NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES

By offering critical perspectives of normative developments within international law, this volume unites academics from various disciplines to address concerns regarding the interpretation and application of international law in context. The authors present common challenges within international criminal law, human rights, environmental law and trade law, and point to unintended risks and consequences, in particular for vulnerable interests, such as women and the environment. Omissions within normative or institutional frameworks are highlighted. Further, the importance of addressing accountability of state and non-state actors for violations or regressions of minimum protection guarantees is underscored. Overall, it advocates harmonization over fragmentation, pursuant to the aspiration of asserting the interests of our collective humanity, without necessarily advocating an international constitutional order.

CECILIA M. BAILLIET is a professor at the Faculty of Law, University of Oslo, where she is also Deputy Director of the Department of Public and International Law and Director of the Master's Program in Public International Law. Her fields of research include international public law, human rights, refugee law and counter-terrorism.

NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES: FROM THE MARGINS

Edited by CECILIA M. BAILLIET



CAMBRIDGE UNIVERSITY PRESS Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org Information on this title: www.cambridge.org/9781107021853

© Cambridge University Press 2012

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2012

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication Data

Non-state actors, soft law, and protective regimes : from the margins / [edited by] Cecilia M. Bailliet.

p. cm. ISBN 978-1-107-02185-3 (Hardback) 1. International law. 2. Soft law. I. Bailliet, Cecilia. KZ1293.N66 2012 341.2–dc23 2012017171

ISBN 978-1-107-02185-3 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

For Marianne, with whom I share a renewed appreciation of sisterhood due to our parallel experience of motherhood.

and

For Julian, who used to fall asleep to my stories of superheroes and is now trying to save the planet by harnessing the sun.

In honour of our mother, Esther, proceeds of this volume will be donated to a charity supporting education for girls.

CONTENTS

Notes on contributors ix Acknowledgements xiv

1 Introduction 1

CECILIA M. BAILLIET

PART I Protection gaps within international criminal law

- 2 Creating international law: gender as new paradigm 17 CATHARINE A. MACKINNON
- Legal redress for children on the front line: the invisibility of the female child
 32

CHRISTINE BYRON

- 4 International law, gender regimes and fragmentation: 1325 and beyond 53
 FIONNUALA NÍ AOLÁIN
- 5 Who is most able and willing? Complementarity and victim reparations at the International Criminal Court 69

EDDA KRISTJÁNSDÓTTIR

PART II Measuring the impact of non-state actors within international human rights

6 What is to become of the human rights international order in an age of neo-medievalism? 95CECILIA M. BAILLIET viii

CONTENTS

- 7 Productive tensions: women's rights NGOs, the "mainstream" human rights movement, and international lawmaking 125 KARIMA BENNOUNE
- 8 Transnational challenges to international and national law: Norwegian-Pakistani women at the interface 151

ANNE HELLUM

PART III Confronting the challenge of environmental protection, climate change and sustainable development: new actors and shifting norms

- 9 The creation of the international law of climate change:
 complexities of sub-state actors 179
 HARI M. OSOFSKY
- International environmental law and soft law: a new direction or a contradiction? 200
 SUMUDU ATAPATTU
- 11 Assuming away the problem? The vexing relationship between international trade and environmental protection 227 REBECCA M. BRATSPIES
- 12 *Quo vadis*, Europe? The significance of sustainable development as objective, principle and rule of EU law 254 BEATE SJÅFJELL
- Conclusion: centrality and marginality in international law 281
 HILARY CHARLESWORTH

Index 289

NOTES ON CONTRIBUTORS

SUMUDU ATAPATTU is the Associate Director of the Global Legal Studies Center and Senior Lecturer at University of Wisconsin Law School. She teaches international environmental law, and is author of *Emerging Principles on International Environmental Law* (2006). Dr Atapattu holds an LLM (public international law) and a Ph.D. (international environmental law) from the University of Cambridge (UK); and is an attorney-at-law of the Supreme Court of Sri Lanka. She is also the Lead Counsel for Poverty and Human Rights at the Center for International Sustainable Development Law in Montreal, Canada. Before moving to the US, she was an associate professor at the Faculty of Law, University of Colombo and a consultant to the Law & Society Trust, Colombo.

CECILIA M. BAILLIET Professor, Deputy Director of the Department of Public and International Law, and Director of the Master's Program in Public International Law at the University of Oslo. She has a doctoral degree in law from the University of Oslo and a combined JD/MA (honours) degree from the George Washington University Law School & Elliott School of International Affairs. She has served as consultant to national and international organizations, and her research has been the basis for the creation of guidelines in various institutions. Her research addresses the vulnerability of humanity, examining the cross-fields of international public law, human rights, women's law, refugee law, humanitarian law and counter-terrorism. Among her publications are: *Security: A Multidisciplinary Normative Approach* (2009) and *Cosmopolitan Justice and Its Discontents* (co-edited with Katja Franko Aas, 2011).

