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## Mobilising International Law as an Instrument of Global Justice: Introduction

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### Globalisation and the Emergence of Global Justice

Globalisation is a hotly debated topic. There is a plethora of literature on the subject. Much of the debate is oriented around the economic and social dimensions of globalisation, leading to a situation in which, despite massive increases in global capital and foreign direct investment, previously existing inequalities have been exacerbated.<sup>1</sup> According to this literature, inequalities at global and national levels have led, correspondingly, to low wages, poverty, pressures to migrate, human insecurity, and ultimately global insecurity.

A prominent commentator on the topic, Saskia Sassen, has observed that the processes of globalisation cut across traditional institutions, including legal institutions. This, she has argued, 'does not mean that the old hierarchies [have] disappear[ed], but rather that rescalings [have] emerge[d] alongside the old ones'.<sup>2</sup> Economic globalisation in particular, she argued, has produced a process to 'negotiate the intersection of national law and the activities of foreign economic actors', a process that has been 'shaped and driven by often thick and complex

<sup>1</sup> Bernhard Gunter and Rolph van der Hoeven, 'The Social Dimension of Globalisation: A Review of the Literature', *International Labour Review*, 143 (2004), 7–43. And more recently: Alan Alexandroff and Andrew Cooper, eds, *Rising States, Rising Institutions: Challenges for Global Governance* (Washington: Brookings Institution, 2010); Andrew Gamble, *The Spectre at the Feast: Capitalist Crisis and the Politics of Recession* (Basingstoke: Palgrave, 2009); Gilford John Ikenberry, 'The Future of Liberal World Order', *Japanese Journal of Political Science*, 16 (2015), 450–5; Charles Kupchan, 'The Normative Foundations of Hegemony and the Coming Challenge to Pax Americana', *Security Studies*, 23 (2014), 219–57; Sijbren de Jong, Rem Korteweg, and Artur Usanov, eds, *New Players, New Game? The Impact of Emerging Economies on Global Governance* (Amsterdam: Amsterdam University Press, 2013); Thomas Weiss, *Global Governance: What? Why? Whither?* (Cambridge: Polity, 2013); Des Gasper and Thanh Dam Truong, eds, *Transnational Migration and Human Security* (Heidelberg: Springer, 2011).

<sup>2</sup> Saskia Sassen, 'Globalization or Denationalization?' *Review of International Political Economy*, 12 (2003), 1–22 at 6.

agendas . . . and an elaborate body of law'.<sup>3</sup> Furthermore, the content of this body of law, which has emerged over a relatively short period of just a few decades, has changed the traditionally 'exclusive territorial authority' of the nation state, 'to an extent not seen in earlier centuries'.<sup>4</sup> In practice, corporate protection has increased as a result of this legalisation<sup>5</sup> and entrenched corporate legal personality. Meanwhile, social protection has been reduced through legal measures that are produced through a liberal, democratic rule of law system, or what we refer to in this chapter as liberal lawmaking. For example, liberal lawmaking tends to prioritise property rights over social and economic rights, de-emphasises government regulation of the market, and is reluctant to interfere in matters that a judge determines to be primarily falling under another state's jurisdiction. This system of liberal democracy and lawmaking has furthermore been reproduced in other countries, and is indeed perfectly functional in authoritarian regimes.<sup>6</sup> Hence, civic actors across the globe have been left with few other avenues for social and economic redress than, often very confrontational, claims directed against both states and corporations. All in all, the developments sketched above have had a number of legal, social, and economic consequences that are the subject of critical attention in this book.

First, liberal lawmaking has led to what Koskenniemi has termed a 'fragmentation' of international law whereby lawyers must continually refine their understandings of the ever-changing nature and purpose of law.<sup>7</sup> This includes the ways in which international legal rules have been given expression at the domestic level. By extension, increased legalisation has spawned a plethora of what Koskenniemi in Chapter 2 of this book refers to as 'legal vocabularies'. In particular, human rights, as a legal normative project, comprise one of the vocabularies in international law that are often at odds with some aspects of liberal legal regimes. As discussed by nearly all contributors to this book, these tensions are especially apparent when human rights are instrumentalised, either by state or civic actors, and acquire a more explicitly political character. A positive illustration of this is the way in which human rights vocabulary has been 'socialised' or 'translated' into locally relevant contexts through mobilisation by civic

<sup>3</sup> Ibid. 7.

<sup>4</sup> Ibid. 8.

<sup>5</sup> Subhabrata Banerjee, 'Corporate Social Responsibility: The Good, the Bad and the Ugly', *Critical Sociology*, 34 (2008), 51–79 at 54.

