AEL 2023/01
Academy of European Law
European Society of International Law Paper

# WORKING PAPER

## Re-Personalising International Law?

Daniel Bertram

European University Institute

**Academy of European Law**

European Society of International Law
Annual Conference, Utrecht, September 2022

# Re-Personalising International Law?

Daniel Bertram

ISSN 1831-4066



Published in June 2023 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu



With the support of the Erasmus+ Programme of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

## Academy of European Law

The Academy of European Law coordinates several important research projects and offers advanced-level courses, including the annual summer courses in human rights law and the law of the EU, resulting in an extensive publications programme. The Academy also hosts the Secretariat of the European Society of International Law (ESIL), and assists in the organization of ESIL events.
Papers presented at ESIL events in 2011-2019 can be downloaded from SSRN. As of 2022, the papers are available in the EUI CADMUS Research Repository.

More information about the Academy of European Law

## European Society of International Law

The European Society of International Law (ESIL) is a dynamic network of researchers, scholars and practitioners in the field of international law. The Society's goals are to encourage the study of international law, to foster inquiry, discussion and innovation in international law, and to promote a greater understanding of the role of international law in the world today. The Secretariat of the Society has been based at the Academy of European Law since 2004 when the Society was set up.

More information about ESIL

## ESIL Paper Series

The ESIL Paper Series features papers presented at ESIL events (Annual Conferences, Research Forums, and Interest Groups events). Publication in the ESIL Paper Series enables authors to disseminate their work widely and reach broader audiences without the usual delays involved in more traditional means of publication. It does not prevent the subsequent publication of papers in academic journals or edited collections.

More information about the ESIL Paper Series

## 2023 ESIL Annual Conference, Utrecht, 1 – 3 September 2022

The 17th Annual Conference of the European Society of International Law was held in Utrecht on 1-3 September 2022. The overall theme of the conference was 'In-/Ex-clusiveness of International Law'. The 2022 Annual Conference was hosted by the Utrecht University School of Law.

More information about the 2022 ESIL Annual Conference

EUI ACADEMY OF EUROPEAN LAW

esil sedi EUROPEAN SOCIETY OF INTERNATIONAL LAW

## Abstract

In this brief thinking piece, I reflect on the rising currency of 'persons' in international legal scholarship. Incipient interest in the people at the heart of the legal order has recently shifted from highly visible elites to a wider range of more unusual suspects, including legal clerks, social movement actors, or even material objects. This ongoing 're-personalisation' of international law raises new, overlooked epistemic and ethical challenges for scholars.

## Keywords

Methodological individualism; constructivism; actors; relational ontology; ethical humility

## Author Information

Daniel Bertram, PhD Researcher, Department of Law, European University Institute. E-mail: daniel.bertram@eui.eu.

## Table of Contents



### 1. The Rise of Methodological Individualism

Earlier this year, international lawyers from all over the globe flocked to Washington, D.C. to attend the American Society of International Law's 116th Annual Meeting. Under the heading 'Personalizing International Law', hundreds of leading and emerging academics and practitioners debated 'how people, independently or collectively, interact with international law.'[1] If any more proof was needed, the organisers' choice of theme must be understood as a sign of international law's ongoing disciplinary recalibration. Call it personalisation, individualisation, or subjectification; the central unit of concern and analysis of, for, and within international law is no longer the state – it is the person.

Personalising tendencies in the discipline's self-understanding have galvanized the establishment of methodological individualism as a serious alternative to statist approaches. In the words of one of its proponents, Tamar Megiddo, methodological individualism signifies a 'commitment to considering all norms, structures and development of international law as ultimately explicable through actions of individual people.'[2] This idea seems to be gaining traction within (parts of) the academe. For instance, at least 13 out of the 28 monographs published during the last three years in the eminent Cambridge Studies in International and Comparative Law book series – hardly a particularly progressive outlet – deploy methodologically individualistic perspectives to some extent.[3]

The adoption of a personalised methodology does not mean that the 'unit of analysis question' is resolved, however; rather, it immediately triggers a thorny follow-up puzzle: *Which* individuals should we study when we study international law? How to credibly pick out actors from the mass of potentially relevant candidates for analysis? In this thinking piece, I would like to offer some reflections on how to navigate the selection of research subjects. I start by tracing what I call the re-personalisation of international legal research and then offer some critical thoughts on the epistemic and ethical implications of this process.

---

[1] See https://www.asil.org/event/asil-2022-annual-meeting.

[2] Tamar Megiddo, 'Methodological Individualism' (2019) 60 Harvard International Law Journal 219, 241.

[3] See <https://www.cambridge.org/core/series/cambridge-studies-in-international-and-comparative-law/95014F6BF2FCB3816FC57DB3EFC723A5>. Publication date=Last 3 years; plus 6 forthcoming titles; minus 2 purely comparative law titles; N=28; search conducted 31st July 2022. Classification on file with the author.

