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rethinking international law and justice

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Charles Sampford, Spencer Zifcak and Derya Aydin Okur

RETHINKING INTERNATIONAL LAW AND JUSTICE

Law, Ethics and Governance Series

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Rethinking International Law and Justice

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Contents

Abbreviations

ACOA	American Committee on Africa
ACTUP	AIDS Coalition to Unleash Power
ANC	African National Congress
ASEAN	Association of Southeast Asian Nations
ATS	Alien Tort Statute
AU	Arab Union
AZT	azidothymidine
BIIJ	Brandeis Institute for International Judges
BIT	bilateral investment treaty
BRICS	Brazil, Russia, India, China and South Africa
CAN	Climate Action Network
CCPR	International Covenant on Civil and Political Rights
CDM	Clean Development Mechanism
CEC	Climate Ethics Consensus
CESCR	Committee on Economic, Social and Cultural Rights
CIEL	Center for International Environmental Law
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CSR	corporate social responsibility
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of the Congo
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EPA	Environmental Protection Agency
EU	European Union
FAO	Food and Agriculture Organization
FET	fair and equitable treatment
FIELD	Foundation for International Environmental Law and Development
FoE	Friends of the Earth
GDP	gross domestic product
GIC	Governor in Council
GPW	Third Geneva Convention of 1949
HRL	Human Rights Law
IACHR	Inter-American Commission on Human Rights

ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTFY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
Idasa	Institute for Democratic Alternatives for South Africa
IGO	intergovernmental organization
IHL	international humanitarian law
ILC	International Law Commission
ILO	International Labour Organization
IPCC	Intergovernmental Panel on Climate Change
IROL	International Rule of Law
KPIA	Kyoto Protocol Implementation Act
MDG	Millennium Development Goals
MFN	most-favoured-nation
MNC	multi-national corporation
MSF	Médecins Sans Frontières
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NEPAD	New Partnership for Africa's Development
NGO	non-governmental organization
NIPCC	Nongovernmental International Panel on Climate Change
NSA	non-state actor
OAS	Organization of American States
OECD	Organisation for Economic Cooperation and Development
OED	Oxford English Dictionary
oPt	occupied Palestinian territory
P-5	permanent members of the United Nations Security Council
PCHR	Palestinian Centre for Human Rights of Gaza
PCIJ	Permanent Court of International Justice
POC	Protection of Civilians
R2P	Responsibility to Protect
ROL	Rule of Law
S-5	Singapore, Costa Rica, Lichtenstein, Jordan and Switzerland
SAIRR	South African Institute of Race Relations
SCSL	Special Court for Sierra Leone
SDG	Sustainable Development Goals
SERAP	Socio-Economic Rights and Accountability Project
TAC	Treatment Action Campaign
TRC	Truth and Reconciliation Commission

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCAT	United Nations Convention against Torture
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UNSRSG	United Nations Special Representative of the Secretary-General
US	United States (of America)
VCLT	Vienna Convention of the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization
WWF	World Wide Fund for Nature

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Chapter 1
Rethinking International Law and Justice

Spencer Zifcak

Overview

The past two decades have witnessed a substantial revision in thinking about the nature and scope of international law. The shift is encapsulated in an alteration in thought as to who should be the primary subject of the law. There is now a progressive appreciation in political and legal spheres that the primary concern of international law should be not only with the relations between sovereign states but also and equally with the protection of the individual dignity of the human person.[1] This shift is most evident in the recent prominence given to the idea of human security, its character and advancement. Beneath this change in perspective there lies an awakening moral commitment to the international rule of law and to the incremental achievement of some legitimate form of global justice.[2]

Serious attention to these matters was galvanized in two reports commissioned by the then Secretary-General of the United Nations (UN), Kofi Annan, in 2004. The first report was that of the High-Level Panel on Threats, Challenges and Change.[3] The Panel was asked to address four key issues. First, it dealt with contemporary challenges to international peace and security. Next, it considered possible reforms to the existing international system of collective security in the interests of dealing more effectively with international and intranational conflict and violence. Then

1 Kofi Annan, 'Two Concepts of Sovereignty', *Economist*, 18 September 1999.

2 See generally J. Glover, *Humanity: A Moral History of the Twentieth Century* (New Haven, CT: Yale University Press, 2000); J. Goldstein et al., *Legalization and World Politics* (Cambridge, MA: MIT Press, 2001); D. Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* (Cambridge: Polity Press, 2004); T. Meron, *The Humanization of International Law* (Boston, MA: Martinus Nijhoff, 2006); A. Peters, 'Humanity as the Alpha and Omega of Sovereignty', *European Journal of International Law* 20, no. 3 (2009); S. Pinker, *The Better Angels of Nature: The Decline of Violence in History and Its Causes* (London: Penguin Books, 2011); R. Teitel, *Humanity's Law* (Oxford: Oxford University Press, 2011); A. Cassese, ed., *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012).

3 United Nations, 'High Level Panel on Threats, Challenges and Change, a More Secure World: Our Shared Responsibility', UN Document A/59/565 (2004), para. 30; Kofi Annan, *Larger Freedom: Towards Development, Security and Human Rights for All* (New York: United Nations, 2005).

it turned its attention to the existing functioning of the major organs of the UN. Finally it proposed an extensive programme of reform in their operation.

