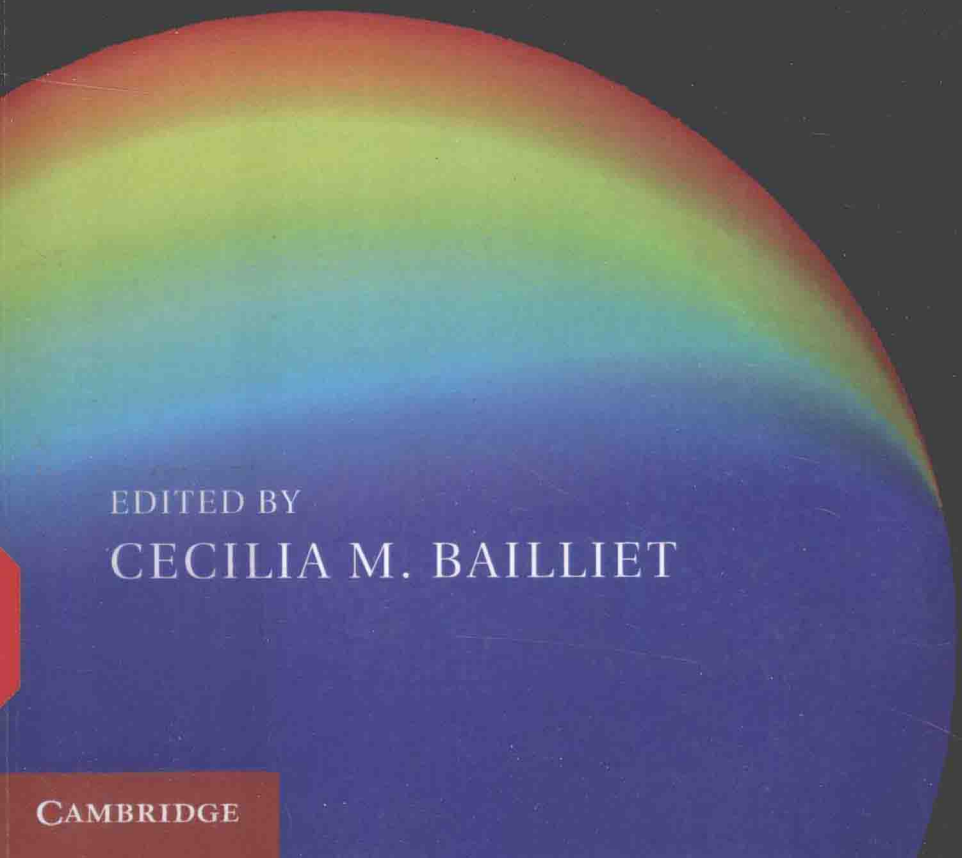
# Non-State Actors, Soft Law and Protective Regimes

## *From the Margins*



EDITED BY
CECILIA M. BAILLIET

CAMBRIDGE

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

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# NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES

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

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

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

and

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

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

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

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

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# CONTENTS

# 1

# Introduction

CECILIA M. BAILLIET

International law has undergone tremendous evolution in recent years. The establishment of subsystems such as: international human rights, humanitarian law, international criminal law, trade law, and environmental law spawned a diversity of specialized institutions, tribunals, committees, normative frameworks, and dispute resolution mechanisms.[1] These include procedures for pursuing claims, assigning accountability for violations, and providing reparation for victims. Positive perspectives on the proliferation of regimes argue that this reflects the maturation of international law. One may consider the view of Bruno Simma:

> Each regime has thus established its separate epistemic communities of lawyers working in the field, institutions developing and applying the law, and courts and tribunals enforcing it ... The formation of specific methods of interpretation or enforcement is inherent in the set-up of such regimes, and the expertise that lawyers will accumulate by working within them, as well as bodies of case law of the various courts and tribunals mandated to interpret and enforce these regimes, will contribute to a growing and ever more dense corpus of law which responds to the needs of the specific regime. In a positive light, these sub-systems of international law, more densely integrated and more technically coherent, may show the way forward for general international law, as both laboratories and boosters for further progressive development at the global level.[2]

[1] See generally, Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn., New York: Routledge, 1997), 7–8, addressing the vast expansion of areas of transnational concern.

