The Foreign Office Model Versus the Global Governance Model: An Introduction

For over a century, no idea has more influenced international relations than the sovereignty of the nation state. States have long been the central actors of the international system, and their status as sovereign entities has shaped that system along two dimensions. First, the principle of sovereign equality—which holds that states are co-equal sovereigns internationally—has provided a framework for state interaction. When states meet in the international arena, sovereign equality dictates that they stand on a level playing field, where advantages in size, political clout or economic power have no formal significance. Second, the concept of territorial sovereignty has constrained the scope of international action by giving each state complete control over its internal affairs. Questions of how a state organizes its government and economy, treats its citizens, or manages internal conflict are purely domestic matters of no concern to other states or the international system.

The framework and constraints provided by sovereignty lie at the heart of the dominant theoretical model of the international legal system: the foreign office model. The foreign office model focuses on states as the principal actors of international law. It conceptualizes states as cohesive juridical units that act internationally through their foreign offices, which are uniquely empowered to represent the state at the international level. The model recognizes that, domestically, states are complex actors functioning at various levels of government and facing the demands of diverse constituencies. Internationally, however, this complexity has no role—states are unitary, univocal entities focused on defending their aggregate interests against those of other states. International law, in turn, consists solely of the rules that states make to govern relations between the states—it has no concerns beyond the formal interactions of unitary states

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on the international stage, and no substance beyond the rights and duties that these states create during those interactions. Thus under the foreign office model, international law adheres to the fundamental principles of sovereignty—it provides structure and coherence to formal state interaction, and maintains an outward focus that makes no comment on states' internal affairs.

The foreign office model is more than a theoretical concept: its ordered, protective vision underpins much of the international legal system. Article 36 of the Statue of the International Court of Justice recognizes as the primary sources of public international law two paradigmatic examples of the foreign office approach: treaties and custom. Treaties develop through international negotiations between states' foreign ministries. Custom derives its legal force from consistent state practice and states' belief in the legal nature of that practice. In other words, the primary sources for international law are founded on the power of the state to speak univocally and act unitarily in the international arena, and limited to matters that states deem proper for international concern. The ICJ Statute recognizes the supremacy of sovereign states by limiting the jurisdiction of the Court to cases between them, and denying that jurisdiction unless the parties have consented. The United Nations General Assembly provides a permanent international platform for state decision-making, and its one-country-one-vote system is premised on the concept of sovereign equality.

The foreign office model dominates international law for the same reasons that sovereignty serves as the organizing principle of international relations. States champion sovereignty because it reinforces their dominance in the international system. By dividing the world along national lines, sovereignty creates a neatly segmented international system with clear lines of authority. The foreign office model, in turn, brings this neat segmentation to the legal sphere—*states alone, through their foreign offices, make international law, and states*

alone enforce it. Further, relatively weak or small states are often the strongest proponents of sovereignty. In their eyes, sovereignty, by providing formal equality and shielding domestic matters, serves as a bulwark against the interference—political, cultural, economic, and military—of more powerful neighbors. The foreign office model ensures that international law contains this same protection by promoting structures that put all states on equal footing, and limiting the content of the law to inter-state matters.

Despite its appeal to states and long-standing prominence, however, the relevance of the foreign office model has come under attack in recent decades. While the model has remained rooted in its original conception of the world, that world has changed drastically. Globalization has called into question the relevance of a legal model focused solely upon the interactions of unitary states. The explosion of the global economy has introduced powerful non-state actors, including multinational corporations and non-governmental organizations, onto the international stage. Transnational human rights movements have forced the international community to take notice of issues once considered purely domestic—i.e., the use of force against citizens, the provision of basic goods and services—and cast doubt on the inviolability of territorial sovereignty. Economic integration, international terrorism, environmental degradation, the internet—all demand increased coordination between states, and not just through foreign ministries, but through police, regulators, local officials, judges and others with the specialized expertise necessary to address complicated, trans-border problems. If international law is supposed to create the rules governing the international system, it must now deal with a complex, interdependent environment where domestic issues are no longer domestic, states no longer the only actors, foreign ministries no longer the only relevant experts, and the voice of the government no longer the only voice that is heard.