The Panel began by identifying new and existing threats to international security. In doing so, it engaged in a significant conceptual shift. It did not confine itself to threats of war, civil disorder, terrorism and nuclear weaponry. It cast its net more widely to draw in less evident but no less important causal factors. These included poverty, infectious disease, organized crime, the abuse of human rights, and environmental degradation. In the Panel's view, security, development and human rights were inextricably linked. Each contributed to and was affected by the other. One could no longer therefore consider the problem of international peace and security in isolation. Their protection was critically dependent upon the achievement of economic and social security and international respect for human rights.[4]

Perhaps the most important thread that ran through the Panel's analysis was that, in certain circumstances, the protection of human security might override the prerogatives of state sovereignty. By switching its conceptual frame from one that privileged states' entitlements to another that was concerned with states' responsibilities to underpin and maintain their people's individual and collective security, the Panel sought to situate human security at the centre of global political, legal and social concerns. As its report put the matter,

> What we seek to protect reflects what we value. The Charter of the United Nations seeks to protect all states, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens. These are the values that should be at the heart of any collective security system for the 21st century, but too often states have failed to protect and promote them. The collective security we seek to build today asserts a shared responsibility on the part of all states and international institutions, and those who lead them, to do just that.[5]

A second report, from the Millennium Project, sought to undergird and supplement the new approach.[6] It proposed a concrete plan of action through which the Millennium Development Goals for the reduction of poverty could be achieved.[7] Under this plan, developing countries would take primary responsibility for strengthening their economic and social performance. For their part, developed countries should

4 See further United Nations Commission on Human Security, *Human Security Now* (New York: Commission on Human Security, 2003).

5 United Nations, 'High Level Panel on Threats, Challenges and Change, a More Secure World: Our Shared Responsibility', UN Document A/59/565, para. 30.

6 UN Millennium Project, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (New York: United Nations, 2005).

7 See further, P. Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (Oxford: Oxford University Press, 2007).

increase their development assistance so that the Goals could be attained by 2015. Together the two reports provided the foundations upon which new thinking about the role of law and politics in international affairs might be constructed.[8]

International law has been at the centre of subsequent developments that have promoted this expanded conception of security. Moving to the position that its original concern with state sovereignty should now be balanced by a parallel commitment to the advancement of human security, international law has undergone rapid change substantively and procedurally. Perhaps the two most prominent threads of that change have been, first, a progressive extension of states' legal responsibility to prevent the commission of genocide and crimes against humanity and to protect civilian populations from the ravages of violent conflict. Secondly, there has been a remarkable expansion in international legal mechanisms designed to ascribe individual responsibility for the commission of such crimes and to try to punish them. A desire to limit states' internal sovereignty in the interests of the protection of people's fundamental human rights has been a powerful and unifying force in both of those trends.

A third thread has emerged even more recently. That is, a growing recognition within international law, in particular in international human rights law, of the significant role played by non-state actors in the commission of human rights violations and, consequently, the need for states and international institutions to regulate them. Each of these threads deserves further elaboration. The purpose of this volume is to cast a new and critical eye over prominent aspects of these significant legal innovations.

Each of the threads identified has been driven by its context. The most significant driver has been the change in the nature and extent of global violence.[9] War between states has faded at the same time as wars and violence within them has increased dramatically. States remain significant initiators of violence within borders, but they have been joined there by non-state actors, in particular rebel movements and terrorist organizations. The changing character and intensity of violence, engendered by alterations in its forums and actors, has focused global attention as never before upon the fate of individual civilians in its wake. Violence against citizens has increased exponentially. Out of this, the revivified concern with human security has arisen.

One result has been an expansion in and increasing confluence between international humanitarian law, human rights law and criminal law.[10] Common

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8 See further, M. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007).

9 See M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Stanford, CA: Stanford University Press, 1999); M. Leitenberg, *Deaths in Wars and Conflicts in the Twentieth Century* (Ithaca, NY: Cornell University Peace Studies Program, 2003).

10 See R. Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002); M. Byers, *War Law* (London: Atlantic Books, 2005); D. Wippman and M. Evangelista, *New Wars, New Laws: Applying the Wars of Law in*

Article 3 of the Geneva Conventions, which provides for the humane treatment of non-combatants, has attained new prominence and two Additional Protocols have been added to the Conventions. The protection of civilians has become a core principle of international humanitarian law. Article 51(2) of Additional Protocol 1, for example, prohibits acts or threats of violence the primary purpose of which is to spread terror among the civilian population.[11] This prohibition has also matured into a principle of customary international law. Consequently, it binds all countries, even those who have not ratified the conventions and protocols. Protocol 1 adds that fundamental human rights apply fully in situations of armed conflict. Common Article 3 of the Geneva Conventions extends its protections of civilians to any armed conflict, thus embracing not only interstate conflict but also ethnic and religious civil wars and transnational terror.

The reach of international humanitarian law has again been significantly expanded in the Statutes of the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR).[12] The Tribunals were given the power to prosecute individuals for breaches of the Geneva Conventions, the violations of the laws or customs of war, genocide, and crimes against humanity. The way was opened for persons to be prosecuted for the crimes defined when committed in armed conflict, whether the conflict was international or internal in character, and directed against civilians. The definition of crimes against humanity has been widened from crimes such as murder, extermination, torture and rape to include persecution on political, racial and religious grounds and other similarly inhumane actions.

