

## NEW DIRECTIONS IN INTERNATIONAL JUSTICE

JAMES W. MCCARTY III

Ph.D. Candidate, Emory University

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### BOOKS REVIEWED

*Humanity's Law*. By Ruti G. Teitel. Oxford University Press, 2011. Pp. 320. \$35.00. ISBN-13: 9780195370911

*Just and Unjust Peace: An Ethic of Political Reconciliation*. By Daniel Philpott. Oxford University Press, 2012. Pp. 368. \$29.95. ISBN-13: 9780199827565.

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In a short, provocative essay in *First Things*, political scientist Daniel Philpott argued that there is a new international theology.<sup>1</sup> He called that theology “the liberal peace.” The liberal peace is an approach to international peacebuilding and transitional justice that emphasizes criminal trials alongside the rapid establishment of a market economy and a liberal democracy, especially in the form of elections. According to Philpott, this “theology” has its own cathedral in The Hague, its own pope (Luis Ocampo, the first Prosecutor of the International Criminal Court), magisterium (speeches by UN secretary generals, beginning with Boutros Boutros-Ghali’s 1992 document *An Agenda for Peace*), saints (Woodrow Wilson), and doctrinal tradition. The doctrinal tradition is composed primarily of the writings of liberal philosophers (Immanuel Kant, Thomas Hobbes, John Locke, John Rawls, etc.) who highlight individual rationality as the ground of human rights and the protection of individual rights as the solution to the dangers of living in the state of nature.

The central unifying ideas of the liberal peace are individual rights and liberties. The most prominent defender of liberal peacebuilding, Roland Paris, has argued that the philosophical anthropology that undergirds the liberal peace is the vision of the human found in state of nature theories.<sup>2</sup> In these theories, human beings are theorized as autonomous, self-interested, and rational individuals who require the state to ensure that their shared life does not devolve into an intolerable existence “full of fears and dangers,” in the words of John Locke. Moral action in this framework is rational decision making defined as the effective pursuit of one’s self-interest. In international life, this account of individual moral agency has traditionally been assumed to reside in the state. Thus, in modern international law and politics the state has been understood as the primary subject according to the philosophical anthropology of the liberal peace.

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1 Daniel Philpott, “Peace After Genocide,” *First Things* (June/July 2012): 39–46.

2 See Roland Paris, “Bringing the Leviathan Back In: Classical versus Contemporary Studies of the Liberal Peace,” *International Studies Review* 8, no. 3 (2006): 425–40.

In Philpott's account, the evolutions in international law and politics, especially after World War II and the Nuremberg trials, are read as movements toward a new universal ethic. While some philosophers have suggested that the Enlightenment project has failed, and that we are in a new post-modern era in which moral pluralism rather than universalism is the norm, Philpott suggests that actual international practices demonstrate a continuation of the search for a universal ethic to govern international life.<sup>3</sup>

Ruti Teitel, in her new book *Humanity's Law*, claims that the core of this emerging ethic is that it takes "humanity," understood as "persons and peoples" rather than nation-states, as its primary subject. *Humanity's Law* tells the story of the birth of this new international ethic through an examination of the evolution of the practice of humanitarian law, the law of war, and international criminal justice toward a common emphasis on the rights of humanity. She concludes the book by saying that "what we see [in humanity's law] is the emergence of transnational rights, implying the equal recognition of peoples across borders. Such solidarity exists across state lines and in normative terms, constituting an emergent global human society" (225). And, while she does not refer to it as a theology, she claims that humanity's law "may well be, in many instances, displacing other premodern forms [of moral discourse], such as religion, in performing meaning-making" (199). She further claims that particular "ethical or religious belief systems are not adequate bases for common values under conditions of admitted diversity" (211), and she therefore encourages the replacement of traditional moral language with the language of humanity's law—a phenomenon that she suggests is already occurring. The law of humanity, then, is the new universal creed that includes "a new discourse for politics" and "a new legal and political subjectivity" (216).

