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No Citizens Here: Global Subjects and Participation in International Law

by
René Urueña

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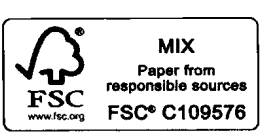

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« Ils trouvent un petit domestique âgé de quinze ans, et lui disent: « Bon jour, citoyen. » Cet enfant répondit en criant : « Il n'y a pas des citoyens ici. *Vive le Roi !* aux armes ! »

Marie-Louise-Victoire de Donnissan, marquise de La Rochejaquelein
Mémoires de Madame la Marquise de La Rochejaquelein (1817 [1815])

"Personally, I like to imagine something the size of a baby hippo, the color of a week-old boiled potato, that lives by itself, in the dark, in a double-wide on the outskirts of Topeka. It's covered with eyes and it sweats constantly. The sweat runs into those eyes and makes them sting. It has no mouth, Laney, no genitals, and can only express its mute extremes of murderous rage and infantile desire by changing the channels on a universal remote. Or by voting in presidential elections."

William Gibson
Idoru (1996)

PREFACE

The role and position of individuals in international law has been much debated for close to a century, at least since the likes of Georges Scelle and Sir Hersch Lauterpacht launched the thesis – with due variations – that while international law deals with relations between states, nonetheless its ultimate subject is the individual. Some of the textbooks, and some of today's leading theoreticians, have taken this claim further, and it has found reflection in positive international law in the explosion of human rights instruments, as well as in the more recent creation and consolidation of international criminal law: individuals can derive rights from international law, and they are under obligations under international law.

On the other hand, there are many issues relating to the situation of individuals which international law remains relatively silent on, despite those issues having a clear international component. The 1951 Refugee Convention, e.g., may quite possibly be the most often applied convention in the world, yet most of the regular general textbooks pay little or no attention to the status and position of refugees. Likewise, migration is an issue which affects millions and which, in the form of remittances, involves large sums of money as well, yet few consider it an important part of international law. One of the oldest functioning international organizations is the International Labour Organization, yet international labour law has a hard time making it into the textbooks. And while the economic activities of investors have found protection in recent decades under a blossoming investment protection law, the activities of individuals working abroad for a while are still subject to national taxation. Admittedly, many treaties exist to prevent double taxation, but such treaties say relatively little about regular working people (and do little to protect individuals against wildly diverging procedural requirements), and are rarely considered to be part of international law. Thus, while it is no doubt justifiable to think of the individual as a subject of international law these days, the question does present itself: what kind of subject is the individual? Or, put differently, what is the kind of individual that international law offers its protection to?

The question is taken up with gusto in the present volume, a re-worked version of Dr René Urueña's doctoral thesis, defended in November 2010 at the University of Helsinki. Dr Urueña adopts Ulrich Beck's sociology of the risk society, where the central question concerns the distribution of risk, rather than wealth. This results in the management of risk by fragmented legal regimes, culminating in the proposition that in the fragmented world of international law, with its separate regimes governing trade, human rights, security, *et cetera*, the inevitable result is that international law presents a fragmented individual as well. Trade and investment law picture the individual as *homo economicus*: the individual as economic actor, but never as citizen. Likewise, human rights law, and international criminal law too by and large, portray the individual as a needy victim, but never as citizen. The resulting picture of the individual, then, is an individual of bits and pieces.

This has the obvious effect of isolating the individual from his or her community; hence, through insistence on notions of public participation, tribunals and decision-making fora aim to re-connect individual and community: this is a third method of what Dr Urueña refers to as subjectivation in international law, most obviously present in the Global Administrative Law approach and certain branches of global constitutionalism. Yet, doing so comes at a price: the empowerment of decision-makers. Eventually, the position of the individual depends on the goodwill of decision-makers, be they judges, experts, or administrators. The proper way to come to terms with this important role, so Dr Urueña suggests, is not to insist on a deontological ethics (demanding that decision-makers follow externally set standards), but is to pay attention to their agency, and this calls out for an application of virtue ethics in global governance.

Dr Urueña is to be congratulated for having written an intelligent, sophisticated and mature study. Most of all perhaps, this is a textbook example of a thought-provoking study: Dr Urueña's study raises as many questions as it answers. This is not a doctrinal work in the traditional legal tradition; instead, it is well-characterized as a study in global governance, detailing how international law can be seen to affect and channel global governance, and how international law can intelligently be used to re-work global governance and make it, however slightly perhaps, more humane. Indeed, this is an exemplary work of inter-disciplinary scholarship: taking insights from neighbouring disciplines (sociology, international relations, ethics, economics) seriously, while still maintaining a

recognizably legal character. It is fitting that the work was written at the Academy of Finland Centre of Excellence in Global Governance Research at the University of Helsinki, and as the Centre's director, I can only express pride and happiness at having been able to work with Dr Urueña.

Helsinki, 13 June 2011

Jan Klabbers
Professor of International Law, University of Helsinki
Director, Academy of Finland Centre of Excellence in
Global Governance Research

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This book is the result of several years of challenging encounters with interesting people. The journey began at the University of Helsinki, in its Centre of Excellence in Global Governance Research, where I found an amazing group of scholars willing to engage in a rigorous dialogue across disciplines. Every page of this study reflects that process. Also in Helsinki, the researchers at the Erik Castrén Institute for International Law and Human Rights were always willing to discuss new (and very old) ideas. Many thanks to Afia Afenah, Martin Björklund, Katja Creutz, Kirsten Fisher, Mónica García-Salmones, Miia Halme-Tuomisaari, Taru Kuosmanen, Milja Kurki, Rain Liivoja, Anne-Charlotte Martineau, Sabrina Praduroux, Silke Trommer, and Varro Vooglaid. The support of Margareta Klabbers, Eeva Kiviniemi, Taru Kuosmanen, Sanna Villikka and Åsa Wallendahl is gratefully acknowledged.