Subsequent judicial decisions made by the ICTY have further demonstrated the progressive interpenetration of international humanitarian and human rights law. Each of these fields retains its exclusive jurisdictional domains, but in particular in relation to issues relevant to international crimes and criminal proceedings, the lines of demarcation have become more hazy. The ICTY has determined, for example, that crimes against humanity do not require a connection to international armed conflict. It is the occurrence of a widespread and systematic attack on a civilian population that makes the relevant act a crime

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Twenty First Century Conflicts (Ardsley, NY: Transnational, 2002); O. Ben-Nafatli, ed., *International Humanitarian Law and International Human Rights Law* (Oxford: Oxford University Press, 2011).

11 International Committee of the Red Cross (ICRC), 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)', 1125 UNTS 3 (Geneva: ICRC, 8 June 1977).

12 T. Meron, 'War Crimes in Yugoslavia and the Development of International Law', *American Journal of International Law* 88(1994); M. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (Heidelberg: Berlin Springer, 2005); W. Schabas, *Genocide in International Law*, 2nd edn (Cambridge: Cambridge University Press, 2009); D. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2012).

against humanity as opposed to a war crime.[13] Similarly, the Geneva Conventions have increasingly been interpreted with reference to their implications for the protection of the human person.

In that context, the second remarkable development in international law has been the introduction of new judicial mechanisms and procedures designed to confer individual responsibility for the commission of grave crimes against humanity.[14] Following from the ad hoc criminal tribunals for Yugoslavia and Rwanda, the International Criminal Court was created.[15] Hybrid tribunals such as the Special Court for Sierra Leone and similar bodies in Lebanon and Cambodia have come into being. Truth and Reconciliation Commissions in countries as diverse as South Africa and East Timor have also been initiated as a crucial component in the pursuit of transitional justice.[16] These new judicial and quasi-judicial bodies have stepped into the gaps left initially by the laws of war and their limited application to novel arenas and situations of institutional violence, civil war and terrorist attack. Human rights law and international criminal law have combined to provide new and creative means for the prosecution of offences against humanity in the interests of protecting people and peoples who are vulnerable to grave harm.

Within that framework, a crucially important development has been the expansion of the idea and actuality of universal jurisdiction:[17]

> Today, international law will sometimes … reflect not only substantive agreement as to certain universally condemned behaviour but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behaviour. That subset includes torture, genocide, crimes against humanity and war crimes. The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity.[18]

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13 Prosecutor v Tadić, Appeals Chamber, International Criminal Tribunal for the former Yugoslavia, Case No. IT-94-1-AR72, 15 July 1999.

14 R. Teitel and R. Howse, 'Crossjudging: Tribunalization in a Fragmented but Interconnected Global Order', *New York University Journal of International Law and Politics* 41 (2009): 959.

15 W. Schabas, *An Introduction to the International Criminal Court*, 4th edn (Cambridge: Cambridge University Press, 2011).

16 P. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, 2nd edn (London: Routledge, 2011).

17 N. Roht-Arriaza, 'Universal Jurisdiction: Steps Forwards, Steps Back', *Leiden Journal of International Law* 17 (2004); Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World' (2011); M. Langer, 'The Diplomacy of Universal Jurisdiction', *American Journal of International Law* 105(2011); S. Macedo, ed., *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia, PA: University of Pennsylvania Press, 2011).

18 *Sosa v Alvarez-Machain*, 542 US 692 (Supreme Court of the United States 2004), per Breyer J.

It is, of course, essential that the exercise of universal jurisdiction is confined to only those crimes the international community regards as most grave. But once that prerequisite is met, obstacles to its application such as extraterritoriality necessarily fall away. Consequently it has now been recognized that states may prosecute individuals for the commission of crimes against humanity even though the state in question has no territorial links with the offence or ties of nationality to the alleged offender. The offences are subject to international jurisdiction as a matter of customary international law. Similarly, the obligations upon states derived from customary international law are generally considered as sufficiently powerful as to override any objections to their exercise on the grounds of state immunity. Crimes against humanity now attract universal jurisdiction if two preconditions are met. First, they must be contrary to a peremptory norm of international law. Secondly, they must be so serious, so systematic and so widespread that they can justly be regarded as an attack on the international legal order.[19]

The application of universal jurisdiction is not without its difficulties. An accused person must still be in the territory of the prosecuting authority. Many escape justice by not leaving their own. In many states, governments may still reserve their authority to determine whether alleged crimes will be investigated, prosecuted or tried. Particularly where the accused are senior political or military figures, there will be a natural reluctance in governmental circles to pursue individuals who may still possess substantial political power or influence. An associated difficulty relates to the achievement of an appropriate balance between keeping the peace and prosecuting crime. Potentially successful endeavours to end civil war by political means may be thwarted by the assertive exercise of universal jurisdiction, whether by a home or foreign state, to prosecute those engaged in sensitive negotiations for their perceived criminal activity during the course of the conflict. Nevertheless, particularly under the aegis of international tribunals, universal jurisdiction to try individuals responsible for crimes against humanity has become an established part of the framework of international law.