KARIMA BENNOUNE is a professor of law and Arthur L. Dickson Scholar at the Rutgers School of Law, Newark (USA). She is a former legal adviser for Amnesty International, and a former member of the Board of Directors of Amnesty International – USA. Bennoune served as a Center for Women's Global Leadership delegate to the NGO Forum at the Fourth World х

NOTES ON CONTRIBUTORS

Conference on Women in Beijing. Her article, 'Terror/Torture' (*Berkeley Journal of International Law* (2008)), was designated one of the top-ten global security law review articles of 2008 by Oxford University Press. In 2011, she won the Chancellor's Distinguished Research Award at Rutgers University, Newark (USA). She is currently writing a book about Muslim opponents of fundamentalism.

REBECCA M. BRATSPIES is a professor of law at the CUNY School of Law, New York City, where she teaches international law, environmental law, administrative law and property. She has published widely on regulation of genetically modified organisms, and on the intersection of human rights and environmental regulation. Her recent work focuses on how the role of legal systems can promote sustainability. She is a research scholar with the Center for Progressive Reform, an appointed member of the ABA Standing Committee on Environmental Law, and a vice-chair of the ABA Section on Energy, Environment and Resources. She holds a BA in Biology from Wesleyan University and a JD *cum laude* from the University of Pennsylvania.

CHRISTINE BYRON joined Cardiff Law School in September 2008 and teaches public international law, human rights law and criminal law at an undergraduate level and international humanitarian law at a postgraduate level. Prior to joining Cardiff, she worked as a lecturer in law at the University of Manchester. She is a graduate in law from Newcastle University and received her LLM and Ph.D. from the University of Liverpool. After completing her master's degree, she spent six months working as a law clerk at the International Criminal Tribunal for the former Yugoslavia, before commencing her doctorate. Her monograph on war crimes and crimes against humanity in the Rome Statute of the International Criminal Court, which is based on her doctoral thesis of the same name, has recently been published. She has been involved in the training of humanitarian workers and military lawyers, both in this country and abroad, for several years.

HILARY CHARLESWORTH is an Australian Research Council Laureate Fellow and Distinguished Professor of International Law and Human Rights at the Australian National University, Canberra. She has written extensively on feminist analysis of international law, including with Christine Chinkin *The Boundaries of International Law: A Feminist Analysis* (2000). Together with Christine Chinkin, she was awarded the Goler T. Butcher Medal of the American Society of International Law in 2006 for

NOTES ON CONTRIBUTORS

xi

her contribution to the development of international human rights law. She is judge ad hoc in the ICJ in the *Whaling in Antarctica* case.

ANNE HELLUM is a lawyer and anthropologist who received a Doctor Juris degree from the University of Oslo. She is Professor at the Department of Public and International Law at the University of Oslo and Director of the Institute of Women's Law, Child Law Discrimination and Equality Law. Her research cuts across human rights law, discrimination law and anthropology of law. She has written extensively on the relationship between women's human rights and legal pluralism in Zimbabwe, South Africa, Pakistan and Norway. Her most recent publications are: Human Rights, Gendered Realities and Plural Legalities (with Julie Stewart, Amy Tsanga et al., 2007); Discrimination and Equality Law (with Kirsten Ketscher, 2008); and From Transnational Relations to Transnational Laws: Northern European Laws at the Crossroads (with Shaheen S. Ali and Anne Griffiths, 2010). She is the recipient of a research grant from the Norwegian Research Council's Global Partner programme where she directs the project Gender, Human Rights and Water Governance, a comparative research on the human right to water in South Africa, Malawi, Zimbabwe and Kenya.

EDDA KRISTJÁNSDÓTTIR received her law degree from the New York University School of Law in 1998. She clerked at the International Court of Justice and subsequently worked as legal counsel at the Permanent Court of Arbitration, for, among others, the Eritrea–Ethiopia Claims Commission. Since 2005, she has worked at the University of Amsterdam Department of International Law, developing and managing the Oxford University Press online database International Law in Domestic Courts, and teaching public international law and dispute resolution. Ms Kristjánsdóttir is a member of the International Law Association's Committee on Reparations for Victims of Armed Conflict.