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Parts of this text have been published before. I thank the publishers and the respective journals.*

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* Parts of Chapter 1 and 2 have been published in "Risk and Randomness in International Legal Argumentation" *21 Leiden Journal of International Law* (2008) 1. Parts of Chapter 3 have been published in "The Limits of Enforcement: Rethinking International Legal Compliance as a Condition for the Rule of Law" *2 Pólemos: Rivista semestrale di diritto, politica e cultura* (2009) 53. Parts of Chapter 4 have been published in "Espejismos Constitucionales. La promesa incumplida del constitucionalismo Global", *Revista de Derecho Público* No. 24, Universidad de los Andes, 2010. Parts of Chapter 2 and 5 have been published in "You'd Better Listen. Notes on the Mainstreaming of Public Participation in Foreign Investment Arbitration" *16 International Law – Revista Colombiana de Derecho Internacional* (2010). Parts of Chapter 7 have been published in "Expertise and Global Water Governance: How to Start Thinking About Power Over Water Resources" *IX Anuario Mexicano de Derecho Internacional* (2009) 117. A condensed version of Chapters 2 has been published as "In the Search of International Homo Economicus: Individual Agency and Rationality in Global Governance" *19 Finnish Yearbook of International Law* (2008 [published 2010]) 343.

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In Bogotá, January 2012

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INTRODUCTION

WELCOME TO GLOBAL GOVERNANCE 2.0

Things have changed quite a bit since the 1990's, when international legal scholars started to talk about global governance. The golden years of the Washington Consensus are long gone, and History has kindly declined Fukuyama's invitation to just *end*. We have witnessed 9/11, the once-called War on Terror, a war in Iraq, another one in Afghanistan, the birth of an International Criminal Court, and a massive international financial crisis. Humanitarian tragedy in Somalia, in Sudan, in Haiti. We have seen the adoption of a common European currency and its first failures. And, yes, we have seen the protests. In Athens, in Seattle, in Genoa, in Bangkok, in Buenos Aires, we have seen the young and the old, the black and the white, the poor and the... well, very seldom the rich, but, in general, we have seen people from the most diverse backgrounds facing new forces that shape their life – sometimes resisting, sometimes cunningly appropriating, sometimes wholeheartedly embracing them. We have seen new sources of power emerge beyond the borders of the state. Centers of power that were not there fifteen years ago, and shape our lives today. The broad band revolution has made the interconnectedness of the 1990's look like something out of an old movie. Growing up in the digital era is serious business, and is having effects everywhere. And that is, finally, perhaps the most fundamental change: today's everywhere is, well, everywhere. As we move into a post-American world,[1] new players emerge in the global game: China, to be sure, and Brazil. But also the middle classes of a new contingent of mid-income countries, with access to information, and a credit card in their hand.

Things have changed. And they have changed fast. Global power has become, at the same time, more concrete and more diffuse. We see concrete expressions of global power that would have been unthinkable twenty years ago, such as the Security Council's anti-terrorist lists. But we also see an increasing use of diffuse power, dearly felt yet hardly pinpointed; think, for example, of the regulatory chill that derives from

[1] See F. Zakaria, *The Post American World* (2008).

international investment arbitration. And international law is, to be sure, right in the middle of it all. From the war on terror to climate change, from currency exchange to access to medicines: international law is the language of choice of Global Governance 2.0. And yet, this language seems to be a strange concoction, somehow familiar as it uses ingredients we know well (a treaty here, and international organization there), but somehow different as a whole. The paradigms of international law we developed in the context of the first wave of (neoliberal) globalization seem to have lost their explanatory power. Well, yes: we resisted the great Eurocentric narratives of international law. There is now an international legal vocabulary to talk about colonialism, the "Other", development and redistribution. We have advanced greatly. And yet, the dichotomies of center/periphery, legal subjects/legal objects, and regulation/non-regulation, seem to be still deeply engrained in our way of thinking about global governance, limiting the possibilities of emancipation we can imagine.

As greater energy is devoted to think about the role of law in global governance, less attention is paid to human beings. We seem to have, somehow, factored actual human beings out of the discussion. We presume there is a subject somewhere, but what we are really worried about is control. How to control bureaucracies? How to prevent fragmentation? More law-making by international courts, or less? More soft law, or less? And what about judicial review? In the meanwhile though, there are some fundamental questions that remain unanswered. Or rather, whose answers are presumed. We need to develop new of ways of thinking about the relation among governance, law and the human being. We need to expand the frontier of possibilities in our thinking about the role of the individual in global governance. Instead of repeating over and over again the same patterns of international legal scholarship, we need to think originally, and push the limits of how we come to think like we do about the things we care about. This book is an effort up that hill.

The Argument in Brief

This book seeks to reveal hidden patterns in the way we think about human beings as legal subjects in global governance. The accumulation of such patterns forms a narrative, the narrative of subjectivation, which is the red thread that is followed throughout the text. To that effect, the book argues that international law creates subjects – a process called here