Philpott, in *Just and Unjust Peace: An Ethic of Political Reconciliation*, charts a different course. Rather than searching for a new universal ethic that transcends our "conditions of admitted diversity," he draws on that diversity, especially religious diversity, to search for an "overlapping consensus" on the nature of justice after mass violence. After examining the accounts of justice in the Abrahamic religions and the international restorative justice movement, he argues that the justice of the liberal peace is too narrow because it is too focused on "individual rights . . . and other matters of desert" (5). Restorative justice is a victim-centered approach to criminal justice that focuses on redressing the harms done to victims as its primary task rather than on punishing perpetrators. The Abrahamic religions, Philpott argues, contain holistic visions of justice guided by divine mercy that lead to the reconciliation of persons to God and their community. He therefore argues that justice in the aftermath of mass atrocity is political reconciliation. "The central meaning of reconciliation," he says, "is the restoration of right relationship" (5).

In making this claim, he endorses what has been called "reconciliationism."<sup>4</sup> Reconciliationism is an approach to transitional justice and peacebuilding that assumes that what is primarily needed in transitional societies and postconflict contexts is the restoration of right relationships. The justice of reconciliation is more than retribution and elections, though it includes punishment and democratic practices. The justice of reconciliation is also participation, recognition, reparation, and trust in one's neighbors and political institutions. It is forward looking as well as backward looking. It is forward looking inasmuch as it moves to create just relationships. It is backward looking inasmuch as it attempts to restore relationships that have been terribly broken.

In reviewing these two important texts, I was struck by a question implicitly raised by their work—if emerging practices of international justice and peacebuilding, including the seemingly

3 See Philpott, "Peace After Genocide," 39–46.

4 See Lisa A. Baglione, "Peacebuilding: A Time to Listen and Learn from Reconciliationism," *Polity* 40, no. 1 (2008): 120–35.

divergent humanity's law and political reconciliation, challenge long-held Western assumptions of what it means to be human that are grounded in the state of nature, do they require an ontology beyond the one that undergirds the liberal peace? Teitel raises the question when she says, "Humanity law offers a distinctive *subjectivity*: the status of the human is a basis for new and diverse *claims*, on the part of diverse voices that are new to international law and politics" (31). If there is a new international subjectivity that is the basis for a diversity of new moral and legal claims, and I think Teitel is right that there is, the nature of that subjectivity needs to be grounded in a vision of the human that is either consistent with or different than the ontology supplied by state of nature theories. It is doubtful that the state of nature can ground such claims.

Elsewhere Teitel says, "The law of humanity affirms the role of the individual within a layered conception that also takes account of the collective character of contemporary violence" (33). The "layered conception" of "the human" in humanity's law is one in which humanity has "two faces" (33), individual and collective, that place new responsibilities on persons and grant new rights to a diversity of peoples who exist apart from the state. Perhaps the clearest example of the responsibilities of individuals in humanity's law is the practice, since World War II, of individuals being tried and found guilty for war crimes. After World War I, Germany was collectively punished for its aggression; after World War II, individuals were found guilty of war crimes, crimes against peace, and crimes against humanity. This individualization of international guilt is at the heart of humanity's law—it asserts that persons have responsibilities to peoples. Persons have become moral agents on the world stage. And, in the creation of genocide as a crime and the subsequent development of social, cultural, and economic rights, "peoples" have become bearers of rights. Human collectives that exist outside the authority of the state can make moral claims on individuals and states in a way that was unimaginable a century ago.

Philpott also hints at the need for a new ontology of international justice. He says that while an ethic of political reconciliation "converges with the liberal peace insofar as it endorses human rights, democracy, the rule of law, the laws of war, and trials . . . one can endorse these rights, norms, and institutions without sanctioning such philosophical values as autonomy" (84). However, he does not provide an alternative ontology that might ground human rights and democracy while also grounding a restorative theory of justice.