## 2. The Changing Individual

Up until relatively recently, methodological individualism was almost exclusively concerned with the behaviour of highly visible elites. Operating on the twin assumptions that (1) state conduct is a defining force in international law and that (2) such conduct is best understood heuristically as the sum of a few key representatives (diplomats, judges, political leaders, etc.), these studies ultimately regard state conduct as the *explanandum* and study the role of individuals as a mere *explanans* within that context.

Both baseline assumptions have recently come under empirical pressure, though. On the one hand, it is increasingly clear that the state is no longer the exclusive determinant of the development, enforcement, and contestation of international laws. A myriad of actors from corporate directors to indigenous leaders participate in these processes, often with decisive impacts.[4] On the other hand, the view that state conduct can somehow be traced back to the characteristics, actions, or opinions of a few key players is outdated at best, considering the diversification and democratisation of states' foreign policy formation.[5] Nonetheless, the radiating force of state-centric thinking continues to exert influence on methodological discussions to this date.[6]

A growing group of scholars, however, take the criticism against statist individualism seriously and have begun to *re*-personalise international law with new subjectivities. In their view, clinging to statist individualism threatens to perpetuate blind spots in our understanding of international law's intimate inner workings. To counter this putative flaw, the hidden, 'back-end' actors of international law's 'everyday life' provide a methodologically auspicious, largely unexplored reservoir for scholars to plunge into.[7] Studies in this 'constructivist' stream[8] – coined as such for finding inspiration in the tenets of social constructivism – explore the role of an army of clerks, secretaries, international bureaucrats, legal and technical advisers, etc. that co-construct international law on a daily basis.[9]

The constructivist approach has significantly expanded the notion of international law's 'actors' – indeed, not only from 'front-end' to 'back-end', but also from subject to object and beyond. New relational methodologies, such as those inspired by actor-network theory and related material schools of thought,[10] foreground interactions themselves rather than obsessing about

---

[4] See, e.g., Jay Butler, 'The Corporate Keepers of International Law' (2020) 114 American Journal of International Law 189.

[5] Hanna Pfeifer, Christian Opitz and Anna Geis, 'Deliberating Foreign Policy: Perceptions and Effects of Citizen Participation in Germany' (2021) 30 German Politics 485.

[6] This persistence is well-documented by Megiddo (n 2).

[7] See, e.g., Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge University Press 2015); Tommaso Soave, *The Everyday Makers of International Law: From Great Halls to Back Rooms* (Cambridge University Press 2022); Tamar Megiddo, 'The Missing Persons of International Law Scholarship: A Roadmap for Future Research' in Harlan Grant Cohen and Timothy Meyer (eds), *International Law as Behavior* (Cambridge University Press 2021).

[8] Megiddo (n 2).

[9] An excellent example of such an approach is Craig Jones, *The War Lawyers* (Oxford University Press 2020), which casts a light on the lawyers advising military officers on the application of international humanitarian law.

[10] See, seminally, Annelise Riles, *The Network Inside Out* (University of Michigan Press 2000). On more recent materialist tendencies, see Carl Landauer, 'The Stuff of International Law' (2021) 32 European Journal of International Law 1049.

their originators.[11] In doing so, they disrupt the pervasive agency/structure dualism and expand the notion of the 'person/individual/actor' to what were previously considered mere objects – armed drones, whales, or passports.[12] In my view, the turn towards individuals as relational creatures must be understood as the latest evolutionary step in the methodological re-personalisation of international law, and as a logical development from the focus on 'back-end' actors.

The tension between statist and constructivist methodologies partially hails from disagreements over the theoretical assumptions animating each approach – a state-centric international law driven by formally authorised representatives here, and a complex, shifting international legal network of formal and informal, social and legal, human and material 'actors' there. And yet, the conflict runs deeper than theoretical positions; it also entails differing epistemological objectives. While statist approaches are interested in making explanatory claims that rationalise outcome Y through the behaviour of individual X, constructivist individualism is often geared towards thick description and open exploration. The latter scrutinises individuals in their own right; it is driven by different curiosities and relies on different sensibilities than the former.

Of course, the statist and constructivist individualisms described here are archetypes and do not map neatly onto the literature. Moreover, I would argue that both approaches are best seen as complementary. They produce distinct types of knowledge about the international legal world and rely on each other more than commonly assumed. Nonetheless, the rise of constructivist methodologies already seems to be displacing hegemonic statist individualism to some extent. While the potential benefits of this shift are generally well-understood, however, there has been relatively little systematic thinking around its epistemic and ethical implications for international legal research.

## 3. Towards an Ethos of Epistemic and Ethical Humility

Selecting research subjects is a highly delicate task. Individual persons – arguably more so than states or international institutions – are infinitely complex and nuanced creatures. Their relative role and weight are often difficult to quantify and qualify. The methodological trend towards 'zooming in', 'breaking down', and 'personalising' almost inevitably risks aggrandising, ostracising, idolising, romanticising, or vernacularising the research subjects. In short, the risk of reductionism looms large in individualist research.[13] Reductionist depictions, in turn, can provoke ethical dilemmas and dangerously expose those being studied.