A third but still fledgling thread in international law's development as a key means of promoting human security has been its recent acknowledgement of novel problems posed by non-state actors. Actors such as armed opposition groups, non-governmental organizations, multilateral governmental bodies and transnational corporations have become prominent players both in the abuse and protection of human rights. The changing nature of violence and conflict has contributed to the emergence of new kinds of insurgency activity, rebel movements and terrorist organizations. Transnational corporations have inflicted or connived in the abuse of human rights. Their activities have consequently become an increasing focus of international concern.[20] An explosion in international treaty making has

19 *Regina v Bartle (The Pinochet Case)*, 37 I.L.M. 1302 (UK House of Lords 1998), per Lord Millett.

20 S. Colliver, J. Green and P. Hoffman, 'Holding Human Rights Violators Accountable by Using International Law in US Courts: Advocacy Efforts and Complementary Strategies',

created powerful private and intergovernmental regulatory organizations. Their lack of accountability and failure to incorporate human rights standards into their deliberations presents new challenges for legitimate global governance.[21] More positively, in response to worldwide human rights abuses, international civil society organizations dedicated to their prevention and remedy have also assumed an increasingly important political and legal role. This in turn has seen governments, among others, focus greater attention on their accountability.[22]

International law has yet to cope adequately with abuses of power in which non-state actors engage. The challenge faced by international law is to address the international community's concern to prevent human rights violations committed by non-state actors before their seeming immunity from the law's reach begins to make the existing human rights regime, directed to states, seem secondary. The central strategy here must be to persuade and induce states themselves to set in place the laws required to regulate the conduct of non-state actors in the human rights sphere.

This is a task upon which international organizations, in particular the UN, have already embarked. The UN has begun to draft agreements, pursue policies and encourage practices that may in time alleviate the disturbances that the absence of non-state actors from the conventional domain of international law still generates. For example, under the guidance of the UN's Special Representative of the Secretary-General on the issue of human rights and transnational corporations, the world body has formulated the Guiding Principles on Business and Human Rights.[23] These set down the distinct responsibilities that both states and corporations should assume if the human rights of citizens affected by corporations are to be adequately protected. States are enjoined to take appropriate steps to prevent, investigate, punish and redress human rights abuse by business enterprises through effective policies, legislation and adjudication. They should assume the responsibility for creating an expectation that business enterprises within their territory are expected to respect human rights in every facet of their operations. Equally, the Guidelines insist that transnational corporations should avoid infringing the human rights of others and should address the adverse human rights impacts of their operations. They are also encouraged to prevent or mitigate the adverse human rights impacts that are linked to their operations, even if they have made no contribution to those impacts.

Emory International Law Review 19(2005).

21 R. Grant and R. Keohane, 'Accountability and Abuses of Power in World Politics', *American Political Science Review* 99(2005): 35; R. Keohane, 'The Concept of Accountability in World Politics and the Use of Force', *Michigan Journal of International Law* 24(2003): 1121.

22 See D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004); D. Bell and M. Coicaud, eds, *Ethics in Action: The Ethical Challenges of International Human Rights Non-Governmental Organizations* (Cambridge: Cambridge University Press, 2007).

23 P. Alston, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005); R. Mares, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff Publishers, 2012).

On a more practical level, substantial hope had been invested in the successful legal elaboration of the US Alien Tort Statute. This legislation provides that the district courts of the US shall have original jurisdiction in any civil action by an alien for a tort committed in violation of the law of nations. The definition is wide enough to embrace corporate malfeasance in the commission of human rights violations in countries other than America. US courts have subsequently allowed legal actions to be brought under the ATS for infringements of international law in relation to crimes such as genocide, torture, war crimes and forced disappearances. Regrettably, however, the US Supreme Court has recently narrowed jurisdiction under the ATS by ruling that it cannot be utilized where a corporation commits an alleged human rights violation entirely outside the territory of the US. Further, even where a claim made outside the US touches and concerns US territory, that connection must be sufficiently strong to displace the assumption against extraterritorial application. This brings to an end, at least for the time being, national provision for universal civil jurisdiction parallel to the universal criminal jurisdiction now recognized.

Armed opposition groups and terrorist organizations are another category of non-state actor that presents formidable problems for the international legal order.[24] The extension of international humanitarian and human rights law to intrastate conflicts, for example, renders obsolete the traditional distinction between combatants and civilians.[25] It has become necessary to distinguish between legitimate and illegitimate armed opposition groups, making the distinction between, for example, rebel movements defending populations against state-sponsored violence and terrorist organizations seeking to bring down legitimate state authorities. It is generally accepted that armed opposition groups, such as rebel movements, should respect international humanitarian and international human rights law even when they are not parties to the relevant treaties. That is in part owed to their assumed coverage by international customary law. It is much less clear, however, when any such group reaches the threshold at which humanitarian and human rights obligations may attach to it. The case of terrorist organizations is entirely different as they are highly unlikely ever to acknowledge that the writ of international law may run with respect to any of their causes or actions. Their situation seems best left to regulation by the complex and comprehensive web of international counter-terrorism treaties and their subsequent incorporation into national laws, assuming there are any. That leaves aside, of course, the vexed question of how individuals accused of terrorist activity should be treated upon

24 A. Cassese, 'Should Rebels Be Treated as Criminals? Some Modest Proposals for Rendering Internal Armed Conflicts Less Inhumane', in *Realizing Utopia: The Future of International Law*, ed. A. Cassese (Oxford: Oxford University Press, 2012), Ch. 39; L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002).