This lacuna is not unique to Teitel and Philpott. Rather, it is prominent in the fields of transitional justice and international peacebuilding. I am convinced that the tendency not to address this question head-on is one reason for the impasse in many of the arguments involving liberal peacebuilding and reconciliationism on the one hand, and between the principled pursuit of negative rights and the practical pursuit of positive rights on the other. Proponents of reconciliationism and the pursuit of positive rights have been unable to convince liberal peacebuilders, who focus on negative rights, of their position, because they have not proposed an alternative ontology out of which transitional justice and peacebuilding should be pursued. Without the vision of the human in state of nature theories being directly challenged, it remains the ontology that is assumed in debates about international justice. However, this vision is unable to ground a "law of humanity" or a vision of justice as reconciliation. Proponents of "justpeace" ethics, which highlights the commonalities between restorative justice and peacebuilding, suggest that both of these ethics assume human interdependence and particularity rather than autonomy and universality, even if they do not state this assumption explicitly.<sup>5</sup> It seems to me that an ontology of human

5 See Jarem Sawatsky, *Justpeace Ethics: A Guide to Restorative Justice and Peacebuilding* (Eugene, OR: Cascade Books, 2008).

interdependence that secures human particularity is the way forward for grounding a law of humanity or an ethic of reconciliation that can move beyond the liberal peace.

*Humanity Law—A New International Subjectivity*

Teitel argues that there is an emerging practice of “humanity law,” a phrase she coins, which takes “persons and peoples” rather than sovereign states as the primary subject of international law and politics. Humanity law is an emerging framework for international law and politics that is common to the evolution of humanitarian law, human rights law, and the laws of war. Central to this emerging paradigm, Teitel argues, is the way in which

[t]he normative foundations of the international legal order have shifted from an emphasis on state security—that is, security as defined by borders, statehood, territory, and so on—to a focus on human security: the security of persons and peoples. In an unstable and insecure world, the law of humanity—a framework that spans the law of war, international human rights law, and international criminal justice—reshapes the discourse of international relations. (4)

Humanity law’s emphasis on persons and peoples has not replaced the Westphalian emphasis on state sovereignty, as it emerged in its milieu and is dependent on its institutions. However, it is increasingly carrying authority in international legal decisions.

For instance, whereas an emphasis on state sovereignty has meant a historic emphasis on *jus ad bellum* criteria in judging the justice of wars, Teitel demonstrates that *jus in bello* criteria are increasingly becoming the standard by which the justice of wars is judged. This is occurring because of the increasing presence of non-state actors at the center of international politics. Thus, concern for the effects of war on noncombatants has become a focus of humanitarian action during a conflict, and of international criminal justice after a conflict. Not mentioned by Teitel, but also supportive of her thesis, is the rise of proponents advocating for *jus post bellum* criteria to guide the ethics of exiting war.

Another example of persons and peoples replacing states as the primary subjects of international law and politics is the recent doctrine of the responsibility to protect. Here we have an emerging international doctrine that explicitly states that there are times when state sovereignty can—or must—be violated in the name of humanity and its rights. In fact, as I write this essay, a public debate is currently underway about a potential international intervention in the Syrian civil war. In arguing for a US-led intervention, several US leaders, including Secretary of State John Kerry and President Barack Obama, have appealed to humanity and the responsibility to protect it. In fact, in an essay titled “Why Attack Syria?,” Teitel herself has argued that humanity law is the best justification for such an intervention.<sup>6</sup>

Not long ago, President Obama used similar reasoning to justify intervention in the 2011 Libyan civil war. Teitel quotes him as saying, “To brush aside . . . our responsibilities to our fellow human beings under such circumstances would have been a betrayal of who we are” (quoted at 3). Later in the book, she quotes Secretary General of the United Nations Kofi Annan’s remarks on the creation of the International Criminal Court. Annan argued that “there can be no global justice unless the worst of crimes—crimes against humanity—are subject to the law. In this age more than ever do we

6 Robert Howse and Ruti Teitel, “Why Attack Syria?,” *Project Syndicate*, September 4, 2013, accessed September 4, 2013, <http://www.project-syndicate.org/commentary/humanitarian-versus-punitive-purposes-in-military-interventions-by-robert-howse-and-ruti-teitel>.

recognize that the crime of genocide against one people truly is an assault on us all—a crime against humanity” (quoted at 193). In these two quotes, we see humanity law at work: “humanity” and the responsibility to protect it are appealed to in order to justify humanitarian military intervention and international criminal prosecutions. The distinctions between humanitarian aid, the practice of warfare, and international criminal justice are increasingly blurred, because each is understood to serve the common goal of protecting a shared humanity.

