Humanity’s Law:
Rule of Law for the New Global Politics

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This Article proposes that international law is undergoing a paradigm shift, which will have significant implications for foreign affairs. A dramatic expansion of legal machinery, institutions, and processes is occurring in the international sphere. Now, more than ever before foreign policy decision-making occurs in the shadow of the law. The conception of a new rule of law is at stake; appropriate to the present state of global politics, as it aims to manage heightened political conflict and violence through law. The impact of the juridical paradigm shift is primarily discursive. The expanded legal discourse represented by the present international human rights system contributes a rhetoric that both enables and constrains politics; but whose constructive potential is not infinitely malleable. Understanding this paradigm shift requires new interpretive principles, which is the larger project for which this Article lays the foundation.

Introduction ................................................................. 356
I. Global Rule of Law .................................................. 359
   A. A Discourse with a New Reach ............................ 360
   B. A Jurisdiction with an Extended Scope ............... 361
   C. A Reconceptualized Personality ......................... 362
   D. A New Institutionalization ............................... 363
II. The New International Legalism ............................... 365
   A. The Rhetoric of Justice .................................. 368
   B. The Role of Humanitarian Discourse in the New Global Politics .............................................. 370
   C. The Uses of International Criminal Law ............. 373
III. Effects of the Merger of Two Legal Regimes ............ 374
   A. Globalizing the Law of War .................................. 374
   B. The New Human Security Rights ......................... 376
   C. A New Minorities Regime .................................. 377
IV. Foreign Policymaking in the Shadow of the Law ........ 380
   A. Rethinking Security ........................................ 380

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B. From the Borders of the State to those of the Collective ........................................ 382
C. Illustrations ................................................................................................................. 383
Conclusion ....................................................................................................................... 387

Introduction

Serious human rights crises persist despite recent democratization and progress in international human rights law. This contradictory state suggests that a puzzle exists concerning international law's relation to politics. Indeed, it suggests that the international legal and political orders are out of sync. This Article begins by exploring the gap between the apparent normative progress and political realities and aims to clarify law's role in international politics.

Existing theory does not adequately account for international law's bearing upon international affairs in contemporary political circumstances. In fact, the prevailing theorizing in the international realm, which tends to be highly schematized between realist and idealist views, evinces the separation between legal and political regimes. Realist terminology explains the fitful course of human rights in the late twentieth-century as a matter of political will. This position does not adequately clarify the present direction in international law and politics, which although democratizing implies persistent disorder and violence. This inadequacy is due in part to the fact that realist lines tend to evaluate foreign affairs as driven exclusively by political circumstances. Similarly, idealist views are often inapt to grasp international law's transformed role in global politics because they tend to privilege formalist and increasingly obsolete conceptions of international law.

There needs to be a move beyond these existing international relations models because, in light of contemporary changes in law and politics, their theoretical structures cannot adequately account for present foreign policymaking. A better understanding of the present international legal system's role in contemporary global politics is urgently needed. This Article argues that an expanded international legal regime structures foreign policymaking and lies at the core of global politics' current transformation. The expanded juridical discourse augments foreign policy realms in new ways. Its dominant conception of the rule of law is based on the "humanitarian" regime, which is an expanded version of what is traditionally called the "law of war." For the most part, the enhanced role of the humanitarian regime in contemporary politics is not yet adequately understood, because it is to some extent still in its infancy and thus lacks a thoroughgoing jurisprudence, particularly with respect to the rights dimensions in the expanded law of war.

This Article takes the first steps in the project of interpreting the newly expanded international legal regime by elucidating the significance of adopting an expanded juridical discourse. Further, this Article aims to clarify the relevance of international law within the changing constitution of the globalizing world order. Recent developments in humanitarian law guide contemporary global politics by structuring international rule of law's policymaking with respect to the heightened disorder associated with end-of-century political transformation. This new international legalism—or "humanity's law"—assists in framing and legitimating the form of policymaking choices in present global politics.