[2] Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner', *European Journal of International Law*, 20 (April 2009), 265, arguing that proliferation of tribunals and fragmentation have not prevented the development of coherent international law. See also Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995).

In contrast, critical approaches reflect upon the emergence of stratified networks and conferences among expert scholars and government officials as possibly weakening the unity of the field.[3] The creation of internal orders may result in limited opportunities for critical review of normative or theoretical interpretation as external opinion may not be solicited or considered relevant. As an example, the majority of legal literature within the field of human rights is largely positive in orientation.[4] There is a revolving door between scholars and members of the UN human rights machinery (as well as close linkages to non-governmental organizations (NGOs)) which has benefits and drawbacks. Critical perspectives are more likely to come from fields external to law, such as anthropology and sociology.[5]

Furthermore, each subsystem functions autonomously, blocking reference to input from other subsystems.[6] Within humanitarian law, some scholars have effectively erected barriers to perspectives from human rights law. They dispute human rights experts' technical mastery of the concepts of international humanitarian law apply (e.g. "direct

[3] On fragmentation, see International Law Commission/Martii Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 (April 13, 2006). See also Christoffer C. Eriksen and Marius Emberland, *The New International Law: An Anthology* (Leiden and Boston, MA: Martinus Nijhoff, 2010), addressing polycentric "decision-making structures and fragmented spheres of law."

[4] For a critical legal article, see Oona Hathaway, 'Why Do Nations Join Human Rights Treaties?', *Journal of Conflict Resolution*, 51(4) (2007), 588. See also: Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009), presenting an alternative view; Elizabeth Bartholet, 'International Adoption: Thoughts on the Human Rights Issues', *Buffalo Human Rights Law Review*, 13 (2007), 151, criticizing UN and human rights NGOs. A forthcoming publication which promises critical perspectives is Frederic Megret and Philip Alston, *The United Nations and Human Rights: A Critical Appraisal* (New York and Oxford: Oxford University Press, 2011).

[5] See for example: Costas Douzinas, *Human Rights and Empire* (Routledge, 2007); Richard Ashby Wilson and Jon P. Mitchell, *Human Rights in Global Perspective* (London: Routledge, 2003); Anne Hellum, Shaheen Sardar Ali, and Anne Griffiths (eds.), *From Transnational Relations to Transnational Law: Northern European Laws at the Crossroads* (Farnham: Ashgate, 2011).

[6] Franceso Francioni, 'International Human Rights in an Environmental Horizon', *European Journal of International Law*, 21(1) (2010), 41, lamenting the reluctance of human rights courts to move beyond the "individualistic perspective" in order to address environmental claims in a meaningful way. See also Petros C. Mavroiodis, 'No Outsourcing of Law? WTO as Practiced by WTO Courts', *American Journal of International Law*, 102(3) (July 2008), 421, discussing the neglect of the World Trade Organization (WTO) adjudicating bodies of non-WTO sources.

participation in hostilities") and question their familiarity with combat operations.[7] This reflects a possible fear that human rights considerations will irreparably dilute international humanitarian law.[8] There is also concern regarding potential risks of political/power dilemmas behind normative development, given that government officials pursue state imperatives to advance the national interest above broader objectives in their contributions to the technical advancement of law.[9]

[7] See Michael N. Schmitt 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance', *Virginia Journal of International Law*, 50 (2010), 796–839. The counter-perspective is supported within public international law and human rights tribunals and committees: see International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Reports (July 9, 2004), at paras. 106–13, confirming the relevance of human rights law in situations of occupation. See also: ICJ, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), ICJ Reports (December 19, 2005), para. 216; UN Human Rights Committee, General Comment No. 31, CCPr//C/21/Rev.1/Add.13 (May 26, 2004), at para. 11, noting the complementary nature of human rights and humanitarian norms in situations of armed conflict; European Court of Human Rights, *Isayeva, Yusupova and Bazayeva* v. *Russia* (December 19, 2002), and *Cyprus* v. *Turkey* (10 May 2001). See also Marco Sassòli and Laura Loson, 'The Legal Relationship Between International Humanitarian Law and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflict', *International Review of the Red Cross*, 90(871) (September 2008), calling for choice of law based on specific applicability to the situation (available online at: www.icrc.org/eng/resources/documents/article/review/review-871-p599.htm; last accessed February 15, 2012).

