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Anna Spain Bradley
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PART I

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Introduction

A conscientious writer must direct his suggestions to what, after careful examination of political reality, may be considered as being possible tomorrow, although it, perhaps, seems not yet possible today. Otherwise, there would be no hope for progress.

Hans Kelsen[1]

1.1 Child in Gaza. Credit: Abid Katib/Staff/Getty Images

Some years ago, I was invited to a fancy dinner in an elegant city full of international law elites. Gathered at the table were a few current and former judges from international courts, a famous international arbitrator or two, renowned international legal scholars, and the odd family member. The mood was celebratory and the wine flowed. Conversations in French, German, Spanish, and English hung in the air above the long, candlelit table. As a guest of an invited guest, I was not an insider, so I played the part of eager and respectful listener. At least until the end of the evening.

As the dessert cheese arrived, we shuffled seats and I ended up next to the guest of honor, whom I shall call Z. Our polite conversation soon escalated

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into tense debate. We were discussing the International Court of Justice (ICJ) and its tricky role in interpreting international law within the confines of each case while also upholding fundamental principles of justice. I voiced my disappointment in the ICJ's history of dealing with the crime of genocide.

Things got heated when our conversation turned to the case that the Democratic Republic of the Congo (DRC) brought against Rwanda in 2002. The DRC alleged that Rwanda had committed "massive, serious and flagrant violations of human rights and of international humanitarian law," including genocide along the border between the two nations.[2] If the allegations were true, it meant that Rwanda had become the perpetrator of genocide only a decade or so after people there were its victim. The ICJ decided that it lacked the jurisdiction to hear the case on the merits based on various important but complex legal grounds having to do with Rwanda taking reservations to the Genocide Convention.[3]

Although well-reasoned, the court's decision struck me and many others as a moral abdication. How could the ICJ – the World Court – not have jurisdiction to hear a case alleging the most serious of all international crimes? Z, however, held steadfast that the court had reached the proper decision.

"But it's genocide!" I said, pressing my case. "Didn't that matter? Didn't that upset you?"

Z responded that any emotions that ICJ judges had about the case were inconsequential. The court decided the case in the best way it could based on available law.

"What would you have the court do?" Z asked me in a tone of barely disguised exasperation.

I decided to drop the matter. After all, Z was a sitting judge on the International Court of Justice.

Although I had no way of knowing it then, this book was born that night over dinner. My disagreement with Z stayed with me and I started to question the near-universal assumption that law and emotion must be kept apart. You see, Z believed, as do many judges, arbitrators, diplomats, lawyers, and other elite decision makers in international law, that an individual in such a role can choose to be impartial. That people should – and are able to – set aside any personal convictions, beliefs, feelings, and biases when deciding a case, relying solely on the applicable law and facts before them. I know this because it is what some decision makers have stated or shared.[4] It is also what I, alongside many other students, was taught during the first year of law school. To think like a lawyer means approaching matters with rational thought and a "cool" head.

The origins of this prevailing view, that passions are the enemy of good lawyering and judging, are often attributed to Aristotle.[5] In writing about whether "the best law or the best man should rule"[6] and how a ruler should

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make decisions, Aristotle claims that "the rule of law is preferable to that of any individual," and "[o]n the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law."[7] It was in this context that his now famous words "[t]he law is reason unaffected by desire" appear.[8] This Aristotelian view has prevailed over time and throughout many legal traditions. International law is no exception.

But is this idea, that humans can put aside emotion, empathy, bias, and beliefs when making choices, accurate? More than that, is it even possible? Is there any basis in science for the assumption that we can remain in full control of our thoughts and decisions? Can elite decision makers in international law (and elsewhere) make judgments, assessments, and other choices by rational thinking, divorced from feeling or belief? Moreover, why does this yet unproven idea persist?

My observations in my career and in my life leave me skeptical. Whether as a young assistant at the US Environmental Protection Agency observing a high-level multilateral negotiation, a State Department lawyer turned US delegate at the United Nations in Geneva, or as legal counsel to a state party in international arbitral proceedings at the Permanent Court of Arbitration in The Hague, I have been privy to high-level decision making by international law elites. Factors other than reason were always at play. On the bench or around the negotiating table, people present their professional selves. But then they go home. They live. Their lived experience creates empathy, fear, love, and bias. These factors are ever present, in their brains and within their bodies, when they are making judgments, decisions, assessments, and findings.

My investigations as a scholar support this skepticism. As this book explores, evidence-based insights from neuroscience, cognitive science, and related research reveal that human cognition and human choice are complex endeavors.[9] We cannot simply choose to ignore our emotions or other Aristotelian desires when we engage in cognitive activity that produces a choice.[10] Of course, we can't blame Aristotle. Neuroscience didn't exist back then.[11] But we can use new knowledge to update old ideas and to recognize that human choice is more complex than international law presently takes into account. This is the aim and ambition of this book.