As continuously stressed in the broader social science methodology literature, the selection process is therefore best addressed with an ethos of epistemic and ethical humility. Yet, it seems that there has been sparse systematic reflection about these dangers in international law. Surprisingly few studies elaborate in depth why they focus on some subjects and not on

[11] Christian Bueger, 'Actor-Network Theory, Methodology, and International Organization' (2013) 7 International Political Sociology 338.

[12] See, respectively, chapters 3, 40, and 23 of Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press 2018).

[13] The authors of a recent biographical collection of leading international criminal lawyers very openly acknowledge this issue. See, Frédéric Mégret and Immi Tallgren (eds), The Dawn of a Discipline: International Criminal Justice and Its Early Exponents (Cambridge University Press 2020) 11–23.

others. Instead, they often seem to harbour silent assumptions about the actors studied, and about their position in the network of international legal activity. If and when these assumptions remain silent, however, there is a serious risk of confirmation bias – exaggerating the chosen individual's contribution based on the limited perspective of an arbitrary sample.

To avoid such risks, researchers in both statist and constructivist streams should transparently justify their working assumptions and hypotheses *ex ante*. Such justifications may be derived deductively or inductively, or by combining both. Deductive justifications can have recourse to prior theorising about the role of a given actor (group), while inductive justifications rely on pilot projects, first observations or earlier empirical work.

Careful justifications of the selected sample of individuals are particularly important to strengthen the credibility of causal and explanatory claims. As explained above, explanatory knowledge tends to be associated with the statist approach. In this context, epistemic humility pushes the researcher to think openly and carefully about the criteria that legitimise how and why their chosen persons matter for the dependent variable they are interested in. To name a deductive example, practice theory and its centring of everyday *habitus* as a driving force of international legal processes has provided the intellectual impetus to explain the International Criminal Court's workings through detailed analyses of its various actors – judges, defence lawyers, prosecutors.[14]

Constructivist individualism, in contrast is less geared towards empirical verification and more towards careful description and theory-building. In the exploratory mode, making sense of individual agencies becomes a task of inherent value, regardless of whether it allows for large-picture explanations. As a result of its relational inclinations, the selection process often involves little more than 'following the actors' along their daily routes and routines.[15] This approach can be very useful in making sense of murky, hybrid processes like the formation of new international norms, where precise hypotheses are either unavailable or tend to hinder rather than strengthen the analysis. The constructivist turn within methodologically individualist research thus implies a new role for the researcher.

Epistemically, this new positionality means that researchers must resist the temptation of drawing out sweeping narratives that their limited perspective cannot support. Beyond epistemic humility, however, the constructivist turn towards raises ethical issues that are not equally present in institutional or more statist analysis. Precisely because of its purported objective of re-constructing international law's modes of operation in ever-more detail, ethical sensibilities should increase with proximity to the research subject. Of course, such sensibilities are contingent upon a number of factors. The research subjects' relative and absolute status of power/vulnerability spring to mind – while state officials usually face professional risks at worst, grassroots activists may be physically threatened or targeted by counter-insurgency measures as a result of research activities, for instance. The research methods employed matter, too. Field research, interviews, spatial analysis, ethnographies –

[14] Jens Meierhenrich, 'The Practice Of International Law: A Theoretical Analysis' (2014) 76 Law and Contemporary Problems 1; Mikkel Jarle Christensen, 'International Prosecution and National Bureaucracy: The Contest to Define International Practices Within the Danish Prosecution Service' (2018) 43 Law & Social Inquiry 152; Mikkel Jarle Christensen, 'The Judiciary of International Criminal Law: Double Decline and Practical Turn' (2019) 17 Journal of International Criminal Justice 537.

[15] Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press 2007).

all of which have been closely associated with international law's re-personalisation – by their very nature tend to be much more intrusive than desk research.

Through its commitment to exacting microanalysis, constructivist individualism raises new dilemmas, or it colours old dilemmas in a new light. What does the academic limelight 'do' to or with an individual actor? How does it not only describe or explain, but also impact her ability to produce, enforce, modify, receive, contest, or otherwise engage with international legal categories? What implications should we draw for the way in which we conduct our research? While it is prohibitively difficult to answer these questions in the abstract,[16] two concluding remarks may serve to provide first orientation. First, it is high time for international legal scholars to foster an attitude of ethical humility when they engage with 'persons'. At the very least, this must include a careful evaluation of the impacts of their choices on those being studied. Second, the international legal academe has much to learn in this regard from disciplines like anthropology, which have long grappled with issues of positionality and developed a rich repertoire of potential responses. While this is arduous work and may sometimes call for research to be abandoned or curtailed for ethical reasons, international lawyers' previous and continuing involvement in imperial projects should caution them to err on the side of disciplinary self-restraint.

[16] Writing on a similar theme, Sarah Nouwen has shown how to engage with ethical issues in relation to fieldwork. Sarah MH Nouwen, 'As You Set out for Ithaka: Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict' (2014) 27 Leiden Journal of International Law 227.