<sup>6</sup> Ibid. 70.

<sup>7</sup> Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart, 2011).

actors.<sup>8</sup> For example, as discussed in Chapter 10 by Oomen, municipal governments aware of social challenges – such as hate speech by right-wing political groups – are uniquely positioned to realise human rights protection in a culturally relevant manner, such as by preventing municipal funding to these groups. But international vocabularies also have the negative potential to obscure local cultural notions of justice and replace them with 'Western'-oriented notions of justice. A good example of the latter is the way in which the much-lauded *Gacaca* courts in Rwanda, billed as 'local' or 'customary' justice mechanisms, were essentially framed by Western donors and consultants.<sup>9</sup> Furthermore, some legal vocabularies have at best been rather impotent, and at worst played a role in subordinating people in developing countries to conquest and domination. The latter has led to a fundamental questioning of international law and its liberal underpinnings by scholars associated with Third World Approaches to International Law, or 'TWAIL'.<sup>10</sup>

The dysfunction of international law in addressing human rights concerns by way of concrete enforcement measures is one of the most challenging aspects of mobilising international law for global justice that the chapters in this book explore, at multiple levels of enforcement and in relation to different themes. Human rights treaties are often not self-executing. States may ratify human rights treaties as a symbolic gesture in order to avoid international criticism. Lax monitoring and weak enforcement mechanisms for non-compliance permit states to 'get away with continued human rights violations'.<sup>11</sup> Moreover, while formal institutions at national and international levels have largely fallen short in operationalising human rights – including the pursuit of international

<sup>8</sup> Thomas Risse, Steve Ropp, and Kathryn Sikkink, eds, *The Power of Human Rights: International Norms and Domestic Change* (New York: Cambridge University Press, 1999); Sally Merry, 'Translating Human Rights and Local Activism: Mapping the Middle', *American Anthropologist*, 108 (2006), 38–51.

<sup>9</sup> Barbara Oomen, 'Donor Driven Justice and Its Discontents: The Case of Rwanda', *Development and Change*, 36 (2005), 887–910.

<sup>10</sup> See e.g. Makau Mutua, 'What Is Twail?' American Society of International Law, Proceedings of the 94th Annual Meeting (2000), 31–9; Antony Anghie, 'TWAIL: Past and Future', *International Community Law Review*, 10 (2008), 470–81; James Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography', *Trade, Law and Development*, 3/1 (2011), 26–64; M. Sornarajah, 'On Fighting Global Justice: The Role of a Third World International Lawyer', *Third World Quarterly* 37/11 (2016), 1972–89. But see also S.G. Sreejith, 'An Auto-Critique of TWAIL's Historical Fallacy: Sketching an Alternative Manifesto', *Third World Quarterly*, 37/11 (2016), 1511–30.

<sup>11</sup> Oomen (2005), 927.

criminal justice, one of the specific themes explored in this book – the possibilities for creative responses by civic actors using the law to support broader forms of legal mobilisation have correspondingly increased. Examples include the capacity of non-governmental organisations (NGOs) to interact with the International Criminal Court, either by bringing evidence of crimes to the attention of the prosecutor, by supporting individuals in witness protection programmes, or by offering legal and logistical support to victims who wish to participate in hearings. In that space, law is wielded in a strategic way to promote progressive structural change.<sup>12</sup>

Second, liberal lawmaking has created particular challenges for inter-governmental regulators seeking to end problematic practices taking place on a global scale, such as the financing of international terrorism<sup>13</sup> or international child abduction. The latter receives detailed attention in this book in Chapter 5 by Maja Groff. International regulators seeking to end such practices have found themselves managing tensions between diverse national legal systems. They have also had to recognise the need for more proactive human rights approaches to guide the direction of global regulation and resist bureaucratic solutions to complex social problems that lie at the core of such problematic practices. Furthermore, the highly contested relationship between national and international legal orders is a key challenge in enforcing international law. While indeed this observation as such is not particularly new, these contestations have become especially visible in the efforts of national regulators to address other global issues, such as transboundary corruption. As discussed by Abiola Makinwa in Chapter 6 of this book, the enforcement of transboundary corruption has revealed not only the challenges of selective national enforcement of anti-corruption laws, but also a very patchy record of corporate self-regulation that has singularly failed to address the social and economic factors driving corruption.

Third, liberal lawmaking has generated a number of vague but rhetorically significant and globally enforceable doctrines and principles. Paralleling the retreat of the state to directly regulating individual or corporate misbehaviour, civic actors who have been forced to make claims themselves have instrumentalised these doctrines and principles at multiple jurisdictional levels. This has created possibilities for

<sup>12</sup> Jeff Handmaker, 'Peering through the Legal Mobilisation Lens to Analyse the Potential of Legal Advocacy', presentation in Leiden Socio-Legal Series, Leiden University, 2017.

