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

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Abstract

Daniel Bethlehem makes a convincing case in 'The End of Geography' that the growing challenges of our contemporary world require a move from our state-centred international legal system. This reply places Bethlehem's voice among a growing list of those who either describe or prescribe a move from the traditional Westphalian state system. It argues, however, that the challenges have always been transboundary and that the Westphalian state system has never been as strong or as long-lived as envisaged by its critics.

'The End of Geography' sets out to tackle the state-centric, Westphalian core of international law, and by 'geography' Daniel Bethlehem means the bounded territories of the international state system.[1] Bethlehem starts by contrasting what he describes as the 'different vision of the world from Geneva' as opposed to New York, because the various international agencies have moved outside the 'New York Westphalian prism'. 'The End of Geography' finds itself, then, in the growing literature on globalization and the end of the state, which splits between the descriptive and the prescriptive, that is, narratives like that of Saskia Sassen, portraying the demise of the state and the transformation of sovereignty, and those like that of Paul Schiff Berman, calling for international law to move away from its Westphalian base.[2] Bethlehem

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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 S. Sassen, *Losing Control? Sovereignty in the Age of Globalization* (1996); Berman, 'From International Law to Law and Globalization', 43 *Columbia J Transnat'l L* (2005) 485.

blends the two narratives, perceiving a more globalized world with ever-increasing cross-border challenges that require a move away from the traditional geography of international law with an 'effective revision and reform of the law to meet challenging circumstances'.

Putting aside Stéphane Beaulac's thorough demolishing of the 'myth of Westphalia', the impact of the treaty in the creation of the Westphalian state system,[3] the system's life may have been much shorter and weaker than suggested by the dominant narrative.[4] David Kennedy has instructed us that the state-centric viewpoint of international law, the 'classical doctrinal system', crystallized essentially concurrently with its modernist response in the 1920s.[5] Indeed, the so-called positivists of the 19th century had not yet emerged from a world in which individual monarchs were often sovereign and their personal alliances integral to the international order, and throughout their discussions of states they had to enter into extremely complicated analyses of semi-states, federations, and persons having character analogous to states.

It turns out that the tortured analysis has not disappeared. International lawyers work carefully through the liminal cases of the sovereign state. There are endlessly complicated discussions of state formation, like the more than 700 pages that James Crawford devotes to *The Creation of States in International Law* with its chapters on succession; divided states and reunification; unions and federations of states; and problems of identity, continuity, and reversion.[6] In essence, his book is largely a study of the edge cases of the international legal identity of the state. There is also a literature on jurisdiction, such as Cydric Ryngaert's *Jurisdiction in International Law* – following in the steps of F.A. Mann referred to by Bethlehem – and Ryngaert's subject is the extraterritorial reach of state jurisdiction entirely avoiding non-state jurisdiction.[7] In essence, Ryngaert, along with Crawford, turns out, despite telling a similarly complicated story, to be one of the border guards of borders. Even Karen Knop's subtle *Diversity and Self-Determination*, despite the contested terrain she describes and her discussion of 'transitional, multinational and plural societies',[8] remains essentially within the standard boundaries of minority rights and self-determination enshrined at Versailles. In a sense, Knop's study is a critical legal extension of L.P. Mair's *The Protection of Minorities* of 1928.[9] At base, her study lives within a cluster of treaties and post-war decisions that has been described as the 'Versailles settlement'

3 S. Beaulac. *The Power of Language and the Making of International Law: The World Sovereignty in Bodin and Vattel and the Myth of Westphalia* (2004), at 85.

4 See Landauer, 'Regionalism, Geography and the Legal Imagination', 11 *Chicago J Int'l L* (2011) 557, at 581–593 (sect. IV 'Westphalia without the West').

5 Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', 17 *Quinnipiac L Rev* (1997) 99, at 110.

6 J. Crawford, *The Creation of States in International Law* (2nd edn, 2006).

7 C. Ryngaert, *Jurisdiction in International Law* (2008).

8 K. Knop, *Diversity and Self-Determination in International Law* (2002), at 381.

9 L.P. Mair, *The Protection of Minorities: The Working and Scope of the Minorities Treaties under the League of Nations* (1928).

if – as Nathaniel Berman has shown despite using the phrase – it was anything but settled.[10]

Certainly, Bethlehem's suggestive list of 'six broad areas of challenge that have a self-evidently transboundary, geography-defying quality' are real cross-border challenges, including international environmental concerns, migration, food security, vulnerability to the global economic system created by its increasingly globalized nature, and cross-border security challenges of 'non-state actors'. And his example of Indonesia's decision 'not to share strains of the human H5N1 avian flu virus it had gathered' is a very concrete example of the dysfunctionality of the state system in the face of these threats. But these threats are hardly new, even if Bethlehem in this sense of newness is in good company. If Catherine Dauvergne, in her *Making People Illegal* focuses on the 'worldwide crackdown on extralegal migration',[11] her premise is the vastness of migration wrought by globalization. But vast movements of populations, foodstuffs, and disease have always been part of human history. If perhaps the post-1492 European colonization of the Americas is particularly dramatic – including the massive slave trade that forever changed both the Americas and Western Africa, the introduction of diseases that decimated indigenous populations, the introduction of major indigenous foodstuffs from the Americas to the rest of the world – it is hardly unique in the ever-flowing movement of people, disease, food, technology, religion, and culture. It is central to human history. Even kingdoms and nations themselves migrate as, for example, Norman Davies tells us of the Baltic beginnings of Burgundia in his *Vanished Kingdoms*.[12] We are aware of the pathogens introduced by conquistadors and New England colonizers, but also the significant literature on the tropical diseases that impacted on European colonizing troops and populations.[13] And, without question, large population movements ran right through the height of the League of Nations era – there was a reason why the League of Nations had to invent the non-state 'Nansen Passport'.[14] If the Graeco-Bulgarian Convention of the Versailles settlement contemplated 'reciprocal voluntary emigration',[15] the millions of people who flooded – and the intense violence that accompanied it – between the newly independent India and Pakistan provides a particularly dramatic example,[16] and that is without thinking of the sprawling train system with its human cargo herding millions to the Final Solution and the immense numbers of 'displaced persons' after the war.

Bethlehem does note, set off by commas, in his point about cross-border security challenges, 'even if they have long been with us', but throughout there is a sense of

[10] Berman, 'But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law', 106 *Harvard L Rev* (1993) 1792, at 1878.

[11] C. Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (2008), at 2.

[12] N. Davies, *Vanished Kingdoms: The Rise and Fall of States and Nations* (2011), at 87.

[13] See, e.g., P. Curtin, *Death by Migration: Europe's Encounter with the Tropical World in the Nineteenth Century* (1989).

[14] M. Lloyd, *The Passport: The History of Man's Most Travelled Document* (2005), at 135.

[15] See Berman, *supra* note 10, at 1844.

[16] See, e.g., Y. Khan, *The Great Partition: The Making of India and Pakistan* (2007).

its newness. We are in a world of post-9/11 neologisms, of 'non-state actors', if not 'failed states' – the list is meant to suggest the novelty of the challenges. Although he does not replicate the awed sense of discovery of Thomas Friedman's *The World is Flat* – a central text for Bethlehem's globalized world – Bethlehem portrays a changed world posing new challenges and straining against the confines of an outdated legal system. The challenges and constraints in certain fora, like the ICJ, are real, but they are hardly new, and the international system is scarcely the monolith that started with Westphalia, or even the French Revolution.