In the face of these emerging challenges, some scholars and practitioners have called for a new paradigm for international law: the global governance model. "Global governance" is a somewhat amorphous concept, but in this context it is probably best understood as "the formal and informal bundles of rules, roles and relationships that define and regulate the social practices of state and non-state actors in international affairs."[1] Global governance moves beyond the foreign office model's state-centric focus and towards a more complicated picture of the world, involving the regulation of trans-border issues and the interactions of a global polity. Under the model, international law still encompasses the formal materials, institutions and rules of the foreign office model—including treaties, customary international law and decisions of the ICJ—but it no longer constrains itself to them. With global governance, the law can address how international actors' rights and obligations are shaped by non-binding "soft law," such as codes of conduct or UN General Assembly resolutions; by normative principles like fundamental human rights or democracy; by domestic laws aimed at regulating global problems; and by interactions between state and non-state actors, such as international NGOs or corporations.

By casting such a wide net, the global governance model attempts to integrate five new concepts into the international legal system: institutions, national democracy, the disaggregated state, transnational networks, and global aspirations.

Institutions: To the extent that institutions simply provide a forum for inter-state bargaining, they hardly challenge the foreign office model. Over the past several decades, however, the role and influence of institutions in the international system have stretched far beyond this original function. International institutions can now question a state's enforcement of its international obligations and scrutinize its domestic laws. The WTO's dispute settlement mechanism empowers independent arbitrators to strike down members' non-compliant domestic

[1] Ann-Marie Slaughter, et. al., *International Law and International Relations*, 92 Am. J. Int'l L. 367, 371.

laws. The International Criminal Court empowers an international prosecutor who can, of her own volition, commence criminal investigations into its members' internal affairs. Institutions are no longer in the exclusive domain of the states that create them. At the International Center for the Settlement of Investment Disputes, individuals can bring claims against states for breaches of bilateral investment treaties. At the United Nations, while NGOs are shut out of many formal processes, they have become a significant informal presence whose advocacy efforts help shape national positions.

Many countries have ceded to regional and international bodies the power to create domestic laws and regulations. Members of the European Union have surrendered much of their regulatory sovereignty to European Commission technocrats. Development agencies and financial institutions design and often oversee a wide-range of legal and administrative programs in developing countries. National legal institutions have also gained new international profiles. National courts increasingly examine the legal decisions and traditions of other countries when ruling on domestic issues. International tribunals such as the ICTY and ICTR may look to the opinions of domestic judges to develop new international legal doctrines. This institutionalization of international law challenges many of the foreign office model's basic assumptions about the supremacy of states and the limitation of international law to merely "international" concerns.

National democracy: Since the 1990s, when the Cold War ended with the democratic West's victory over the communist East, the rhetoric of national democracy has come to dominate international discourse. Today, many international actors see democracy not as one of several options for national government, but as the only acceptable option. A commitment to democratic governance is now a central part of development assistance. The United Nations,

often through binding Security Council mandates, organizes and monitors democratic elections in transitioning countries around the world. Many commentators argue that international organizations should give special privileges to democratic countries or even exclude undemocratic ones.[2] The United States and its allies point to the spread of democracy to justify their unsanctioned invasion of Iraq in 2003. This new focus on democracy is in sharp contrast to the foreign office model's normative neutrality and insistence on territorial sovereignty, deliberately avoiding an examination of a state's internal governance. It raises serious questions about whether international law can and should be the vehicle for the universalization of one form of government.

The model's state-to-state approach is also at odds with the principle of popular participation that underpins democratic government. From this angle, the question is whether the legal system itself should be structured more democratically. Efforts to reform the United Nations have focused on the need for greater democracy, including the elimination the Permanent Five's veto or an increase in the number of permanent seats in the Security Council. Demands for increased NGO participation in formal structures are premised on needing better representation of the diverse peoples and interests found within unitary states. Such restructuring requires abandoning the foreign office model's vision of a neutral international legal system, and instead using the law to reallocate the balance of power between states and between state and non-state actors.