Perhaps the clearest demonstration of the influence of the shift to persons and peoples in humanity law is the practice of trying individuals for crimes against humanity in international trials. Whereas there was a time when claiming that one acted in the name of a state was sufficient to obtain immunity for acts undertaken in times of war and conflict, individuals are now regularly tried for their violations of human rights during war. One of the most significant legacies of the Nuremberg trials is that “following orders” is no longer a sufficient defense for actions that result in the violation of human rights. In fact, the very idea that humans have rights and responsibilities that exist independent from their relationship to a specific state is in itself evidence of the shift that Teitel traces.

According to Teitel, the humanity law framework functions with the core conviction that humanity is to be preserved or secured. Human security, then, is the primary end of humanity law. Human preservation is achieved through securing both persons and peoples. Consistent with the claims of first generation rights, the most fundamental right is the right to be secure from bodily harm and violation. However, human security does not end there. Contemporary human rights law is a direct descendent of the creation of the crimes of genocide and “crimes against humanity” after World War II. Thus, since the beginning of humanity law’s evolution, concern for group rights has been central to its theory and is increasingly central to its practice. In a humanity law framework, humans have group rights as well as individual rights, because the groups to which individuals belong must be secure in order for individuals to be secure themselves.

As indicated above, one especially important result of the emergence of humanity law is the proliferation of non-state actors involved in international politics and law. The voices and actions of persons and peoples are regularly the subject of humanity-based discourse. In this way, Teitel argues, the emergence of “the language of humanity law aims to construct a bridge between the discourse of state power and that of transpolitical moralism” (35). Human rights advocates, international nongovernmental organizations, the United Nations, religious leaders, politicians, and others have appropriated the language of human rights as the primary language with which to insist on justice. The language of law, then, has become the lingua franca of lawyers, politicians, and activists. The language of “humanity” and humanity’s rights is beginning to serve as the trump card of international political, legal, and popular moral discourse. Humanity law is not merely law; it is the emerging global, moral language.

According to Teitel, humanity’s law differs from natural law in that “there is no a priori view of those norms that we all share.” Rather, “the universal comes to sight through evolving practice, where the humanity norm comprehends duties and rights relating to the ultimate preservation and protection of persons and peoples” (203). Through a discursive process in which jurists, secular and religious human rights activists, politicians, and others participate, the idea of “humanity” and its protection emerges. Rather than through a deontological claim about the human person or “humanity,” “the premise of humanity law is the shared experiences of the memory of inhumanity, and the claims to rights of situated, affected agents. This is the face of humanity as such—as it presents itself, in a body and of a people” (205).

Teitel argues that humanity law “evolved through demands for justice and judgment” (205) and therefore demands legal judgments in its practice. The responsibility to protect, for example,

demands that judgments be made and actions taken, up to and including military actions, on behalf of people whose preservation is at risk. The rights of humanity trump the sovereignty of states. Even violence, then, is being humanized (206) inasmuch as protecting humanity is the justification for military action. Humanity law is emerging, then, as the most global ethic we have seen in practice.

*Political Reconciliation—Toward a Positive Peace*

In *Just and Unjust Peace*, Daniel Philpott argues that transitional justice is best understood as the restoration of right relationships. He calls this stance “political reconciliation.” Philpott argues that the theological ethics of Judaism, Christianity, and Islam, as well as the contemporary restorative justice movement, support his argument that “justice is identical to reconciliation” (54).

Specifically, he exegetes Jewish and Christian scriptures to argue that the biblical vision of justice is a restorative one. The Hebrew words *mishpat* and *sedeqah*, for example, imply a holistic vision of justice rather than a purely retributive one. In addition, the Hebrew word *shalom* denotes a comprehensive vision of peace akin to what peace scholars describe as a “positive peace.” Drawing on an ecumenical array of theological works, Philpott argues that the Christian New Testament constructively receives this tradition from its Jewish ancestry and intensifies it in Paul’s theology of justification. The biblical justice of God, Philpott argues, is a restorative justice.