STUDYING HUMAN CHOICE IN INTERNATIONAL LAW

We humans are inherently complex creatures. In the past few decades, research has emerged that reveals just how complex we are. Work in fields such as neuroscience, cognitive studies, psychology, and behavioral economics has led to a fuller understanding of humans, our brains, and our behavior.

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Herein, the study of human choice is illuminating how we make the choices we do.[12] We now know that there is no unitary process in our brain for making a choice. Instead, we can invoke different parts of our brain at different times. The cognitive processes we employ to reach a choice may invoke our emotions, experiences, and memories. In other words, choice is much more than the product of thought or judgment. We also know that people tend to make irrational choices in ways that are predictable. Explicit bias and implicit bias are real. Insights like these reveal that human choice is more complex than previously understood. Such new knowledge helps us refine old ideas about who we are and how we decide.

I believe that scientific knowledge about human choice can and should inform the study and practice of international law.[13] Accordingly, this book's central purpose is to introduce the study of human choice to the study and practice of international law. There are existing inquiries into decision making and human behavior in international law that have employed insights from behavioral science, psychology, sociology, mathematics, and computer science.[14] The novelty of this project is that it focuses on understanding human choice through neuroscience, in addition to these aforementioned disciplines.

To do so, the book introduces to international law insights and evidence from neuroscience and cognitive studies about how human beings make choices in the brain. Herein, I first investigate how people make choices, employing neuroscience research that relies on brain-imaging studies and animal studies; research from psychology, which utilizes clinical research with human subjects; behavioral science; and more, which I explain in further detail in Chapter 2.

Next, I aim to bridge knowledge about human choice to understanding how people, serving in elite roles in international legal spaces, create and shape international law through the choices they make. This includes the fifteen people who serve as judges at the ICJ in The Hague, the twelve representatives who sit around the semi-circular table at the UN Security Council in New York City, and powerful political leaders, diplomats, and staff who serve unseen yet important roles in key global organizations. Herein, I engage existing conversations in international law, international relations and decision-making literatures. This includes the examination of decision-making practices of international legal actors in certain contexts such as international courts or the United Nations,[15] explorations of state behavior and international law through a variety of methodologies,[16] and investigations into the very nature of what international law is.[17] This human-choice approach considers how those operating under the imprimatur of international law influence what it is.

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Throughout this book, my frame of analysis utilizes scientific insights about human choice and then asks what international law should make of the evidence, not the other way around. International legal scholarship commonly considers how international law affects people. This book frames the conversation around understanding how people affect and shape international law. In aiming to bring the study of human choice and the study of international law together, I acknowledge – indeed, affirm – that there are many areas of relevant inquiry that I do not cover. The study of human choice is vast, as is the study of international law. Space is limited and readers' attention is finite. I ask more questions that I can answer and future scientific breakthroughs will continue to update what is known. These caveats aside, I hope the pages that follow will provide a solid scientific foundation for understanding the rich complexities of human choice and compelling insights into how such complexities shape international law.

FOUNDATIONS, ASSUMPTIONS, AND IMPLICATIONS

Any book about international law should be clear about how it conceives international law. As I define it here, international law is a set of enforceable rules that nations, referred to hereafter as states, have consented to uphold and to be bound to follow.[18] These rules govern relations between states, such as the general prohibition on the use of force, and create rights owed to and obligations owed by states.[19] Historically, states are seen as the central actors in international law.[20]

International law is also more than this. It is a legal system comprised of norms, beliefs, policy, politics, and institutions.[21] International law is the outcome or product of the decision-making processes by which it was made.[22] Here, I extend the view taken by former President of the ICJ, Judge Rosalyn Higgins that, "international law is the entire decision-making process . . . made by authorized persons or organs, in appropriate forums, within the framework of certain established practices and norms."[23] International law is all these things: a set of rules, a legal system with norms, and the result of decision-making processes.[24]

International law involves people. In this book, I argue that whatever else international law is, it is also inextricably linked to human choice. To some, this assertion may seem self-evident. Of course, people make law. Legal process theorists have long argued such. Here, I take these instincts and insight further. At every turn, international law involves the choices certain people take, making a human-choice approach to international law valuable. I use the term *choice* to describe the diverse array of brain activity involved in choosing, which includes

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thought, decision making, judgment, assessment, and more.[25] Choice occurs when a person, serving as a judge, determines the meaning of a general principle to decide if the crime of genocide has occurred. Choice occurs when a diplomat relies on international law, alongside political considerations, when deciding the terms of a trade deal. Choice occurs when heads of state decide to create and enter into a human rights treaty, perhaps influenced by advocates, activists, and public opinion. Even when nations decide, those decisions are made by people acting as agents of the state.

A human-choice approach to understanding international law disrupts commitments to old and outdated understandings. For example, this book asks us once again to question the prevailing view that international law is the product of state behavior. It asks us to reconsider continued reliance on a realist account of international law that often employs rational-choice theory to understand state behavior.[26]

More fundamentally, this project brings the study of international law into better alignment with the study of human behavior. A human-choice analysis of international law reveals why we no longer need to treat international law as if it were superhuman. Instead, we may come to see that legal rules come about because of a caring ambassador or an angry legal advisor or a brilliant but tired lawyer who has kids and only had five hours of sleep last night. We understand that it is not just nations but particular political administrations that are responsible for grave breaches of international law, such as the Bush administration's invasion of Iraq, or Iraq's illegal invasion of Kuwait under Saddam Hussein. Rarely do we speak of these events as being the outcome of choices made by particular people at a particular moment in time. But they are. And we should.

