Chapter 1

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.[1] 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] emerg[ed] alongside the old ones'.[2] 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

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[1] Bernhard Gunter and Rolph van der Hoeven, 'The Social Dimension of Globalisation: A Review of the Literature' (2004) 143 *International Labour Review*, 7-43. And more recently: Alan Alexandroff and Andrew Cooper (eds.), *Rising States, Rising Institutions: Challenges for Global Governance* (Washington: Brookings Institution Press, 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' (2015) 16 *Japanese Journal of Political Science*, 450-455; Charles Kupchan, 'The Normative Foundations of Hegemony and the Coming Challenge to Pax Americana' (2014) 23 *Security Studies*, 219-257; 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).
[2] Saskia Sassen, 'Globalization or Denationalization?' (2003) 12 *Review of International Political Economy*, 1-22 at 6.

agendas … and an elaborate body of law'.[3] 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'.[4] In practice, corporate protection has increased as a result of this legalisation[5] and entrenched corporate legal personality. On the other hand, 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.[6] 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. [7] 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 vocabuly has been 'socialised' or 'translated' into locally relevant contexts through mobilisation by civic

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[3] Ibid. 7.
[4] Ibid. 8.
[5] Subhabrata Banerjee, '*Corporate* Social Responsibility: The Good, the Bad and the *Ugly*', *Critical Sociology*, 34 (2008), 51–79 at 54.
[6] Ibid. 70.
[7] Martti Koskenniemi, The Politics of International Law (Oxford: Hart, 2011).

actors.[8] 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.[9] 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'.[10]

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'.[11] Moreover, while formal institutions at national and international levels have largely fallen short in operationalising human rights—including the pursuit of international

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[8] 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.

[9] Barbara Oomen, 'Donor Driven Justice and its Discontents: The Case of Rwanda', *Development and Change*, 36 (2005), 887–910.

[10] 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.

[11] 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.[12]

Second, liberal lawmaking has created particular challenges for intergovernmental regulators seeking to end problematic practices taking place on a global scale, such as the financing of international terrorism[13] 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

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12 Jeff Handmaker, 'Peering Through the Legal Mobilisation Lens to Analyse the Potential of Legal Advocacy', presentation in Leiden Socio-Legal Series, Leiden University, 2017.
13 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. [14] 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. [15] 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.[16] 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

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[14] 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>

[15] Robert Cryer Prosecuting International Crimes: Selectivity and the International Criminal Law Regime (Cambridge: Cambridge University Press, 2005).

[16] 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 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 doctrines and principles, 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.[17] 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.[18] Liberal endorsers of social justice often pay attention to promoting the interests of the poor through realising access

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[17] Thomas Pogge, Global Justice (Oxford: Blackwell, 2001); Florian Wettstein, *Multinational Corporations and Global Justice* (Stanford: Stanford University Press, 2009).
[18] Ibid.

to justice and are inspired by iconic figures such as Nelson Mandela, who also endorsed a liberal vision of social justice.[19]

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.[20] 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.[21] The legal empowerment concept has also become a basis for substantive rule of law interventions, for example by the International Development Law Organisation (IDLO).[22]

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.[23] While Nagel critiqued Rawls's notions of egalitarianism, and in particular his tolerance for non-liberal states, his

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[19] 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.

[20] 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.

[21] 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.

[22] Stephen Golub, ed., Legal Empowerment: Practitioners Perspectives (Rome: IDLO, 2010).

[23] 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.'[24] 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.[25] 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.[26]

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'.[27] He has also stressed the importance of relating what one knows about the legal system to explaining people's experience with 'formal legality'.[28] 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

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[24] Thomas Nagel, 'The Problem of Global Justice', Philosophy and Public Affairs, 33 (2005), 113–47 at 131.
[25] Adrian Bedner, 'An Elementary Approach to the Rule of Law', *Hague Journal on the Rule of Law*, 2 (2010), 48–74.
[26] Ibid. 59.
[27] Ibid. 60.
[28] 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. [29] 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.[30] 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

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[29] 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.

[30] 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'.[31] 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, interpretations and the institutions created to enforce it, legal scholarship has generally resisted multi- or inter-disciplinary 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.[32]

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 hoped international law might achieve, for example in realising self-determination.[33] Higgins' 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

with liberal law-making processes, with legal institutions and indeed with each other.

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[31] 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.