25 R. Arneson, 'Just Warfare and Non-Combatant Immunity', *Cornell International Law Journal* 39(2006): 663.

apprehension. Extraordinary rendition and the Guantanamo Bay solution are hardly the answer. In dealing with the problems that non-state actors present, then, there remains a great deal of legal work to be done to ensure that human rights can be made real.

One final development on the boundary of international law should be noted in this survey of its recent transformations. International humanitarian law deals more or less effectively with crimes committed during the conduct of interstate and intrastate conflict. But it has little influence until crimes against humanity have been committed. This raises the question as to how mass atrocities, particularly those committed by governments against their own people, might be prevented and what responsibility, if any, the international community might have, to intervene when such atrocities are realistically in prospect. The UN Charter provides that a state may use force in self-defence in response to actual or imminent attack by another state and defensive force may also be legitimated when approved by the UN Security Council. The Charter is silent, however, with respect to any duty or authority the international community may have to avert or intervene in intrastate conflict to protect civilian populations from the commission of atrocity crimes.

To fill that gap, in 2005 the UN General Assembly unanimously endorsed the new doctrine of 'the responsibility to protect', a more sophisticated and nuanced version of what had previously been known as humanitarian intervention. In accordance with this doctrine, a state has primary responsibility for the protection of its citizens from the commission of mass-atrocity crime. Where, however, a state fails in its exercise of this responsibility, that responsibility shifts to the international community. It may then take action, with the endorsement of the Security Council, to take such measures as are necessary to prevent or intervene to stop the escalation of violence reaching the level of genocide, crimes against humanity, war crimes and ethnic cleansing.

While possessing the general endorsement of the international community as represented in the UN General Assembly, the doctrine is yet to be fully tested and accepted in practice. In 2011, the Security Council referred to the doctrine when authorizing military intervention in Libya to prevent mass slaughter in Benghazi. In response to a request from the government of Mali, in 2013 the Security Council authorized external military intervention to put down attacks by armed Islamic groups that threatened the stability of the country. In radical contrast, however, the Security Council was paralyzed when confronted with the devastating loss of life in Syria as first the government and then armed rebel groups committed war crimes and crimes against humanity in a conflict that had rapidly assumed that form of an intrareligious civil war. There is no doubt that the responsibility to protect represents a significant doctrinal advance in attempting to fashion a solution to the commission of intrastate offences against humanity. How effective and durable it will be in practice remains to be seen.

This brief survey of recent developments in international law suggests that in the past two decades or so it has taken a distinctly humanitarian turn. Partly in response to the changing nature of global conflict and violence and partly in

response to the developing conceptual significance of the idea of human security, a more ethically and politically appropriate balance is being forged between the law's original concentration upon regulating the relationship between states and a newer focus on and commitment to the protection of the individual person, people, and their common humanity. That development in turn leads one naturally to consider the relationship between human security and global justice.[26]

In his recent book, *The Idea of Justice*, Amartya Sen draws a contrast between two different approaches to the definition of justice.[27] The first he terms transcendental institutionalism, an approach most closely identified with the paradigmatic political philosopher John Rawls. The purpose of transcendental institutionalism, Sen argues, is to attempt to construct an ideal set of just institutions. That task is to be undertaken in terms of social contract. Sen argues in contrast for an idea of justice founded on public reasoning and on the ranking of reasonable alternatives that can in fact be realized. Put more simply, Sen's social choice approach is one that takes note of social states that actually exist, asks how they are going, and inquires whether the arrangements can in some way be improved. The key in providing an answer to those questions is to focus first and foremost on the avoidance of manifest injustice.

This second approach is more practical and realizable than the first. And it links up well with the concept of human security. A more just society will be one that advances human security, practically defined. A less just set of arrangements will diminish human protection. Global justice, then, may best be conceived as the prevention of global injustice.

In that endeavour, international law has a major role to play. By turning its attention to the practical concern of humanity with the prevention of war, civil conflict and the violation of fundamental rights, that is, to the progressive elimination of manifest injustice, the last two decades have seen the law make incremental, sometimes halting, but nevertheless significant steps towards the achievement of human security. In so doing it has already made a notable contribution to a more just community of nations.

The Book's Contributions

In their different ways, the chapters in this collection each make original and interesting contributions to our understanding of several of the significant developments delineated above. What follows is an outline of that contribution.

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26 See further T. Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs* 33, no. 2 (2005): 113; C. Barry and T. Pogge, *Global Institutions and Responsibilities: Achieving Global Justice* (Malden, MA: Blackwell Publishing, 2005); T. Pogge and D. Moellendorf, eds, *Global Justice: Seminal Essays* (St. Paul, MN: Paragon House, 2008).

27 A. Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009).

Steve Nabors enters the sphere of international humanitarian law by tracing the history of what has become known as the belligerent's privilege. The privilege constitutes an authorization, in international law, for an individual to engage in combat hostilities. That authorization entitles the participant to immunity from prosecution under domestic law for hostile and destructive actions undertaken in the course of war. It also entitles them to certain guaranteed protections under the Third Geneva Convention if captured and detained as a prisoner of war. The essential condition for the conferral of belligerent's privilege was the notion of 'right authority'. A person had right authority in war if their participation could properly be justified by reference to their cause and status. The cardinal example of belligerent's privilege was that of members of the armed forces engaged in a just war.