<sup>13</sup> Nathanael Ali, 'Dynamism and the Erosion of Procedural Safeguards in International Governance of Terrorism', PhD thesis, Erasmus University, Rotterdam, 2015.

individuals, for example, military commanders and even corporate managers, such as board members, to be held directly responsible for serious international crimes. Such crimes are prosecutable not only through international criminal courts, but also by national authorities, and even through civil claims on the basis of the principle of universal jurisdiction.<sup>14</sup> In such instances, the focus of international law has dramatically shifted away from the state (although not entirely of course) and has more explicitly engaged individuals who had hitherto been regarded as passive 'objects' of international law. While civic participation in international (criminal) law has expanded, the retreat of the state has been matched by a general reluctance of, and a high degree of selectivity by, states in exercising jurisdiction over international crimes.<sup>15</sup> Accordingly, this tendency towards cosmopolitanism or global constitutionalism has been at odds with the tendency of some, often quite powerful, states to pursue an exceptionalist agenda that negates these universal principles and is premised on a claim of hegemonic legitimacy by these states. For example, Richard Falk has criticised the United States of America for exercising forceful military intervention without sanction of the UN Security Council, arguing that this is in contravention of international law, and has led to double standards being applied.<sup>16</sup> Similarly, Saba in Chapter 5 of this book explains how Israel's extreme use of force against civilians, negating principles of protection enshrined in the Geneva Conventions, reveals its profound disregard for international legal rules.

Finally, as the line between international and national becomes increasingly difficult to distinguish, it is becoming clear that the consequences of liberal lawmaking are more acutely felt 'at home', including at the level of the city. The conventional functioning of multiple vocabularies in international law through national (state-level) institutions and international organisations have led to normative contestations, bureaucratic solutions, and inconsistent enforcement. By contrast, the forces of globalisation have had a more positive influence from a municipal standpoint, where in some cases there is greater respect for international law norms than at the national level. Challenging Koskenniemi's

<sup>14</sup> Jeff Handmaker and Liesbeth Zegveld, 'Universal Jurisdiction: State of Affairs and Ways Ahead. A Policy Paper', Working Paper 532 (2012), International Institute of Social Studies, Erasmus University, Rotterdam. <https://repub.eur.nl/pub/31137>

<sup>15</sup> Robert Cryer *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005).

<sup>16</sup> Richard Falk, 'Legality and Legitimacy: The Quest for Principled Flexibility and Restraint', *Review of International Studies*, 31 (2005), 33–50.

observations that the power of human rights tends to be lost when they are instrumentalised by public authorities, Chapter 10 by Oomen reveals that, in contrast to national government authorities that tend to 'rank' rights in accordance with what is all too often a security agenda, human rights-based approaches are being incorporated directly into some municipal policies and programmes, including the symbolic ratification of international human rights treaties that national governments may refuse to ratify.

The liberal lawmaking project has had a number of consequences for those engaged in mobilising international law for global justice. Fragmentation in international law has been matched by a proliferation of legal vocabularies. International regulators have struggled to counter specific practices (such as child abduction and foreign corruption) that cause great harm on a global scale. Vague but rhetorically significant and globally enforceable concepts, such as the Responsibility to Protect and obligations to prosecute international crimes, are rarely enforced by states. So what is the potential for mobilising global justice in a world of liberal states? How indeed can the concept be understood?

### The Elusive Concept of (Global) Justice

Just as is the case with the term globalisation, notions of justice, and even more so global justice, have been elusive and difficult to define. Thomas Pogge and others have attempted to do so, emphasising a pro-poor orientation that promotes rights-based approaches and takes issue with the influence of multinational corporations and other powerful interests in international policymaking and governance.<sup>17</sup> However, Pogge framed his definition of global justice in Rawlsian terms, falling short of fundamentally critiquing the liberal underpinnings of lawmaking that trigger the need for global justice, such as the liberal legal characterisation of corporations as legal persons.

Hence, Pogge's notion of global justice is associated with liberal articulations of social justice, drawing broadly on the work of Rawls that stresses social and economic inequalities.<sup>18</sup> Liberal endorsers of social justice often pay attention to promoting the interests of the poor through realising access

<sup>17</sup> Thomas Pogge, *Global Justice* (Oxford: Blackwell, 2001); Florian Wettstein, *Multinational Corporations and Global Justice* (Stanford: Stanford University Press, 2009).