[32] Veronica Rodriguez-Blanco, 'Objectivity in Law' (2010) 5 *Philosophy Compass*, 240–249.

[33] Rosalyn Higgins, *International Law and How We Use It* (Oxford: Oxford University Press, 1994) 11-12.

On the other side of the scholarly plain, social scientists often misunderstand law. Law has been regarded as irrelevant, particularly by scholars studying culture in relation to identity, race, lifestyle, ritual and other factors, conceptualising law and culture as 'distinct realms of action and only marginally related to one another'. [34] Countering this perspective, Mezey has argued: 'Law, at first glance, appears easier to grasp if considered in opposition to culture as the articulated rules and rights set forth in constitutions, statutes, judicial opinions, the formality of dispute resolution, and the foundation of social order. In most conceptions of culture, law is occasionally a component, but it is most often peripheral or irrelevant. [35] Such an assumption, according to Mezey, is 'profoundly wrong' indeed, just as wrong as legal scholars dismissing the cultural implications of law.[36]

Indeed, law is a cultural system in itself. As Cotterell deftly put it: 'legal ideas are a means of structuring the social world'.[37] Society structures law, and law structures relationships within society. Law is also highly political, whether in the manner in which it is made, the circumstances and ways in which it is understood and interpreted, or the extent to which it is respected (or not). Social justice advocates invoke law in order to underpin claims for self-determination or to try and hold states or corporations accountable by way of campaigns and sometimes audacious acts of civil disobedience. Examples include: a Greenpeace action to interrupt a Formula One racing event by drawing attention to its primary sponsor, a multinational oil corporation implicated in violations of environmental law, including damage to the environment in the Arctic;[38] large-scale demonstrations at meetings of the World Economic Forum in Davos from 2005 until 2015 to emphasise alleged failures of the Forum's organisers to adequately address human rights violations by corporations, particularly in the extractive industries (although as of 2016 the protests were largely abandoned following a "lifetime achievement

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[34] Naomi Mezey, 'Law as Culture' (2001) 13 *Yale Law Journal*, 35-67 at 35.

[35] Ibid.

[36] Ibid. See also e.g. Lan Cao, *Culture in Law and Development: Nurturing Positive Change* (Oxford: Oxford University Press, 2016) and Kate Nash, *The Cultural Politics of Human Rights: Comparing the US and the UK* (Cambridge: Cambridge University Press, 2009).

[37] Roger Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically' (1998) 25 *Journal of Law and Society*, 171-192 at 192.

[38] Greenpeace, 'Shell's priceless Grand Prix Moment', (2013), available at: http://www.greenpeace.org/australia/en/news/climate/Shells-priceless-Grand-Prix-moment/ .

award" to Chevron Corporation);[39] and, as explained in Chapter 4, repeated efforts by civil society activists to 'break the blockade' in Gaza by sailing boats to the Israeli-occupied territory.[40]

Law also functions as the framework for administering international organisations in order to prevent a proliferation of conflicts, or to intervene by way of forceful measures in order to try and resolve a conflict, though it often fails to do so and is argued to be hopelessly outdated in this regard.[41] The work done in and by international organisations is embedded within high-level negotiations that are featured by massive power differentials (for example in the United Nations Security Council). Law should also function to regulate the behaviour of states, of individuals and of corporations, but is often limited by nationalist and hegemonic acts of protectionism, reinforced by complex webs of interests involving powerful governments and politicians, and above all the market.

International development interventions too have an explicit legal basis, whether in functioning to eradicate poverty and improving the quality of healthcare in developing countries, or introducing preferential trade measures in order to enable developing countries to participate in international markets on a more equitable basis. As elaborated earlier in this introduction, both international and national law are also a basis for efforts to end impunity for international crimes.

In these, and so many other respects, law fulfils a central function in society, in political discourse and in social relations. But its resistance to other scholarly perspectives, and the way in which some legal scholars fail to critically address the normative, liberal bias embedded in law has served as an impediment to understanding the complex interactions between politics and law, not to mention its structural potential as a vehicle for delivering global justice.

The Structural Bias in International Law: What Have We Learned?