The new humanitarianism is the rule of law that emerged from a world of contradictory political conditions. As a rule of law, it comprehends the dimensions of democratization, political fragmentation, and disorder's coexistence. The fall of the Soviet Union and the related rise of U.S. power, as well as post-Soviet transitions and other recent political and social transformations, form the context for the paradigm shift now occurring in international law. Political, economic, and technological changes have had globalizing ramifications that penetrated state borders in ways that transformed the core rule of law values in the international legal order and created a shift away from the previously prevailing state-centric system. These globalization processes have numerous ramifications for the structure of a simultaneously expanding and disaggregating international order.

6. See Held et al., supra note 3; Larry Diamond, Developing Democracy: Toward Consolidation (1999); Ken Jentzi, New World Disorder: The Leninist Extinction (1994) (discussing the political destabilization that occurred as a consequence of the collapse of communism).
7. See Lea Bienen, American Hegemony: Political Morality in a One-Superpower World (1994) (focusing on American international hegemony and arguing that the "legitimacy of international hegemony should be evaluated in the same way as the legitimacy of other authoritative political structures, particularly domestic governments").

2. See Farer, supra note 1.
3. See generally Daniel Held et al., Global Transformations: Politics, Economics and Culture (1999) (discussing the globalization debate and drawing attention to the dangers of sliding globalization with concepts such as interdependence, integration, universalism, and convergence).
legal system and have significant consequences for the rule of law.\(^9\)

The present international political context is more democratic\(^10\) yet also less stable, because increasing political fragmentation creates potential for political violence.\(^11\) Though perhaps paradoxical, the new democratization is largely associated with the post-Cold War transformations, a time when political violence profoundly increased and a host of inadequately consolidated international regimes appeared.\(^12\) This new political reality challenges prevailing assumptions regarding the comparative roles of dictatorships and democracies in maintaining the peace.\(^13\) Recognition of the prevailing political conditions of increased violence clarifies the contemporary turn to a dominant conception of global rule of law in terms of an enlarged law of war.

The primary change in the international legal regime is that humanitarian law has expanded and has a greater reach. Its expanded legal rhetoric reflects changing conceptions of legitimacy in contemporary international politics and represents a paradigm shift between divergent conceptions of the rule of law in the international domain.\(^14\) Understanding the significance of the greater juridicization of international affairs discourse requires new interpretive principles, which this Article begins to lay forth.

In order to do so, this Article explores the relationship between the contemporary international law regime and foreign affairs. Part I introduces the new rule of law and examines the dynamic interaction between the emerging humanitarian law regime and the rapidly changing political conditions of global politics. Part II analyzes the role of the new international legalism in foreign affairs. Subsequently, Part III focuses on the effects of merging the two legal regimes. Finally, Part IV addresses the role of the legal scheme in globalizing politics, specifically its redefinition of security in international politics.

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1. **Global Rule of Law**

This Article contends that the most pronounced change in the international legal system is the dramatic expansion of humanitarian law's reach through its merger with international human rights law\(^15\) and its attendant implications for global rule of law.\(^16\) Accordingly, this Part examines changes in international law that have had the greatest impact on the contemporary transformation of international relations and maintains that the changing legal regime reconceives the structure, subject and core animating values of the international system.\(^17\) The legal change that is now occurring at international, regional and domestic levels is coalescing to form a body of law that elaborates upon changing conceptions of rule of law values, state responsibilities and human rights in a transforming international system.\(^18\) The new global rule of law challenges the international legal system's prevailing bases and values in a number of ways.

In the emerging regime, humanitarian law's scope has expanded exponentially. This remarkable transformation amounts to a paradigm shift because it levels the threshold conditions that determine whether an international or national legal regime applies to a given situation. The new humanitarian regime implies change along several dimensions resulting in a discourse with a new reach, a jurisdiction with an extended scope, a reconceptualized personality, and a new institutionalization. These elements are elaborated upon below.

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9. See Sassen supra note 8, at 92; Slaughter, supra note 8, at 183–84; Spirt, supra note 8, at 1223.