[8] An additional point of concern is that the relationship between conservative international humanitarian law (IHL) scholars and the International Committee of the Red Cross (ICRC) appears strained at times, with the former alleging that that latter lacks sufficient expertise within the field or is inappropriately responding to pressures from human rights NGOs or other actors. See W. Hays Parks, Part IX of the ICRC, '"Direct participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect', *New York University Journal of International Law and Politics*, 42(3) (spring 2010), 770 (available online at: www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website__journals__journal_of_international_law_and_politics/documents/documents/ecm_pro_065930.pdf; last accessed February 15, 2012).

[9] For a specific example, see the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) Manual on Air and Missile Warfare completed by academic and government experts (available online at: www.ihlresearch.org/amw). The experts originated from Australia, Belgium, Germany, Sweden, the United States, Switzerland, the UK, Norway, and Canada. Slaughter would highlight the state's interest as being defined by the individuals and groups within it. Anne-Marie Slaughter, 'International Law in a World of Liberal States', *European Journal of International Law*, 6 (1995), 503, 505. See also: Anne-Marie Slaughter and David Zaring, 'Networking Goes International: An Update', *Annual Review of Law and Social Science*, 2 (2005), 211, 215; Sean Kanuck, 'Pragmatic Law for International Security', in Cecilia M. Bailliet (ed.), *Security: A Multidisciplinary Normative Approach* (Leiden and Boston, MA: Martinus Nijhoff,

In contrast, at the regional level, the Inter-American Human Rights Court has proved more open to referring to norms from other regimes.[10] Linked to this counter-trend is a growing literature in which human rights scholars examine the failure of international organizations engaged in development work to incorporate human rights perspectives within their operations and/or policies.[11]

Hence, the unfolding of fragmentation is complex and riddled with contradictions, progression, and retrogression. Paul Schiff Berman concludes:

> Instead of bemoaning either the 'fragmentation' of law or the messiness of jurisdictional overlaps, we should accept them as a necessary consequence of the fact that communities cannot be hermetically sealed off from each other. Moreover, we can go further and consider the possibility that this jurisdictional messiness might, in the end, provide important systemic benefits by fostering dialogue among multiple constituencies, authorities, levels of government, and non-state communities. In addition, jurisdictional redundancy allows alternative ports of entry for strategic actors who might otherwise be silenced.[12]

The chapters within this book cross disciplinary boundaries. They advocate harmonization over fragmentation pursuant to the aspiration of asserting the interests of our collective humanity without necessarily advocating an international constitutional order. In the spirit of global legal pluralism they call for communication among multiple legalities – finding common concerns among the different orders, while respecting

2009), at 350 and 360, explaining that government practitioners "are literally paid to seek the greatest economic, political, or military advantage for their respective countries" and "government practitioners strive to resolve specific issues and manage risks within the purview of their public mandates, particular departments or agencies, and terms of office."

[10] Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', *European Journal of International Law*, 21(3) (2010), 585–604.

[11] See: Mac Darrow and Louise Arbour, 'The Pillar of Glass: Human Rights in the Development Operations of the United Nations', *American Journal of International Law*, 103(3) (July 2009), 446; Galit A. Sarfaty, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank', *American Journal of International Law*, 103(4) (October 2009), 647; Guglielmo Verdirame, *The UN and Human Rights: Guarding the Guardians* (New York: Cambridge University Press, 2010), assessing UN humanitarian operations and their compliance with human rights law.

[12] Paul Schiff Berman, 'Federalism and International Law through the Lens of Legal Pluralism', *Missouri Law Review*, 73 (Fall 2008), 1151.