<sup>18</sup> *Ibid.*

to justice and are inspired by iconic figures such as Nelson Mandela, who also endorsed a liberal vision of social justice.<sup>19</sup>

The United Nations approach to social justice was recently rearticulated in the Sustainable Development Goals. They focus on the need to narrow yawning gaps in wealth between rich and poor countries and between citizens within countries; eliminate poverty; protect the environment; and ensure health, shelter, education, and non-violence for all.<sup>20</sup> The Sustainable Development Goals uphold the liberal position that states are expected to live up to their human rights obligations. This formalistic position that is exclusively oriented around the rule of law fails to fully acknowledge the structural circumstances in which individuals are often forced to make claims against the state regarding their rights. This liberal premise is reinforced by Golub, Khan, Banik, and others who, during the mid- to late-2000s, emphasised the need for legal empowerment of those living in poverty. They grounded their social justice perspective in the everyday realities of the poor and recognised that there were multiple ways in which the poor could be supported through intermediary, legal, and other mechanisms.<sup>21</sup> The legal empowerment concept has also become a basis for substantive rule of law interventions, for example by the International Development Law Organisation (IDLO).<sup>22</sup>

Similarly, Pogge identified access to medicines coupled with measures to track outreach efforts and cost-effectiveness in health system delivery and challenging the interests of pharmaceutical companies as primary features of global health justice.<sup>23</sup> While Nagel critiqued Rawls's notions of egalitarianism, and in particular his tolerance for non-liberal states, his

<sup>19</sup> Nelson Mandela, 'The Continuing Struggle for Social Justice', in International Labour Office, *Visions of the Future of Social Justice: Essays on the Occasion of the ILO's 75th Anniversary* (Geneva: ILO Publications, 1994), 183–5.

<sup>20</sup> Addressing inequality, so as to 'leave no one behind', is a central notion in the Sustainable Development Goals, which are the core of the development agenda pursued by the United Nations in the period 2016–2030. See *UN Doc. A/RES/70/1*, 21 October 2015. See also Karin Arts, 'Inclusive Sustainable Development: A Human Rights Perspective', *Current Opinion in Environmental Sustainability*, 24 (2017), 58–62.

<sup>21</sup> Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* (Washington, DC: Carnegie Endowment for International Peace, 2003); Irene Khan, *The Unheard Truth: Poverty and Human Rights* (New York: Norton, 2009); Dan Banik, 'Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication' *Hague Journal on the Rule of Law*, 1 (2009), 117–31.

<sup>22</sup> Stephen Golub, ed., *Legal Empowerment: Practitioners Perspectives* (Rome: IDLO, 2010).

<sup>23</sup> Thomas Pogge, 'The Health Impact Fund: Enhancing Justice and Efficiency in Global Health', *Journal of Human Development and Capabilities*, 13 (2012), 537–59.

position was still fundamentally a liberal one. Underlining the challenges of defining global justice from a human rights or humanitarian perspective, a principal emphasis of this book, Thomas Nagel has argued that: 'The normative force of the most basic human rights against violence, enslavement, and coercion, and of the most basic humanitarian duties of rescue from immediate danger, depends only on our capacity to put ourselves in other people's shoes.'<sup>24</sup> But does either of these conceptualisations of global justice go far enough? Even if notions of global justice place an emphasis on either the social or socio-economic characteristics of justice, failing to critique the shortcomings of liberal lawmaking and institutions may be an oversight.

By contrast, Adrian Bedner's reconceptualisation of what is meant by the rule of law concept has highlighted the function of the rule of law, rather than its normative content. He has emphasised that the rule of law concept is highly contested, particularly in pluralistic legal systems.<sup>25</sup> More specifically, he has questioned the capacity of liberal lawmaking and institutions to address state power:

one may establish legal rules and procedures to be followed to call the state to order on this matter, but if such behaviour is widespread even the most 'liberal' procedures applied by the most independent of judiciaries cannot control it. In the end it is the behaviour of state bodies themselves which is decisive. In most, if not all rule of law conceptions this is a major litmus test to establish whether a state can be labelled as obeying the rule of law.<sup>26</sup>

To drive home this point, Bedner has further reflected on the practice of rule of law interventions, observing that 'those developing rule of law indicators may lose sight of the legal issues and only focus on state practices'.<sup>27</sup> He has also stressed the importance of relating what one knows about the legal system to explaining people's experience with 'formal legality'.<sup>28</sup> In making the case for a socio-legal approach to studying the rule of law, which takes into account legal practice as well as normative legal questions, Bedner joins other socio-legal scholars who have made a strong

<sup>24</sup> Thomas Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33 (2005), 113–47 at 131.

