal discussions of the NATO action in Serbia in connection with the Kosovo crisis in 1999. There is now a vast literature on whether humanitarian intervention is justified or not, and if it is, what qualifications should apply: how serious should the humanitarian crisis have to be? what constraints should apply to the military action that is taken with respect to it? should the UN Security Council have a role? and so on.[7] However, as has also been observed, once an issue is cast in terms of a choice

6. See further S. Marks and A. Clapham, *International Human Rights Lexicon* (2005), at 324–58.
7. Some of the leading works include: J. L. Holzgrefe and R. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003); J. Welsh (ed.), *Humanitarian Intervention and International Relations* (2004);

between state sovereignty and suffering humanity, there is really no contest.[8] How can an abstract idea be allowed to take precedence over the reality of mass expulsion or killing of human beings? Clearly intervention must be lawful. The *only* questions are those I have just mentioned as to how it should be regulated so as to prevent the right (or duty) of intervention from being abused and maintain a proper balance between the state sovereignty principle and the protection of basic human rights.

This points up the feature of state-centrism I highlighted at the beginning, that criticism of state-centrism typically associates itself with a progressive standpoint, fixed on the goal of making sure that reality is put before reified consciousness, and justice before a peace unworthy of the name. To this extent, of course, state-centrism is not just a partly normative concept; it is a *justificatory* concept, that is to say, a form of rhetoric designed to mobilize support for a particular policy or course of action. When we speak of maintaining a proper balance between the principle that states are sovereign and the protection of basic human rights, the implicit suggestion is that, if we can get the balance right, the dangers of warmongering will go away. To suggest that, however, is to miss, or obscure, the character of humanitarian intervention as a rhetorical manoeuvre, the function of which is precisely to justify war. The specific ways in which the concept of humanitarian intervention was used in the Kosovo crisis to mobilize support for the NATO action have been the subject of some very insightful studies.[9] These have shown how we were invited to identify with the NATO governments as responsible representatives of the 'international community', figured in the debate as an arena of consensus and co-operation – not a site of asymmetrical power relations, but a unity of interests. At the same time, military intervention was justified insofar as it was made to appear the sole alternative to doing nothing. Thus the NATO governments came to seem the saviours of the Kosovar Albanians, for their part viewed as an amorphous mass of passive victims with no agency of their own.

Since the Kosovo crisis, humanitarian intervention has been used in connection with the invasion of Afghanistan and, more recently, Iraq. Here the suffering humanity that is pitched against state sovereignty includes not just citizens of the state intervened against – Afghan women, Iraqi dissidents, and so on – but also citizens of the intervening states – Americans and other Westerners at risk of terrorist attack. In debates about these conflicts, arguments based on humanitarian intervention are hard to disentangle from arguments based on the assertion of a sovereign right to use pre-emptive force. This again reminds us of the other feature of state-centrism I mentioned at the beginning, whereby criticism of state-centrism always seems to end up drawing us back to the state. What begins as a discussion about the abuse of human rights turns into a discussion about which sovereignty to prefer:

S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2003); and S. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996).

8. See especially A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003).

9. See especially A. Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism', (1999) 10 EJIL 679, and H. Charlesworth, 'International Law: A Discipline of Crisis', (2002) 65 *Modern Law Review* 377.

the sovereign right of Iraq to determine its affairs freely within its own boundaries, or the sovereign right of the United States and its allies to protect their citizens from criminal conspiracies hatched abroad? At a more straightforward level, the championing of humanity against state-centrism becomes a justification for the supreme expression of sovereign power, the use of military force.

3. Lawless world

Up to this point I have said something about two of the three forms of state-centrism on which I want to comment. In the first, as you will recall, the discussion was about states and non-state activity, and I focused in particular on terrorism. In the second, the discussion was about sovereignty and humanity, and I focused in particular on war. In each case I tried to illustrate and explicate some of the general features of state-centrism I highlighted at the beginning, and especially the dynamic whereby criticism of state-centrism always seems in some sense to re-centre the state. Let me turn now to the third form of state-centrism. This follows from what I have just been saying about war, only here the discussion is a more general one about public policy and international law. In this third guise, state-centrism refers to what is variously characterized as unilateralism, à la carte multilateralism, or simply disregard for international law. It is linked with arguments about the imperious, or perhaps imperial, tenor of present-day US foreign policy.

Writing in 1992, Noam Chomsky remarked that, for United States officials, '[d]iplomacy and international law have always been regarded as an annoying encumbrance'.[10] Since then, he and others have stressed the willingness of successive US administrations to act outside the framework of the United Nations over Kosovo and then again over Iraq, along with their successful scuppering of international agreements and their catalogue of high-profile treaty denunciations and treaty non-adherences. On the other side of the Atlantic, these arguments have crystallized into a powerful critique of US disregard for international law. Thus, according to the author of one recent book, we live in a 'lawless world', in which the United States, with the backing of Britain and other countries, is abandoning long established rules of international law in favour of an approach epitomized by George W. Bush's (in)famous statement, 'I don't care what the international lawyer says; we are going to kick some ass'.[11] On the cover of this new book is a drawing of a man in an orange jumpsuit, goggled and handcuffed, kneeling beneath a hot, low sun; in this vision Guantánamo Bay stands for a regime in which the need to comply with international law has been cast off and flung aside, as surplus to imperial requirements.