His treatment of Islamic texts is not as in-depth as his treatment of Jewish and Christian texts, but he follows the interpretations of several Muslim scholars to say that Islam also contains resources for conceiving justice in a restorative manner. While Philpott’s treatment of Islamic texts is not as thorough as one might like, his attention to “rituals of reconciliation in Arab-Muslim culture” (160) is helpful and intriguing. Philpott argues that there is a history of Islamic practices that are akin to modern practices of restorative justice. Thus, Philpott argues that the Abrahamic traditions each contain resources for conceiving of justice as the restoration of relationships.

Philpott’s extended definition of transitional justice as political reconciliation, in light of his examination of Judaism, Christianity, Islam, and restorative justice, is

a concept of justice that aims to restore victims, perpetrators, citizens, and the governments of states that have been involved in political injustices to a condition of right relationship within a political order or between political orders—a condition characterized by human rights, democracy, the rule of law, and respect for international law; by widespread recognition of the legitimacy of these values; and by the virtues that accompany these values. Political reconciliation comprises six practices that each aim to restore persons and relationships with respect to the distinct wounds that political injustices have inflicted on them. (58)

The six practices that comprise the ethic of political reconciliation are: (1) building socially just institutions, (2) acknowledgment, (3) reparations, (4) apologies, (5) punishment, and (6) forgiveness. According to Philpott, the virtue that undergirds each of these practices, and the ethic in general, is mercy.

“A merciful action,” according to Philpott, “is one whose end is the relief of distress, suffering, and rupture” (63) on the part of the victim or perpetrator of a wrong. The mercy of political reconciliation is “an understanding of mercy that is older, richer, wider, and more comprehensive” than liberal theories of mercy which oppose it to justice. The mercy that undergirds the ethic of political reconciliation is “found in the Jewish, Christian, and Islamic scriptures,” and therefore “does not contradict justice when conceived of as reconciliation” (63). Thus, even punishment can be merciful when its purpose is restoration (219).

Central to Philpott's argument for political reconciliation is a delineation of the "political." He describes the political as "that portion of relationships that concerns persons as citizens of states and states as members of the international order" (54). "Right conduct" by political actors, then, "centrally involves respect for basic human rights and the rights entailed in international laws governing war" (54). Philpott assumes and situates his ethic in the context of contemporary international human rights law. All persons have rights, in Philpott's account, and the violation of these rights entails wrongs that cause wounds that must be healed. The repairing of these wounds and political relationships, then, is the doing of justice.

According to Philpott, there are primary and secondary wounds that occur as the result of political injustices. Primary wounds are the direct result of the injustice: the violation of rights, the violation of bodily integrity, the "standing victory" of an injustice when it has not been judged as wrong, and the like. Secondary wounds grow out of the primary wounds: individual and communal memories, emotions, and judgments, which can result in new political injustices. The ethic of political reconciliation is especially helpful in that it addresses both primary and secondary wounds that result from political injustice.

For example, several people in South Africa who were survivors of human rights violations testified before the Truth and Reconciliation Commission about the disappearance of a family member. In telling their stories, and sometimes in confronting the perpetrator who killed their family member, some of them learned what happened to their loved one and where he or she was buried. To the surprise of many in the West, several people, when asked what would be appropriate reparation for their loss, responded that they would like to be able to give their family member a proper burial. Seen through the lens of particular wounds, the ignorance of the location of a family member and the inability to give that person a proper burial (a secondary wound) are as much an injustice as the original murder of the person (a primary wound). While one cannot raise a child from the dead, one can honor that child. This is especially important in societies where one's relationship with ancestors is of vital importance. While the primary wound can never be healed, the secondary wound can, and the healing of any wound is an act of justice that moves toward reconciliation.

According to Philpott, the six "practices provide no fixed and determinate solution for each circumstance and leave ample room for prudential judgment" (287). In addition, "the nature and scale of the injustices to which they respond and the political possibilities in any time and place will affect greatly which of the six practices will be realized and to what degree" (287). However, as an ethic, political reconciliation provides guidelines by which these practices can be judged. Specifically, it judges the degree to which these practices or the lack of them contributes to or detracts from the restoration of right relationships. Each practice can address particular wounds caused by political injustice. No one practice can achieve political reconciliation on its own. Political reconciliation is a long-term process in which each of the six practices is implemented in contextually appropriate ways.