10. Democracy has grown chiefly in terms of open elections. See generally Held et al., supra note 3; Larry Diamond, Developing Democracy: Toward Consolidation (1999).


12. See generally Jowitt, supra note 6 (discussing political destabilization following the communist collapse).


14. For elaboration see infra text accompanying notes 137–72.


16. For a comprehensive exposition of the contemporary law of war, see generally War Crimes, supra note 4.

17. This argument is distinguishable from constructivist arguments. This Article argues that the law plays a constitutive role in contemporary politics, but it does not advocate the constructivist view that these uses necessarily imply expression of determinate values. Indeed, the argument elaborated in my previous work is more limited and pragmatic. See Ruti Tel Ke, Transitional Jurisprudence: The Rule of Law in Transitional Jurisprudence (1997) (arguing that in periods of political change the law can be used to play multiple roles, both constraining and enabling). For a useful discussion of distinctions between the approaches of constructivism and pragmatism, see Jack Snyder, Principles and Fragmentism in Strategies of International Jurisprudence, Presented to the Olin Institute's National Security Seminar at Harvard University (Dec. 2001) (unpublished paper on file with author). For a discussion of constructivism, see Martha Finnemore, National Interests in International Society 2–3 (1996); Martha Finnemore, Constructing Norms of Humanitarian Intervention, in THE CULTURE OF NATIONAL SECURITY: NORMS AND INSTITUTIONS IN THE MAKING OF THE POST-COLD-WAR ORDER (Peter J. Katzenstein ed., 1996); THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANCE 7–8, 236, 270–73 (Thomas Risse et al. eds., 1999) (using an argument that generally draws on social constructivism); see also Alexander Wendt, Social Theory of International Politics (1999) (developing a theory of the international system as a social construction).

A. A Discourse with a New Reach

In the new humanitarianism, the normative apparatus of the law of war, particularly its criminal justice dimension, is expanding beyond its historic role. International jurisdiction's demonstrable extension is occurring across the dimensions of time and space, and is redefining political time and boundaries. Historically, international criminal processes were deployed ex post, or after the peace. However, in the contemporary moment the law of war is being invoked ex ante, or before war, coming in much earlier in foreign policy deliberations and at times even in lieu of military intervention. 19

First, "humanity's law" extends humanitarian law in terms of political time because it evokes the discourse of justice earlier in policymaking processes and thus changes the rule of law's role in international politics. Historically "justice talk" was entirely ex post. International adjudicatory processes were deployed following international armed conflicts prompted by state violations of international law, and were used to retroactively rationalize infringement on state sovereignty. 20 Currently, however the humanitarian regime comes in much earlier in policy debates, particularly in deliberations regarding intervention in human rights crises. 21 For example, early introduction of humanitarian law occurred in the deliberations concerning the appropriate international response to the Balkans conflict. 22 This apparent expansion in international humanitarian regime gives "justice talk" a bigger role in contemporary foreign policymaking.

Second, the new humanitarian regime creates a spatial transformation by expanding the humanitarian regime's jurisdiction in terms of territoriality that extends across national borders. Historically, the law of war applied in times of international conflict. In contrast, it is now more generally applied and extends to situations of internal political conflict. Contemporary humanitarian law reaches well beyond the parameters of international armed conflict to regulate persecution internal to states, 23 as evidenced in the new treaties, charters, and ad hoc tribunals. 24 This jurisdictional expansion is further evidenced in the International Criminal Court's Charter, which redefines offenses by dropping the previously required nexus to international armed conflict and extending "international jurisdiction" to situations internal to states. 25 The present shift to an expanded humanitarian law that is generally applicable with or without international conflict reveals the extent to which the law of war has moved from international law's periphery to its core. The expanding law of war challenges the basic category of international human rights law by redefining the threshold conditions of war and peace. 26 This expanded jurisdiction implies humanitarian law's normalization. As this Article further elaborates below, humanitarian law assists in controlling some of the illiberal dimensions of contemporary political transitions, thus redefining the sense of global rule of law.