I suggested at the beginning that, as far as international legal practitioners and scholars are concerned, this take on state-centrism is bound up with their own self-perception. By 'bound up with' I do not, of course, mean 'determined by', but merely 'linked to'. My simple point is that there is a personal or professional dimension

10. N. Chomsky, *Deterring Democracy* (1992), at 3.
11. Sands, *supra note* 2, at 174.

to be considered. In order to throw some light on this dimension, let me introduce one final element into the equation, in the shape of a concept which was elaborated in an entirely different context, but which might nonetheless help us here. The concept I want to introduce is Harold Bloom's notion of 'anxiety of influence'.[12] It is probably an understatement to observe that, in the decades since it was first launched, this idea has acquired some very heavy baggage, to do with literary studies and American cultural politics. I am putting that baggage to one side; it does not matter for my argument, especially as I shall be using the concept in a way that in fact cuts against the grain of the originator's own subsequently expressed intentions. As is well known, Bloom coined the phrase 'anxiety of influence' to refer to the shock felt by poets when they recognize the influence of their precursors in their work, and their despair at ever being able to come up with anything original. At the same time, it refers to the things they do to overcome this sense of belatedness in relation to the tradition to which they belong.

What, then, might the anxiety of influence be when transposed to the situation of people working in the field of international law? Most obviously, it is anxiety at the precarious status of international law as a system for the constraint of state power which is also a *product* of state power. From this perspective, the anxiety of influence felt by international lawyers is a worry about the indebtedness or dependency of right with respect to might, and the concept of state-centrism is one of the expedients used to manage the fear of irrelevance that is often the way in which that worry is experienced. Just as the concept serves to keep the non-state separate from the state, and pull sovereignty apart from humanity, so too it helps to make international law seem independent of international politics. But this kind of anxiety is very familiar, reflected as it is in the 'is international law really law?' question that appears in the opening chapter of every student textbook in this field. Alongside it I want to suggest that there may also be another kind of anxiety of influence in play here, which is less readily, or at any rate less widely, acknowledged. This has to do not with the status of international law as a product of state power, but with state power as a product of international law.

Let me try to explain. I suggested earlier that, through the optic of state-centrism, subversive violence is made to appear a pre-political fact, already there when the state came along and the law was brought to bear. In this way, I proposed, terrorism becomes a thing we must repress, but cannot hope to understand. I also suggested in earlier discussion that, within the logic of humanitarian intervention, those who wage war in the name of the international community are made to appear as saviours. If the 'humanitarian' label of humanitarian intervention encourages us to assume what needs to be proved, the 'intervention' part of the concept discourages us from considering the possibility that these representatives of the international community are not arriving for the first time, but rather were already there in the region in various ways, shaping the events to which they purport now simply to react. My point now is that what applies to terrorism also applies to counter-terrorism, and

12. H. Bloom, *The Anxiety of Influence* (1997).

what applies to the international community also applies to international law. When we treat a phenomenon like Guantánamo Bay as an instance of lawlessness or, in the widely circulating phrase, a 'legal black hole', we make it seem like a legal mystery.[13] Well, Guantánamo Bay is certainly a place in which people have few rights, but it is no legal vacuum or mystery. Its basis in legal stipulations (constitutional law, special regulations, extradition arrangements) is, or should be, plain for all to see. Conversely, when we treat international law as a redemptive force that could save the world if only it were properly respected and enforced, we obscure the possibility that international legal norms may themselves have contributed to creating or sustaining the ills from which we are now to be saved. We also mischaracterize the processes of emancipatory change as redemption or deliverance. And we weaken our capacity to criticize international law, and make it more useful to those by whom liberatory processes are actually carried forward. If all it would have taken to make the war in Iraq legal was a few more votes in the Security Council, then perhaps at least some of the energy that is going into affirming the illegality of the war should be turned to the question of whether there is something wrong with international law.

Viewed from this angle, the anxiety of influence felt by international lawyers is a not just a fear of irrelevance but a fear of relevance as well – not just a shock at the recognition of politics in law, but a shock at the recognition of law in politics. If this is right, then what is troubling is not only belatedness, but also primordiality, and not only indebtedness, but also responsibility. John Bolton and Richard Perle may like to think – or like *us* to think – that international law is irrelevant to the US administration, but John Yoo and Jay Bybee know better. But then, their intricately argued 'torture memos' only really confirm what historians can tell us anyway: that empire is a *legal* construct – not only encumbered by international law, but also partly constituted by it.

13. See J. Steyn, 'The Legal Black Hole', (2004) 53 *International and Comparative Law Quarterly* 1 (using a phrase that appeared in the judgment of the Court of Appeal of England and Wales in *R. (Abassi) v. Sec. of State for FCO* (6 Nov. 2002), [2002] EWCA Civ 1598).