### *Whose Humanity?*

In their works *Humanity's Law* and *Just and Unjust Peace*, Ruti Teitel and Daniel Philpott map and argue for new directions in international justice. Teitel argues for a law of humanity and Philpott for an ethic of political reconciliation. Both authors assume the normative presence of international human rights law as the context for their ethics. They assume that human rights exist, and that their formalization in international law is the proper way for them to be protected. However, any discussion about the ground of these rights is absent from both texts.

By not directly addressing the question of the ground of human rights, the authors leave the ontological assumptions of state of nature theories unchallenged and give insufficient attention to the ways in which they propose particular visions of what it means to be human. These visions, it must be said, do not emerge naturally from the state of nature that grounds the liberal peace. Teitel proposes that “humanity,” in its persons and peoples within and beyond the boundaries of nation-states, has rights; Philpott proposes that injustice is the violation of right relationships. Neither of these claims is compatible with the philosophical anthropology of the liberal peace. Teitel and Philpott need not have started with a predetermined ontology to construct their ethics; however, their ethics require ontological claims not common to the liberal peace, and which are able to support the visions of justice they propose. They do not provide philosophical-theological anthropologies able to achieve this task.

I wish Philpott, especially, had attempted to answer this question, because his interlocutors provide resources more readily than Teitel’s do for doing so. Teitel is primarily in conversation with the international jurists who exist within the institutions that are designed to pursue the liberal peace. Philpott, on the other hand, is informed by interlocutors who address the question of philosophical-theological anthropology directly. I am thinking particularly of indigenous religious traditions and “care feminists,” each of which Philpott mentions briefly in his text. He says that *ubuntu* and “care feminism” “contain notions amenable to reconciliation” (19), but he focuses on the Abrahamic traditions, especially their scriptures. By choosing to focus on scriptures and the restorative justice movement, and by merely footnoting the theologians and philosophers who tackle questions of theological anthropology, Philpott limits his own project inasmuch as his theory can be read as not fully escaping the anthropological assumptions of liberal political philosophy that he seeks to challenge.

*Ubuntu* philosophy, for example, has been important in pushing against overly individualistic accounts of the self and of moral action. *Ubuntu* is a southern African philosophy grounded in traditional religious traditions and practices. It states that an individual’s humanity is tied to the humanity of others. A colloquial translation for the term is “I am because we are.” *Ubuntu* is often used as a direct challenge to liberal philosophical anthropology and, therefore, would have strengthened Philpott’s argument.

Another example of a theological anthropology that could ground human interdependence, human rights, and restorative justice is social trinitarian theology. Social trinitarian theology, a movement in contemporary Christian theology that utilizes the doctrine of the Trinity for ethical reflection, emphasizes that humans are created in the image of a God who is simultaneously three and one. The persons of the Trinity are three distinct and equal persons with one shared essence. The divine persons, social trinitarians argue, are the models for all persons. Thus, humans are created to be in interdependent relationships that create the conditions for equality in particularity. Nearly all theologians and philosophers agree that if there exists such a thing as the image of God, it bestows enough dignity to ground human rights. To be created in the image of a God who is Trinity is, I argue, to find that image in human relationships. Thus, the violation of these relationships is the violation of the rights grounded in them as the image of God. To do justice after their violation, then, is to restore those relationships. Justice in a social trinitarian perspective is, in short, reconciliation.

Both Teitel and Philpott have written important texts that incorporate legal practice, political theory, and international human rights. The missing element, fundamental to furthering each project, is an effort to address the question of philosophical-theological anthropology. What vision of humanity is necessary to ground humanity law and/or political reconciliation? Based on the relational nature of both Teitel’s and Philpott’s interpretation of the proper future of international



justice, it seems that a philosophical-theological anthropology of human interdependence is required. Looking to Christian theology, *ubuntu* philosophy, or care feminism might provide the resources for doing just that.

*Humanity's Law* and *Just and Unjust Peace* help us to see the limits of the liberal peace and the new directions in which international justice is moving and may move in the future. These developments, rather than being simple continuations of the Westphalian system, are rejections of the philosophical assumptions of that historical moment. We are now tasked with defending those assumptions and rejecting these new directions or constructing new foundations for the evolving practice of international justice.