The disaggregated state: Anne-Marie Slaughter describes the disaggregated state as "regulators pursuing the subjects of their regulations across borders; judges negotiating minitreaties with their foreign brethren to resolve complex transnational cases; and legislators consulting on the best way to frame and pass legislation affecting human rights and the

[2] *See, e.g.*, Ivo H. Daalder & James Lindsay, *An Alliance of Democracies*, WASH. POST, May 23, 2004 at B7.

environment." [3] Evidence of disaggregation is found throughout the international system, for example in the Basel Committee, where domestic banking regulators meet to develop cooperative approaches to transnational banking problems;[4] or in the Parliamentary Assemblies of NATO or the OSCE, which facilitate dialogue between domestic legislators from member states;[5] or in the meetings between U.S. Supreme Court Justices and their European counterparts to discuss approaches to common legal problems.[6] The disaggregated state recognizes "the rising need for and capacity of different domestic government institutions to engage in activities beyond their borders, often with their foreign counterparts."[7] It sees states as multi-dimensional, complex actors that speak internationally in many different voices. In the disaggregated state, international rules do not develop through formal negotiations between foreign ministries, but through cooperation between multiple levels of domestic government. This antithesis of the unitary state falls fully outside of the foreign office model.

Transnational networks: Networks are an organizational form "characterized by voluntary, reciprocal, and horizontal patterns of communication and exchange."[8] Transnational networks can exist both within government circles and outside of them. As part of government, they are an integral component of the disaggregated state. When domestic officials act internationally, they usually do so through dialogue, strategizing and sharing of experience, rather than through formal, state-to-state negotiations. As their exchanges become more regular and purposive, they develop into networks that serve as flexible forums to discuss and enhance cooperation on issues of common interest.[9] Some of these networks have grown so large and

[3] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 12 (2004).
[4] *Id*. at XX
[5] *Id*. at XX
[6] *Id*. at XX
[7] *Id*. at 12.
[8] MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 8 (1998).
[9] *See* SLAUGHTER at 46.

important that they have formed their own "organization," such as the Basel Committee. Others are convened under the auspices of an international organization, such as the OECD, which regularly brings together domestic officials to discuss economic and regulatory problems.[10] Still other networks are entirely informal, with regulators and officials meeting on the fringes of international negotiations or conferences. Whatever their form, networks are becoming increasingly prevalent in inter-state relations, though they defy the basic premise of the foreign office model.

In the non-governmental arena, transnational networks are most often partnerships between international and national NGOs, local organizations and social movements. These groups come together around a particular issue in order to create an international advocacy platform. By forming a network, participants can more easily share information, develop strategy and advocate at the local, regional and international levels. For local actors, a transnational network can bring international attention to a domestic problem that would be otherwise ignored. For international groups, networks can provide concrete problems around which to organize campaigns based on broad, normative principles. By interacting with governments, these networks help shape states' positions and even force international action. Transnational networks are responsible for articulating the principles behind and lobbying for many recent expansions of international law in areas such as human rights and the environment. Transnational networks have been one of the driving forces behind Security Council decisions to back peacekeepers in places like Darfur and in the development of international criminal tribunals. As such, they represent yet another way in which non-state actors are becoming an important component in the development of international law.

[10] *Id*.

Global Aspirations: The concept of "global aspirations" refers to a commitment to a set of values held by an individual or group that is projected into the international arena. Often these values stem from local or regional beliefs or traditions, but contain principles that the holders believe the international community as a whole should embrace. The international human rights movement is perhaps the best example of the phenomenon. In the past fifty years, advocates have taken the Western philosophy of fundamental human rights and turned it into a supposedly universal ideology enshrined in legal documents such as the Universal Declaration of Human Rights and the ICCPR and ICESCR. The development of human rights law lies far outside of the foreign office models' focus on states as the sole generators of legal doctrine and institutions, but has nonetheless radically altered the international legal landscape. "Global aspirations" can be found in many other fields, such as environmental protection or even international economics, where business leaders have long pushed for universal acceptance of capitalist principles such as free trade. These values have been similarly influential in international affairs.