The key distinction in this regard was between combatants and non-combatants. Traditionally, non-combatants were not entitled to the privilege. In time, the advent of guerilla warfare, popular rebellion against repressive rule, and the use by the state of irregular militias to suppress liberation movements blurred the distinction substantially. In an illuminating discussion, Nabors tracks historically the position of ever more diverse categories of non-combatant: volunteer corps, auxiliary groups, partisans, indigenous peoples, informal militia and irregular forces, among others. He concludes that, particularly following the adoption of the Geneva Conventions, the idea that unprivileged belligerents' engagement in hostilities automatically constitutes a violation of the laws of war is no longer tenable. New classes of belligerent need to be afforded the privilege where circumstances suggest that their participation possesses an updated and expanded justification of 'right authority'.

Davide Tundo presents a dispassionate yet highly charged assessment of the non-protection of civilians in the case of the 2008 Israeli attack on the Gaza Strip. He begins by reciting the protections for civilians provided for in international humanitarian law. These include the requirement to separate combatants from civilians, to provide proportionate responses to armed attack, and to engage in conflict only when there is the military necessity to do so. Against these protections, he cites the conclusions of the Goldstone Report, which found that Israeli military operations were aimed not just at Gazan rebels but also and critically at the civilian population and supporting infrastructure. The barricading of the Gazan population during the course of the violence, he suggests, amounted to a form of illegal collective punishment.

The Israeli intervention, Tundo argues, constituted a gross injustice. It may have included the commission of crimes against humanity. Yet the international legal and political systems have failed as yet to take meaningful action to provide any remedies or to try any perpetrators of the allegedly severe offences. The Israeli authorities have not undertaken any meaningful inquiry into the actions of their military forces. The International Criminal Court has declined to consider prosecution on jurisdictional grounds. The only option left, Tundo concludes, is the exercise by other states of universal criminal jurisdiction.

As noted previously, there has been a new proliferation of international organizations and tribunals whose purpose is to draw individuals and organizations to account for human rights violations. Another important, potential source of investigation and remedy lies within domestic law. *Selman Karakul* proposes, however, that alterations to the procedural treatment of individual applications to international and regional courts may have the effect of prejudicing the fair hearing and determination of such applications. This is because such applications may be returned to domestic courts for further and final determination; and there, causes and remedies may still be inadequate.

Karakul examines the general rule that, before an application can be heard by an international tribunal, all domestic remedies in relation to an alleged case of human rights abuse must be exhausted. Given the absence of effective protections in domestic law, the number of applications to the European Court of Human Rights, among others, has increased dramatically. That has led to the Court adopting a new procedural expedient to handle the number and complexity of cases that come before it. Where the Court determines that many cases before it appear to constitute a systemic human rights failure, the Court will take one case and deliver a 'pilot judgment'. Having identified the failure, the Court will give clear indications to the government in question as to how the human rights issue may best be resolved within domestic law. The problem, however, is that governments may not favour the recommended actions, may be unwilling to alter their domestic laws, may capitalize on their 'margin of appreciation', and may place procedural obstacles in the way of further review.

Amrita Mukherjee argues that the principles of extraterritorial or universal jurisdiction and immunities from prosecution in relation to individual criminal liability for violations of international crimes have been the subject of recent controversy. The international legal system has developed specialized courts and tribunals, such as the International Criminal Court, to address international criminal responsibility. However, primacy is given in international law to the prosecution of perpetrators under domestic laws and in domestic courts. This chapter examines these principles in relation to rules of customary international law and treaty law, particularly the United Nations Convention against Torture. It explores how these principles have been applied in international and national case law – the subject matter from the context of national courts' jurisdiction to prosecute and punish offences committed extraterritorially by individual officials of other states and the law on immunities that acts as a bar to prosecution. The chapter examines whether, in the light of current problems in international criminal justice, 'the most potent mechanism for overcoming individual impunity for acts of torture is the requirement of international law that at the national level each state must criminalize torture and prosecute perpetrators under its domestic law and its domestic courts.'[28]

28 N. Rodley and M. Pollard, 'Criminalisation of Torture: State Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading

Tomoko Ishikawa turns his attention to the international commercial sphere. His concern is with the operation of arbitral bodies examining international investment treaties. In particular he looks at the operation of most-favoured-nation (MFN) clauses within those treaties. The purpose of MFN clauses is to effect greater harmonization of the standards that exist among the many and various investment treaties. The essential question in relation to such clauses is whether a third party investment treaty provides more favourable treatment to a party or parties in dispute than in the treaty pursuant to which the parties have already conducted their negotiations. If so, a party or parties may take advantage of the more favourable treatment in the third party treaty.

Ishikawa's argument is that, in determining this question, arbitral tribunals should found their decisions upon established rules of treaty interpretation rather than policy considerations. Policy considerations should be considered as relevant only in so far as they cast light on the interpretative process. Should policy considerations beyond this limitation become dominant in the interpretation of MFN clauses, the legitimacy of international investment arbitration tribunals may well be undermined.