Koskenniemi has argued that there is a 'structural bias' embedded within global governance institutions, itself a consequence of the fragmentation

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[39] Samuel Oakford, 'This Year in Davos, Opponents Aren't Even Bothering to Protest', *ViceNews* (2016).
[40] This particular example is discussed in chapter 4 of this book by Claudia Saba.
[41] Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge: Cambridge University Press, 2017).

of international law. [42] According to this concept, international law is not the homogenous system it once was but has evolved into 'a wide variety of specialist vocabularies and institutions'.[43] As discussed earlier, these include the international legal vocabularies of human rights and criminal law. However, according to Koskenniemi, the rhetoric of rights has lost its 'transformative effect' through over-legalistic explanations and is 'not as powerful as it claims to be'.[44]

Related to the structural bias, Koskenniemi has also raised concerns about the extent to which international legal institutions are characterised by an excessive managerialism, 'that envisages law beyond the state as an instrument for particular values, interests, preferences'.[45] While acknowledging that it is highly difficult to manage anything on a global scale, Koskenniemi has argued that the 'unforeseeability of future events, including the effect that any determining rules might have in practice suggests that such rules ought not to be laid out at the outset'.[46]

Similar to Higgins, who stressed the processual nature of law, Koskenniemi's declaration of the malleability of law has represented a serious shift away from the preoccupation of legal scholars with what has been regarded as legal doctrinal argumentation. Regarding law as inherently political thus represented a fundamental challenge to widely held assumptions within legal scholarship about the nature of law and also helped to explain why legal instruments and administrative institutions have so inadequately served as a vehicle for delivering social justice.

Koskenniemi's reflections on the structural bias contained in international law and the dangers of managerialism build on nearly three decades of critical scholarship. This first gained wide attention through his seminal article on the politics of international law in 1990 in the first issue of the European Journal of International Law.[47] Directed primarily to international lawyers, both scholars and practitioners, he argued that one should look beyond the normative liberal tendency that underpins the world view of many lawyers, that is, to look beyond the content of law. On the one hand, Koskenniemi argued that international law has been

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[42] Martti Koskenniemi 'The politics of international law: 20 years later', European Journal of International Law, 20/1 (2009), 7–19 at 9.
[43] Ibid. 12.
[44] Koskenniemi (2011), 133.
[45] Martti Koskenniemi 'Constitutionalism, Managerialism and the Ethos of Legal Education', *European Journal of Legal Studies*, 1 (2007), 1–18 at 2.
[46] Ibid. 8.
[47] Martti Koskenniemi, 'The Politics of International Law', *European Journal of International Law*, 1 (1990), 4–32.

criticised as 'too apologetic to be taken seriously' because of its dependence on the political power, and thus the power politics, of states.[48] On the other hand, international law has been considered to be too far removed from power politics and thus 'too utopian' (or speculative) to meet the challenges of a complex globalised world.[49] Rather than forming an objective system of 'concrete and normative' and therefore 'valid' and 'binding' rules, as many lawyers claim them to be, Koskenniemi observed that international legal rules were, in fact, highly malleable. Thus, he asserted that:

> it is impossible to prove that a rule, principle or doctrine (in short, an argument) is both concrete and normative simultaneously. The two requirements *cancel each other out*. An argument about concreteness is an argument about the closeness of a particular rule, principle or doctrine to state practice. But the closer to state practice an argument is, the less normative and the more political it seems. … An argument about normativity, on the other hand, is an argument which intends to demonstrate the rule's distance from state will and practice. The more normative a rule, the more political [the rule] seems because the less it is possible to argue [the rule] by reference to social context. It seems utopian and – like theories of natural justice – manipulable at will.[50]

So what has been the response to Koskenniemi's critique in the intervening years, if any? The picture is mixed. While conventional legal scholars maintain a largely doctrinal discussion, debating 'simply' the content of international law, other legal scholars have ventured into the social, cultural, political, and economic underpinnings of international law and governance institutions. [51] For example, Balakrishnan Rajagopal has studied the role of transnational and so-called third world social movements both in resisting and using international law 'from below' and in seeking to redefine its content in the course of social justice struggles, at both national and global levels.[52] John Hagan, Sarah Nouwen, Wouter Werner, and others have critically studied the

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[48] Ibid. 9.

[49] Ibid.

[50] Ibid. 8 (emphasis in original text).

[51] Edwin Egede and Peter Sutch, *The Politics of International Law and International Justice* (Edinburgh: Edinburgh University Press, 2013); Mezey (2001), ; Dana Gold, ed., *Law and Economics: Towards Social Justice* (Bingley: JAI Press, 2009).