B. A Jurisdiction with an Extended Scope

Changes in the substantive values of the international legal system are related to the jurisdictional changes discussed above. The longstanding statist model has been associated with a concomitant understanding of international rule of law that defined security on the basis of existing national borders. Indeed, in the traditional state-centric system the very basis for human rights was tied to state borders and the principle of nationality. 27 This longstanding perception is now giving way to an alternative

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20. See generally TAIT, supra note 19; WAR CRIMES, supra note 4 (offering a comprehensive historical account); Teitel, supra note 5.


22. See infra notes 131-54 and accompanying text.
view of the meaning of global order, as evidenced in the present expansion of the treaty regime defining the law of war. The merger between humanitarian law and human rights law gives rise to a complicated and somewhat contradictory legal regime that challenges the very basis of longstanding notions of international rule of law. Whereas international rule of law was defined in terms relating to state sovereignty and self-determination, there is now a shift to a juridical definition of the state and an alternative discourse framed in the universalizing language of human rights.

C. A Reconceptualized Personality

Transformations in the new legal regime's subject transcend changes relating to its values and jurisdictional parameters. The traditional state-centered view of personality predicated on the view of the state as the relevant subject of the international regime, has numerous implications for the meaning of international rule of law, such as the understanding of equality and reciprocity as the cardinal rule of law principles governing international relations. Consequently, the protection of territorial sovereignty traditionally defined the international rule of law.

In contrast, the new paradigm wed traditional humanitarianism with the law of human rights, causing a shift away from states as the dominant subjects of international law to include "persons" and "peoples." The merger between humanitarian law and human rights law gives rise to a complicated and somewhat contradictory legal regime that challenges the very basis of longstanding notions of international rule of law. Whereas international rule of law was defined in terms relating to state sovereignty and self-determination, there is now a shift to a juridical definition of the state and an alternative discourse framed in the universalizing language of human rights.


29. For a discussion of human rights as a language, see KATHRYN SIKKINK, ACTIVISM BEYOND BORDERS, in JOHN E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 211 (1997); NICHOLAS CARNABY, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 175, 177-80, 180-81 (1999); see also Anne-Marie Slaughter, International Law in a World of Liberal States, 6 EUR. J. INT'L L. 503, 505, 537 (1996) (discussing the role of judicial discourse).

30. See D. P. O'CONNELL, INTERNATIONAL LAW 80 (2d ed. 1970); STARK'S INTERNATIONAL LAW 85 (L. A. Shearer ed., 11th ed. 1994) (arguing that states are the principal subjects of international law); see also ROYALD HIGGINS, PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT 39 (1994) (discussing the classic view that international law applies to states, and arguing that there is growing perception that international law is relevant to international actors other than states).


32. The central principles of state sovereignty are legal equality in relation to other states and the right to be free from the use of force against its territorial integrity. See Ruti Teitel, NATIONAL SOVEREIGNTY, 3 LEGAL AID. 26-27 (2002).

33. See infra note accompanying note 58; GLOBAL LAW WITHOUT A STATE (G. J. SCHUBER, ed. 1997).


35. For a discussion of "peoples," see JOHN RAWLS, THE LAW OF PEOPLE (1999); Slaughter, supra note 8, at 183-84 (discussing disaggregation in globalizing politics).

36. On the merger of international humanitarian law and human rights law, see ICC Statute, supra note 18, at art. 7 (defining "crimes against humanity" and proscribing "persecution against any identifiable group of collective on political, racial, national, ethnic, cultural, religious, gender ... grounds") as part of "widespread or systematic attack directed against one, civilian population." Id. at (h); Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Jurisdiction Appeal (stating that "a state sovereignty approach has been gradually supplanted by a human being oriented approach"); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 16-17 (1992).

37. See infra notes 1-44 and accompanying text.

38. One aspect of these new regulatory structures involve nongovernmental organizations (NGOs). For an elaboration of their role, see MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1997).