By recognizing the concepts just described, the global governance model presents a serious challenge to the current international legal system. Global governance's multifaceted world has landed in the midst of a legal system that remains firmly rooted in the foreign office model. Treaties and custom remain the primary sources of hard legal doctrine. The International Court of Justice still only recognizes suits bought by states on problems arising out of agreements between them. Foreign ministries are still the main actors in formal legal proceedings and negotiations. Even laws and institutions that seem to go beyond the foreign office model—such as human rights treaties and the WTO—are still defined by agreements between states, and will exist only as long as those states permit. Despite conflicts with existing structures, however, institutions, the disaggregated state, global values, and transnational

networks have not yet disappeared. Rather, they have taken root and have helped shape a new body of law and practice that is often at odds with the existing order. As they have done so, two camps have formed: those who seek to constrain or eliminate the new forces, maintaining that the foreign office model's formal divisions and clear allocation of power are necessary to ensure a functioning international system that protects the weak from the strong, and those who counter that the model is an anachronism incapable of addressing the most fundamental questions of the new world order.

The first camp—advocates of the continuation of the foreign office model—raise serious and difficult questions about how the global governance model allocates power and representation in an international system characterized by extreme imbalances of wealth, military strength, and political influence. It asks whether international institutions are really just holding states to the bargains they made, or are they forcing them to implement agreements and principles to which they did not freely consent; if democratization is actually a universally held value, or if Western states have hijacked international law in an illegitimate attempt to shape the world in their image; if the less powerful can have any say in the shape of international law, when agreements are made in a "disaggregated" system that holds none of the formal protections of the sovereign order. It asks how participants of transnational networks can legitimately claim to represent countries and peoples that are not their own, and whether "universally-held" values are, like democratization, just Western ideals repackaged as global aspirations by unrepresentative Western advocacy groups and the Western powers that support them. These are not the questions of despotic leaders of poverty-stricken third world countries. Rather, they are the questions of the governments of many small states that struggle to maintain relevance in the face of powerful, wealthy neighbors; of developing country intellectuals, who have seen the

cultural, economic and political choices of their countries trampled by Westernization; and of the citizens of small and developing nations, who want their concerns taken into account, but only by actors and institutions who truly understand them.

In the face of these questions, members of the second camp—those who support the global governance model—point out that, regardless of fears, the new world order has arrived and does not seem to be going anywhere. If international law is to maintain any relevance, it must adapt to this new system, and respond to the most pressing international legal questions of the day: To whom and how should institutions and disaggregated state actors be held accountable? How are decisions made in transnational networks; how do they develop into soft or hard legal norms? How can we define universally-held global values, and who has the authority to do so? How should international law treat non-state actors; can it give them rights and duties directly; how can *they* be held accountable? How can international law serve as a moral force for what is right, without trampling on the rights of weaker states? Can it be used to pressure countries to convert to democracy? Can it permit the use of force in the name of human rights? These questions, in their turn, are not merely the questions of starry-eyed Western human rights advocates. Rather, they are the questions of domestic regulators now participating in international affairs; the architects of international institutions, who want to create relevant and effective structures; and of intellectuals and practitioners of all stripes, who hope to shape the development of an equal, representative international order.

Thus international law is, in many ways, at a fascinating crossroads. The formal institutions and principles that have underpinned it for so long persist, providing structure and coherence to the system, guaranteeing the official equality of states, and protecting the weak against the strong. At the same time, however, international institutions, transnational networks,

disaggregated state actors, and global aspirations have emerged as potent new forces in international affairs. Governments, practitioners, scholars and citizens must decide how the law should address these new forces—should it attempt to constrain them, in favor of the continued dominance of the foreign office model, or should it embrace them, remaking the international legal order in their image? The choice will have enduring significance for international law and the world in which it functions. The debate between foreign office and global governance is not merely academic, but one of the defining issues of the modern international legal system.

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