[52] Balakrishnan Rajagopal, International Law From Below: Development, Social Movements and Third World Resistance (Cambridge: Cambridge University Press, 2003). See also Jeff Handmaker, Advocating for Accountability: Civic-State Interactions to Protect Refugees in South Africa (Antwerpen, Intersentia, 2009).

administration of international criminal justice.[53] Makau Mutua has made a political and cultural critique of the human rights corpus, the NGOs and institutions involved in the articulation of social problems, and the construction of justice mechanisms intended to address those problems.[54] Doris Buss has studied how international criminal law and its enforcement institutions draw on various forms of expert knowledge (sociology, anthropology, history, and other disciplines) in the course of delivering criminal justice.[55]

Similarly, Barbara Oomen has been studying the disconnect between national and global justice. Taking on the human rights corpus, which others such as Mutua have criticised, Oomen has sought to explain why there is a lack of national enforcement of international human rights norms by analysing the example of the Dutch government 'exporting' human rights norms and values while it simultaneously ignored critical human rights issues at home.[56]

From a growing critical literature on the politics of international law, and the justice mechanisms that accompany these normative frameworks, new discussions have emerged. This has been especially evident in the vocabulary of human rights, including Barnhizer and colleagues' extensive evaluation of human rights as an important 'strategic system' in global governance.[57] While most studies focus on the nature of legal concepts, and several of these concepts feature in the contributions to this book as well—for example in relation to the Responsibility to Protect,[58]

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[53] John Hagan, Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal (Chicago: University of Chicago Press, 2003); Sarah Nouwen, Complementarity in the Line of Fire (Cambridge: Cambridge University Press, 2013); Sarah Nouwen and Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law*, 21 (2010), 941–65.

[54] Makau Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights', *Harvard Human Rights Journal*, 42 (2001), 201–45.

[55] Doris Buss, 'Expert Witnesses and International War Crimes Trials: Making Sense of Large-Scale Violence in Rwanda', in Dubravka Zarkov and Marlies Glasius, eds, Narratives of Justice in and Out of the Courtroom (Heidelberg: Springer, 2014).

[56] Barbara Oomen, Rights for Others: The Slow Home-Coming of Human Rights in the Netherlands (Cambridge: Cambridge University Press, 2013). See also Karin Arts, 'Reflections on Human Rights in the Netherlands', Netherlands Quarterly of Human Rights, 33/4 (2015), 374–81 and Jasper Krommendijk's chapter in this book.

[57] Barnhizer (2001).

[58] Anne Orford, International Authority and the Responsibility to Protect (Cambridge: Cambridge University Press, 2011); Karin Wester, 'Promise and Pitfalls of the Responsibility to Protect and Lessons to be Learned from the Case of Libya', PhD thesis, University of Amsterdam, 2016.

obligations *erga omnes*,[59] and universal jurisdiction[60]—some address the challenges of enforcement.[61]

This book as a whole shows in various ways how the invoking of legal vocabularies have framed the possibilities for mobilising international law for global justice. In addition to showing how this legal mobilisation can potentially hold states, corporations, or individuals accountable for violations of international law, numerous inconsistencies within the global liberal legal order are revealed.

Structure of the Book and Chapter Summaries

The potential for realising justice through invoking the law by way of different kinds of engagements is the core theme of this book. Accordingly, this book is organised in three parts that each address the realisation of justice from a different vantage point. The first part of the book explores how realising justice requires a conscious and critical engagement with the nature and role of international law and the multiple 'vocabularies' that international law produces. The second part of the book explores three empirical examples of how instrumentalising specific legal vocabularies to realise justice can solve political problems in some cases, and in other cases creates new problems altogether. The third and last part of the book explores the particular challenges of realising justice by embedding international legal principles in a national or local setting.

The first part of the book presents three critical perspectives on the nature and role of international law and justice in addressing social problems. The chapter by Martti Koskenniemi, which substantially sets the tone of the book and to which all authors make reference, addresses what he refers to as the 'competing vocabularies' of international justice, international politics, and international law and their relationship with each other, highlighting justice as the most important and difficult to define of the three. Koskenniemi draws on the theories of Morgenthau and Lauterpacht to illustrate the tensions between these competing vocabularies. He argues that both scholars had valid perspectives on how to realise justice. Koskenniemi then proceeds to highlight how