The next five chapters examine the significance of non-state actors for the development of international law. *Angelica Bonfanti* introduces the subject matter by considering how multinational corporations might be brought to account for actions they take that infringe upon human rights or adversely affect the environment. She observes that a substantial volume of investment by multinational corporations in developing countries originates in developed ones. Of these, the two most significant sources of investment are from corporations domiciled in the United States and Europe. She examines the key international instruments that provide authoritative guidance as to the obligations upon multinational corporations not to infringe upon human rights, namely, the UN Global Compact and the UNSRSG Guiding Principles described above. She points in particular to the Guiding Principle that recommends that states should take steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuse.

Bonfanti then moves to a consideration of the judicial mechanisms present in Europe and the USA. EC Regulations confer jurisdiction on EU member states courts in relation to defendants' domiciled EU territory. This may be extended to defendants outside EU territory if so provided by the domestic law of a member state. In the US, jurisdiction is founded upon the Alien Tort Statute, which provides that district courts have original jurisdiction with respect to torts committed in violation of the law of nations or a treaty to which the United States is a party. In both cases, significant limitations are imposed upon the assumption of civil jurisdiction in cases where MNCs are not incorporated in the country in which proceedings are initiated. Even where there is some connection to the

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Treatment or Punishment', *European Human Rights Law Review* 2(2006): 116.

home country, complex corporate structures may still frustrate an attempt to hold independent subsidiaries located elsewhere to account for their actions.

The Alien Tort Statute is also the focus of *Bethany J. Spielman*'s contribution. She examines the implications of the 2013 United States Supreme Court decision in *Kiobel v Royal Dutch Petroleum and Shell Transport and Trading Co.* for the exercise by US courts of jurisdiction under the Statute. By way of establishing the significance of the jurisdiction, she introduces her chapter with a brief description of recent uncontrolled human clinical trials of new but as yet unproven pharmaceutical medicines undertaken without proper consent from participants in poor, developing countries.

Spielman then moves to a consideration of the limitations imposed by the Supreme Court on jurisdiction under the Alien Tort Statute. The extraterritoriality bar imposed by the Court, she concludes, will have the effect of depriving damaged victims of non-consensual experimentation of a remedial path that had previously been thought to be open to them. This is because the Statute will no longer be applicable to human rights violations engaged in by foreign corporations in foreign countries. Nor will it apply to companies that do have a connection to the United States if that connection affects the political or commercial interests of the US only indirectly or tenuously.

Genny Negende contends that, through the past two decades, the relationship between developing countries in Africa and the MNCs that invest in them has been radically transformed. Investment by MNCs in developing countries has increased dramatically and to such an extent that it now constitutes the primary form of international aid to these countries' economies. At the same time, the structure, organization and powers of such countries' governments has remained weak. This has produced an asymmetrical relationship of power between governments and MNCs in which increasingly the latter dictate the terms of their involvement often heedless of attempted domestic constraints. The power vacuum this has created between the two, Ngende argues, has recently been filled, at least partially, by the rise of non-governmental human rights organizations.

To make the argument, she explores a number of significant case studies. She traces the role of NGOs in working with the United Nations to weaken the hold of Apartheid. She analyses the role of the Treatment Action Campaign in pressing for substantial reductions in the price of anti-retroviral drugs to combat the widespread and severe health problems provoked by HIV/AIDS. In this case, the South African Government's response was slow, owed in part to AIDS denialism. Threatened legal action by the Treatment Action Campaign achieved substantial price concessions from the pharmaceutical manufacturer, Pfizer, that the government had been unwilling or unable to negotiate. Other pharmaceutical manufacturers soon followed. The South African example, she concludes, can provide a powerful example as to how NGOs in other developing countries can compensate for the weaknesses of government through targeted and tactical legal action.

Saheed Alabi provides a thoughtful and complementary account of the role that non-state actors might play in the achievement of climate justice. He identifies

three kinds of non-state actors in the climate field: social advocacy groups, legal rights organizations, and scientific and technical experts. Each of these has a role to play in the achievement of climate justice. Climate justice is understood as the fair treatment and meaningful involvement of all people with respect to the development, implementation and enforcement of international and national environmental laws and policies.

Alabi cites important examples of the role that advocacy organizations have played in the development, negotiation and implementation of international environmental treaties. Legal organizations have also played their part by attempting to draw governments to account for their non-performance of international environmental treaty obligations and parallel domestic legal obligations. In this latter sphere, however, progress has been made difficult by the fact that it has been hard for non-governmental environmental organizations to obtain legal standing in the courts. This is because they are not parties to international climate agreements. The author suggests, therefore, that in future international treaties, for example the successor treaty to the Kyoto Protocol, a provision should be inserted allowing recognized NGOs to bring non-compliance actions to relevant international arbitral and treaty monitoring bodies. Treaties should also provide for appropriate access to information regarding national performance and more favourable opportunities for NGOs to contribute to treaty-related monitoring and implementation.

Mohammad H. Zarei and *Azar Safari* conclude this section with a more general discussion of the status of non-state actors under international law. They observe that non-state actors have come to possess very significant economic, financial, political and institutional power. This is as true of multinational civil society organizations as it is of multinational corporations. However, they lack any semblance of corresponding legal or social responsibility. Since this is so, more concerted efforts are required to draw them to account by subjecting them to the rule of international law.