<sup>25</sup> Adrian Bedner, 'An Elementary Approach to the Rule of Law', *Hague Journal on the Rule of Law*, 2 (2010), 48–74.

<sup>26</sup> *Ibid.* 59.

<sup>27</sup> *Ibid.* 60.

<sup>28</sup> *Ibid.* 62.



case for addressing the function of law, rather than simply its normative content.

By a similar token, driven by the practices of international transitional and criminal justice mechanisms, scholarly literature relating to global justice has increasingly focused on criminal justice, and primarily on ending impunity. Particular attention has been devoted to the role of the International Criminal Court and other criminal justice mechanisms.<sup>29</sup> This institutional form of global justice has primarily involved punishing individuals for particular human rights violations qualified as international crimes (such as torture, war crimes, and crimes against humanity). Attempts to apply this have extended to former world leaders such as Augusto Pinochet from Chile, Hissène Habré from Chad, and Charles Taylor from Liberia. These developments have furthermore been underpinned by the post-World War Two utopian ideal 'never again', which refers to the response of world powers to some of the horrors of war by establishing the UN; codifying human rights; and creating international criminal tribunals to prosecute individual violators, for example in Nuremberg, Tokyo, and later in The Hague and Arusha, as well as hybrid-international criminal tribunals in Freetown and Phnom Penh.

While doctrinal accounts of international criminal justice mechanisms, and a still liberal orientation concerning rule of law questions have tended to dominate the scholarly debate on global justice, broader questions have also come up, which question the function of law as an instrument of global justice. Such questions have explored, among other issues, the politics of state (non-)compliance with international human rights and the strategic challenges involved in accomplishing global justice.<sup>30</sup> Nouwen and Werner have critiqued the institutionalisation of formal criminal justice mechanisms, particularly when labelled as global justice interventions, to monopolise justice discourses. They argue that this preference for global solutions has resulted in the sidelining of what

<sup>29</sup> Frédéric Mégret 'What Sort of Global Justice Is International Criminal Justice?' *International Journal of Criminal Justice*, 13 (2015), 77–96; Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (New York: New Press, 2006); Luis Moreno Ocampo, 'The International Criminal Court: Seeking Global Justice', *Case Western Reserve Journal of International Law*, 40 (2009), 216–26; Marlies Glasius, 'What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations' *Human Rights Quarterly*, 31 (2009), 496–520.

<sup>30</sup> David Barnhizer, *Effective Strategies for Protecting Human Rights* (Aldershot: Ashgate, 2001); Christopher Lamont, *International Criminal Justice and the Politics of Non-Compliance* (Aldershot: Ashgate, 2010).

they term 'alternative' conceptualisations of justice, thereby transcending 'the values, institutions and interests of directly affected communities'.<sup>31</sup> Accordingly, we now turn to the function of law as an instrument for pursuing global justice.

### The Function of Law as an Instrument for Pursuing Global Justice

Similar to conceptualisations of justice, the function of law as an instrument for global justice has an ambiguous character. Law and legal institutions articulate bold promises yet contain very definite limits to what they can deliver, let alone explain in relation to complex social phenomena.

Legal perspectives have a very different starting point than other scholarly perspectives, particularly within the social sciences. While there are numerous perspectives among legal scholars about the content of law, its origins and interpretations, and the institutions created to enforce it, legal scholarship has generally resisted multidisciplinary or interdisciplinary study. Many lawyers and legal scholars continue to regard law either as a given product (*lex lata*, law as it is) or as something of the future (*lex ferenda*, law as it should be). Positivist or doctrinal legal scholars continue to make claims to objectivity.<sup>32</sup>

Legal scholars such as Rosalyn Higgins have departed from a purely doctrinal understanding of law, and in particular of international law, recognising the value of seeing law as process. For instance, Higgins has characterised the primary function of international law as a 'co-ordination of clashing wills', or, alternatively, to reflect certain realities and aspirations of peoples in relation to what they hope international law may achieve, for example in realising self-determination.<sup>33</sup> Higgins's characterisation of law as process recognises the pluralistic nature of international law, beyond its normative content. Such an approach allows for a critique of international law's function by interacting with other disciplines such as sociology, politics, and anthropology. Such approaches furthermore recognise the complexity of participants involved in legal process and their interactions

<sup>31</sup> Sarah Nouwen and Wouter Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', *Journal of International Criminal Justice*, 13 (2015), 157–76 at 158.

<sup>32</sup> Veronica Rodriguez-Blanco, 'Objectivity in Law', *Philosophy Compass*, 5 (2010), 240–9.

<sup>33</sup> Rosalyn Higgins, *International Law and How We Use It* (Oxford: Oxford University Press, 1994) 11–12.