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[59] Jochen A. Frohwein, 'Obligations *Erga Omnes*', Max Planck Encyclopedia of Public International Law (Oxford University Press, 2015).
[60] Cedric Ryngaert, Jurisdiction in International Law (Oxford, Oxford University Press, 2008).
[61] Christian Tams, Enforcing Obligations Erga Omnes in International Law (Cambridge: Cambridge University Press, 2005).

lawyers and political observers view these concepts differently through the use of these different frames. He observes that 'there is no "correct" response to the question who is right—the jurist or the politician'[62] and often it is a matter of looking through frames simultaneously, while also explicitly recognising the differences and the implications of each other's positions. He concludes Chapter 2 by revisiting his often-stated critique on the fragmentation of international law, emphasising the importance of legal learning on the failure of international law to resolve social problems, which he characterises as the 'politics of re-description'. He further observes that lawyers need to engage with this rather than avoid it (which lawyers are inclined to do).

Chapter 3 by Warner Ten Kate and Sarah Nouwen develops this theme in the specific context of international criminal justice. The authors provide explanations for why the views of some individuals and groups are re-described or amplified in the discourse on international criminal justice while others are silenced. This, they argue 'is not the inevitable consequence of a technical development',[63] but is the culmination of what Koskenniemi in this book refers to as 'the politics of re-description'.[64]

Nouwen and Ten Kate argue that the spaces for civic participation, according to the 'language' of international law, are very limited, especially with regard to the prosecution of international crimes. Nouwen and Ten Kate then discuss in more detail the participation of various stakeholders in transitional justice processes. In an earlier work, Nouwen and Werner had argued that, in the course of legal and political processes, punishment tends to be much more emphasised than reconciliation and other forms of justice.[65]

Chapter 4 by Claudia Saba complements Nouwen and Ten Kate's analysis by revealing efforts on the part of civil society organisations to provide a justice solution when states and international authorities fail to do so. In particular, she focuses on the role of the so-called 'Freedom Flotilla', which sought to provide concrete humanitarian assistance, notably medical supplies, to Palestinians in the Israeli-occupied territory of Gaza and generate international attention for their situation. Saba's chapter vividly reveals the strategic importance of engaging with the political character of law, towards the realisation of justice.

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[62] Chapter 2, 27.
[63] Chapter 3, 46.
[64] Chapter 2, 40-44.
[65] Nouwen and Werner (2015).

Accordingly, she addresses issues concerning: legal versus political discourse and efforts to make them 'talk' to each other; the mobilisation of international law, including deliberately misinterpreting it for one's own purposes; the powerlessness of law against the existing political order; and bringing Palestinian voices to the fore by mobilising international law arguments. In so doing, Saba illustrates how civil society organisations can contribute to attempts to re-describe international law and, by explicitly engaging in the political and legal implications of their actions, promote justice.

The second part of the book, on new vocabularies in international law, addresses various dimensions of how law has emerged to solve political problems, or in some cases has made matters worse. As the authors in this section reveal, the plethora of legal vocabularies has given rise to new challenges in the functioning of international legal norms relating to, respectively: harmonising public and private international law, as illustrated by the work of the Hague Conference on Private International Law; combating foreign-based corruption; implementing the 'Responsibility to Protect'; and addressing the challenges of universal jurisdiction for international crimes.

Maja Groff, in Chapter 5, seeks to counter some prominent critiques of international law (including Koskenniemi's ideas about an over-reliance on formalistic rules and lack of appropriate interdisciplinary engagement; excessive 'managerialism' in international institutions; the indeterminacy of international legal norms; and Eurocentrism), choosing rather to focus on potential avenues of further progress in international law. She does so on the basis of the work done by the Hague Conference on Private International Law, especially as regards child support, abduction, and protection orders. The relationship between private and public international law principles plays a significant role in her chapter.

Next, in Chapter 6, Abiola Makinwa discusses global efforts to end impunity for foreign-based corruption. She critically explores the formidable challenges faced by both lawyers and politicians in seeking to introduce concrete measures. She evaluates the global regime to address international corruption, including 'smart' measures and the complementary measures taken by states to address international corruption, including the US Foreign Corrupt Practices Act and the UK Bribery Act. She also shares some observations concerning the fragmentation of international law, building on Koskenniemi's characterisation of conceptual 'boxes', each of which comes with its own vocabulary. Abiola argues that, due to the lack of a coherent set of rules and regulations governing international efforts

to tackle foreign-based corruption, 'multiple boxes are emerging'. The resulting fragmentation leads to different standards of compliance among countries that ought to be harmonising their efforts in order to tackle the extraterritorial nature of international corruption practices. Accordingly, she notes various general lessons that can be drawn from this global effort at norm-making to address international corruption, also based on her larger study of this area.[66]