CATHARINE A. MACKINNON, the Elizabeth A. Long Professor of Law and long-term James Barr Ames Visiting Professor of Law at Harvard Law School, specializes in sex equality issues under international and constitutional law. She pioneered the legal claim for sexual harassment and, with Andrea Dworkin, created ordinances recognizing pornography as a civil rights violation. Representing Bosnian women survivors of Serbian genocidal sexual atrocities, Professor MacKinnon won with co-counsel a damage award of \$745 million in August 2000 in *Kadić* v. *Karadžić*, which first recognized rape as an act of genocide. In addition to scholarly works that xii

NOTES ON CONTRIBUTORS

include: Sex Equality (2001), Toward a Feminist Theory of the State (1989), Only Words (1993), Women's Lives, Men's Laws (2005) and Are Women Human? (2006), she has published widely in journals and the popular press. Professor MacKinnon holds a BA from Smith College, a JD from Yale Law School, and a Ph.D. in political science from Yale. She has taught at Yale, Chicago, Harvard, Osgoode Hall, Stanford, Basel and Columbia, among others, and spent a year at the Institute for Advanced Study at Stanford. Professor MacKinnon practises and consults nationally and internationally, and works with Equality Now, an NGO promoting international sex equality rights for women, and the Coalition for Trafficking in Women. She has served as Special Gender Adviser to the Prosecutor of the International Criminal Court since November 2008.

FIONNUALA NÍ AOLÁIN is concurrently the Dorsey and Whitney Chair in Law at the University of Minnesota Law School and a professor of law at the University of Ulster's Transitional Justice Institute in Belfast, Northern Ireland. She is co-founder and Associate Director of the Institute. She has previously been Fellow at the Institute of Advanced Studies Hebrew University (Jerusalem) (2011–12); Visiting Scholar at Harvard Law School (1993–94); Associate-in-Law at Columbia Law School (1994–6); Visiting Professor at the School of International and Public Affairs, Columbia University (1996–2000); Associate Professor of Law at the Hebrew University in Jerusalem, Israel (1997–9); and Visiting Fellow at Princeton University (2001–2). She has published extensively in the fields of emergency powers, conflict regulation, transitional justice and sex-based violence in times of war.

HARI M. OSOFSKY is an associate professor with tenure and the 2011 Lampert Fesler Research Fellow at the University of Minnesota Law School. She is also the Associate Director of Law, Geography & Environment of the Consortium on Law and Values in Health, Environment & the Life Sciences and an affiliated faculty member in geography and conservation biology at the University of Minnesota. Osofsky has published a co-edited book on climate change litigation (Cambridge University Press, 2009), and has received peer recognition from both legal and geography scholars for her recent articles.

BEATE SJÅFJELL, Professor dr. juris at the University of Oslo, Faculty of Law, is the author of *Towards a Sustainable European Company Law:* A Normative Analysis of the Objectives of EU Law, with the Takeover Directive

NOTES ON CONTRIBUTORS

xiii

as a Test Case (2009). Beate is the project leader for the research project 'Sustainable Companies', and head of the Company Law Research Group at the Faculty of Law in Oslo. Beate has written a number of papers on EU company and securities law and the integration of sustainable development, including: 'Political Path Dependency in Practice: The Takeover Directive' (*Yearbook of European Law* (2008)); 'Internalizing Externalities in EU Law: Why Neither Corporate Governance nor Corporate Social Responsibility Provides the Answers' (*George Washington International Law Review* (2010)).

ACKNOWLEDGEMENTS

This book originated from the conference 'Creation of International Law: An Exploration of Normative Innovation, Contextual Application and Interpretation in a Time of Flux', hosted by the Department of Public and International Law of the University of Oslo, 6–7 August 2010. This venue brought together scholars from different sub-fields of international law. For several, it was the first time they had met each other. The presentation of research across disciplines proved stimulating and challenging, as we identified common concerns. We sought to promote the establishment of new cross-field networks and exchange of ideas, commencing with publication of this volume.

I wish to extend my warmest thanks to Professor Aslak Syse, Director of the Department of Public and International Law, Professor Ole Kristian Fauchald, Head of the Research Group on the Internationalization of Law, and Øyvind Henden, Administrative Head of Department, for understanding the importance of the conference and offering their generous support. We acknowledge the kind, practical assistance provided by Elisabeth Wenger-Hagene and Linn Bævre to the participants at the conference. The authors are indebted to the scholars who graciously offered commentary on initial drafts of the chapters, including Andreas Føllesdal, Ole Kristian Fauchald, Nobuo Hayashi, Simon O'Connor, Malcolm Langford, Christoffer Eriksen and Christina Voigt.

I also wish to extend appreciation to the commissioning editor at Cambridge University Press, Finola O'Sullivan for enabling this volume to come to fruition.