To assist with determining how this might best be done, the authors contrast formal and substantive conceptions of the rule of law. They do so by considering different perspectives of the legal philosophers Joseph Raz and Ronald Dworkin. Raz argues that the rule of law is animated by two governing ideas. First, people should be ruled by the law and obey it. Secondly, the law should be such that people will be able to be guided by it. This conception of the rule of law is concerned predominantly with the character of law rather than with its content. As Raz puts it, the rule of law is just one of the virtues by which a legal system may be judged. It is not to be confused with parallel virtues such as democracy, justice, equality or human rights. For Ronald Dworkin, in contrast, principle matters as much as legality. He insists that individuals have political rights against the state, in addition to moral rights as against one another. These rights, he argues, must be recognized as essential threads in the rule of law's fabric. It is for this reason that Dworkin's conception is characterized as substantive. While the authors are inclined to favour the formal conception, they conclude by affirming that non-

state actors should nevertheless be held to account pursuant to the rule of law for human rights violations.

One of the most hopeful developments in the direction of achieving human security has been the international community's adoption of the doctrine of the *responsibility to protect*. In his chapter, *Spencer Zifcak* traces the development of the doctrine in its first decade through a detailed description and analysis of its consideration by the UN General Assembly. The chapter examines the most important Assembly debates on the subject of responsibility to protect (R2P) with a view to determining to what extent and in what ways the doctrine has been advanced or trimmed as its practical application has been progressively exposed to critical international political scrutiny.

The chapter tracks discussion immediately prior to the UN World Summit in 2005. It follows with a consideration of the debate upon the Secretary-General's first three reports on R2P, which sought both to support and to set limits to the doctrine. Then, it explicates the discussion on R2P that took place following the first coercive intervention under the doctrine's banner, in Libya in 2011. The author concludes that, although the speed with which the international community first embraced R2P was remarkable, many problems have emerged following cases of its practical implementation. The Libyan intervention in particular has had the effect of dividing nations as to its desirability and efficacy. The recent attempt by the government of Brazil to mitigate this disunity with its revised doctrine of the 'responsibility while protecting' seems likely to create just as many problems as it seeks to resolve.

Three final chapters then deal with the complex question of how best to rethink aspects of international justice.

Charles Sampford asks, when Rawls famously declared that justice is the first virtue of institutions, should we say the same thing about international institutions? When Rawls wrote *A Theory of Justice*, theories of strong state sovereignty were at or near their apex. The institutions he then had in mind were internal state institutions. His methodology, imagining individuals who knew nothing about themselves but pretty well everything else, has long been discredited as a source of universal norms. However, it is a good way for those within an existing community to think about the values their institutions should serve – just as Rawls helped to tease out the values that moderate Americans would like to see their governments deliver. As we move to a more globalized world where non-state institutions (international, regional, corporate, NGO and professional) are assuming ever greater prominence and an ever greater role in both governance problems and governance solutions, it is worthwhile considering whether Rawls's dictum should run more widely. In doing so, the chapter revisits the various kinds of justice that might make claim to be the first virtue of institutions as well as the non-justice claims that have been considered (and some might still consider) to outrank justice claims: efficiency, prosperity and survival.

The chapter then examines the same questions for international institutions and other international actors with which they interact. It argues that justice

was generally a secondary, frequently inconvenient value and it still has many competitors. If we are to hope that justice could become the first virtue of international institutions, it needs to be a form of justice that reflects the ideals of, and insights into, justice from the world's cultures and the world's peoples – and especially of their experiences of injustice.

Ahmet Ulvi Türkbağ provides a timely perspective on the idea of justice by contrasting Western with Islamic ideas on its nature and content. He takes St Thomas Aquinas and Al-Ghazali as representative thinkers of the two intellectual traditions. Aquinas proposes that natural law, and through it justice, may be derived from two different sources. The first is divine revelation, the second is through reason. Ghazali suggests similarly, that natural law may be revealed through divine grace. Then a process of reason and evaluation takes place to determine the parameters of the natural laws that may be derived from what has been revealed. Given these commonalities of approach, it is no surprise, the author argues, that the content of natural law in both the Western and Islamic traditions is fundamentally similar.

Finally, *Gábor Sulyok* tackles a vexed contemporary issue in debates about the content of international law. The question he poses is whether general principles of law, which constitute a recognized source of international law, are to be derived principally from international law itself or from an aggregation of legal principles common to the domestic law of nations. The author favours the latter view. He argues that domestic principles of law are incorporated as general principles of law by a customary rule of reception. This rule of reception accepts principles of domestic law as general principles if they meet two criteria. They must be generally recognized among nations and they must be suitable for the government of international relations. The requirement of general recognition does not mean that a principle must be present universally. It is sufficient if it is generally recognized in the world's dominant legal systems. The requirement of suitability is met if the principle concerned is capable of effective application to relations between states or between states and their citizens.

Sulyok observes that general principles derived in this way may still be very broad. To become genuinely effective, therefore, they require detailed elaboration by the International Court of Justice and other international judicial organs. Through elaboration and interpretation, for example, the European Court of Justice has determined that general principles of law that have been incorporated into the law of the European Union now include respect for fundamental rights, a prohibition on discrimination, a requirement of judicial independence and control, and a prohibition on retrospective legislation. It is likely that the primary international judicial bodies will arrive at similar conclusions. Elaborated in this way, general principles of law have made, and are likely further to make, a significant contribution to our understanding of the constituent elements of global justice.

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PART I
International Humanitarian Law