In Chapter 7, Mark Kersten introduces the concept of the Responsibility to Protect (RtoP) and in particular addresses the relationship between the RtoP concept and the role of the International Criminal Court (ICC). Using the lenses of liberalism and cosmopolitanism, he argues that, although both the RtoP and the ICC have emerged from liberal cosmopolitan values, the role of the UN Security Council in determining their scope and function has eroded these values.

Kersten makes particular reference to Libya, drawing on numerous empirical examples that illustrate the extensive range of unilateral, regional (NATO), and multilateral efforts to try and resolve the crisis in that country. Accordingly, he highlights various military, humanitarian, and other justifications for intervening in Libya's affairs, measuring these interventions against the principles underpinning the RtoP. This allows him to make certain observations about the utility of both the concept of the RtoP and the functioning of the ICC, based on Koskenniemi's characterisation of international law serving as a form of political apology or utopian ideal.

The third section of the book refers to localised efforts to realise justice through 'bringing human rights home' by introducing national and even municipal measures to implement international human rights obligations. These last four chapters address the practical normative and functional challenges of realising global values at the national and local levels while confronting diverse socio-cultural and political contexts. From the national prosecution of international crimes and the associated recognition of humanitarian law to the realisation of children's rights and establishment of 'human rights cities', the authors in this section explore the hard issues of domesticating, and even translating, human rights in a locally relevant manner.[67]

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[66] Abiola Makinwa, Private Remedies for Corruption: Towards an International Framework (The Hague: Eleven International, 2013).
[67] Merry (2006).

Aisling O'Sullivan in Chapter 8 discusses the many tensions of the national exercise of universal jurisdiction for international crimes, which lay bare the exceptional challenges of addressing the pluralistic and often politicised character of international criminal law that were alluded to by Nouwen and Ten Kate in Chapter 2. O'Sullivan's chapter explores various positions concerning the universal jurisdiction debate, and in particular the politically sensitive question of whether it is legally possible to prosecute someone for international crimes through a national court without the physical presence (i.e. *in absentia*) of the accused on the territory involved. The implications of deciding whether or not to prosecute in turn relate to more complicated matters as to whether prosecutions in these circumstances are desirable and raise multiple and competing questions of realising justice: for the accused, for the victims of international crimes, and/or for 'humanity' in general. In weighing these different and often competing considerations, O'Sullivan engages with a classic debate—which she acknowledges as irreconcilable—on whether law ought first and foremost to meet the justice needs of the so-called international community or of individuals.

This is followed by Jasper Krommendijk's chapter (Chapter 9), which provides insight into the extent to which states have been influenced by the Concluding Observations of the Committee on the Rights of the Child when introducing national measures aimed at the realisation of children's rights. Evaluating the extent to which the Netherlands has given effect to its obligations under the Convention on the Rights of the Child by domesticating these international human rights norms, and drawing on international law and international relations theory, Krommendijk reveals whether the Committee has exerted a 'compliance pull' or has affected the extent to which states act on the findings of the Committee by giving concrete effect to them in their policies and legislation.

Finally, in Chapter 10, Barbara Oomen analyses efforts to go beyond pure formal domestication of international legal norms and more deeply embed or translate global human rights obligations at a local level through the establishment of so-called human rights cities. Realising human rights at the municipal level, Oomen argues, holds tremendous potential for fostering a culture of constitutionalism. Accordingly, she questions whether the tensions between the various 'global' vocabularies referred to by Koskenniemi present fundamental problems when crafting human rights policies, particularly at the local level where municipal government responses often are more grounded in the local realities of

rights violation and realisation. Oomen suggests that Koskenniemi's distinction between talking either 'Rabbit' or 'Duckalese', respectively the language of politics or that of the law, might not be that simple in local practice.

The book concludes with final reflections (Chapter 11) on the various chapters that re-engage with Koskenniemi's politics of re-description and how three key dilemmas faced by those mobilising the law in order to realise justice are revealed, namely: the cultural embeddedness of justice understandings, the non-enforcement of international legal obligations, and the existence of significant socio-economic gaps at the global level.