This book's final and most important aim is educational. Centering human choice as an integral part of what international law is places people at the heart of the story. It calls for a cultural shift in how scholars and practitioners understand and take part in the field of international law. By clarifying the scientific realities of human choice, this book hopes to humanize international law and illustrate how law is shaped by the people empowered to make it. By retrieving the human dimension of choice, this book asserts the normality of emotions and beliefs, alongside thought, in the hallowed halls of international legal institutions. These insights ask us to destigmatize all that makes us human.

ORGANIZATION OF THE BOOK

In the chapters that follow, I explain how human choice works, based on scientific evidence and insights, and why such information is relevant to understanding what international law both is and, perhaps more important,

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can become. The book contains eight chapters, divided among three parts. Part I lays the foundation and framework for the book's central claim that human choice shapes international law.

Chapter 2 presents the book's central thesis – that whatever else international law is, it is also human choice – through a close consideration of the human choices that led to the creation, use, and permissible legality of nuclear weapons. This inside story illustrates that international law and human history have been shaped by choices that a particular person made at a particular moment in time. Human choice has played a significant, yet underexamined, role in shaping international law. The chapter concludes by situating this analysis within relevant theories and frameworks of choice in international law.

Chapter 3 explores the scientific research investigating human choice. It introduces key findings on the ways that thought, empathy, emotion, and bias inform human cognition associated with choice. The chapter offers a neuroscience-driven framework for understanding human choice, while also considering key insights from cognitive studies, psychology, and related fields. It then considers how this evidence-based reality might challenge existing understandings and theories of decision making in international law.

Part II of the book grounds this human-choice approach in three contexts of international legal decision making: the ICJ, or World Court; the UN Security Council; and human rights. Chapter 4 considers how people who serve on the ICJ make their judgments. As the judicial arm of the United Nations, the ICJ is one of the most powerful institutions in the world. Established in 1945, it shapes international law through judicial opinions that decide legal disputes submitted by nations throughout the world. In each case, some dealing with incredibly complex and charged topics concerning genocide or the legality of nuclear weapons, the court's judgment is determined by the choices made by the fifteen women and men who serve on the court. This chapter offers a close examination of decision making at the ICJ at the individual level through a combination of historical analysis and original interviews with current and former ICJ judges. It also considers the *DRC* v. *Rwanda* genocide case and discusses how the court's majority opinion in that case was at odds with the separate opinion. Insights from judges, who discuss candidly how they make legal choices, deepen and contextualize the chapter's analysis and illustrate how judges are subject to the same cognitive limits and possibilities that impact us all.

Chapter 5 examines the human elements of decision making at the UN Security Council. Drawing on interviews with council personnel, it recounts key decision moments including the council's authorization of the use of force

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in Libya and reveals how decision makers were influenced by their values and beliefs. The chapter then connects such decisions to research on the cognitive aspects of choice in our brains. Analyzing such key council decisions through a cognitive lens better enables us to appreciate how law and norms influence those tasked with making tough decisions about international peace and security.

Chapter 6 analyzes elements of human choice by international legal decision makers in a variety of human-rights contexts. Specifically, I consider how emotion is, perhaps, more accepted in these spaces and examine how emotive dynamics may influence legal choices in human rights. The chapter further explores how to think about fear, shame, and bias alongside compassion and kindness in an area of international law that, by design, exists to uphold the values of dignity, freedom, equality and nondiscrimination.

Part III of the book considers the implications and limitations of a human-choice approach to international law. Chapter 7 argues for a culture shift in international law that better aligns the duties and expectations international law requires with the realities of human choice. I discuss how professional cultures and expectations in international law may ask too much or too little of decision makers by remaining uninformed about human choice. I then consider what embracing human realities such as empathy, emotion, and bias might mean for the culture of international law and consider potential benefits and challenges. The chapter concludes by sketching out new approaches to international legal decision making that could shift the culture of choice in a better direction.

The book concludes in Chapter 8 by considering how we get from the international law we have to the international law we will need in the future. As an instrument for international peace, security, and cooperation, international law has long relied on an international order based on the authority of states. Yet, current and future threats including those arising from climate change, pandemics, cyberwarfare, and terrorism, create challenges that international law is, at present, ill-equipped to meet. These and other future realities call on international law to evolve to be capable of directly engaging the needs and interests of people in addition to states. This chapter takes up these questions in three time periods: international law as it was, international law as it is, and international law as it needs to be. The concluding message is that in order for international law to evolve, those within it need to evolve with it. Understanding human choice dimensions of decision making in international law helps us reimagine the international law we need for our future world.

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