40. Id. The ICC Statute became active when sixty ratifications were obtained. There are presently eighty-four ratifications and one hundred thirty-nine accreditations. See http://


41. See ICTY Statute, supra note 23; ICTR Statute, supra note 23.

42. See ICC Statute, supra note 18.
the law of war, the parameters of war and peace and the state's duties to its citizens, by extending international jurisdiction beyond national borders and situations of conflict to penetrate states during times of peace.

The establishment of an international regime that contemplates the coercive enforcement of humanitarian law reflects a reconceptualization of the rule of law in the international order. The aim of the newly established enforcement machinery in the form of independent international institutions dedicated to enforcing humanitarian law supports the perception of a heightened international rule of law. These new international institutions incorporate criminal sanctions into the international legal system. Criminal sanctions are a distinctive dimension of legal norms and can plausibly be used to signal and reinforce the difference between general and positive law norms. Moreover, criminal sanctions have distinctive constructive potential.

Changes concerning the central elements of the expanded humanitarian regimes primarily signal a move towards a greater juridification of foreign affairs. This shift illustrates the law's new constructivist potential. A new discourse in the international realm enables the reconceptualization of present international political circumstances, and an attendant redirecting of the course of current foreign policy deliberations and policy. The constitutive relation of law and politics in international affairs is a complex dynamic. At minimum, the new juridical approach allows law to reframe and shift the parameters of existing politics. The next Part explores some of the implications of international legalism's rise, as well as its relation to the politics of globalization.

44. On the challenge to the differentiation of international and internal conflicts, see ICC Statute, supra note 18, at art. 7 (concerning jurisdiction for crimes against humanity); Tadic decision of 2 October 1995, 9 148-154; see also Ruti Teitel, supra note 21, at 184 (arguing that the ICTY expanded the international criminal jurisdiction first established at the Nuremberg Trials to cover "crimes against humanity" when they occur within the state). The ICTR evidences another instance of expansion of international criminal jurisdiction which, while an international tribunal, prosecuted solely in intrastate crimes committed in the Rwandan genocide. See ICTR Statute, supra note 23, at art. 4.
45. See generally H. L. A. Hart, THE CONCEPT OF LAW 213-14 (Oxford 1961) (discussing the uses of sanctions for norm strengthening functions in domestic law); Judith N. Shklar, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (1986) (discussing legalism as an ideology integral to the legal profession and, more importantly for the purposes of this Article, as political ideology). Growing emphasis on positivism in international law has tended to derive largely from American jurisprudence. See Anthony Sebok, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1996); Teitel supra note 17, at 2016-30 (offering a comparative perspective to positivism in the rule of law).
46. To date, there has been little exploration of the distinctive contribution of criminal law to the constructivist theory of law. On constructivism generally, see supra note 17 and accompanying text. In particular, the question arises of whether the role of coercive sanctions should be accounted for within the context of traditional international law premised on consent or within constructivist theory generally premised on other techniques of persuasion. This Article attempts to advance this question. See infra text accompanying notes 93-100.
47. For some of the scholars advocating constructivism in the law, see supra note 17 and accompanying text; see also Ruti G. Teitel, TRANSMIGRATION JUSTICE 4-6 (2000).
48. These are highly schematic here but will be elaborated on further in a larger project in progress.
49. Moreover, within international affairs the "realist" perspective sees the rule of law largely as a function of politics. See supra note 1; see also supra note 41.
51. Some of the ramifications of this restructuring of the political discourse are taken up infra in Part IV
52. See ICJ Statute, supra note 50; see infra note 57 and accompanying text.
54. See infra note 57.
relations.55 In the global context of fragmented power, other agents, namely private parties, non-governmental actors and transnational institutions, play a growing role in the production of international law.56 These changes in international lawmakers processes go to the core of the existing structure and mechanisms of the international regime57 and affect aspects of both political and legal sovereignty. Transformation in the sites and processes of international lawmakers reflect a shift in the legitimacy and authority of international law, with ambivalent ramifications for the new international humanitarian regime's transformation. Diversification in the sites of international norm making parallels the general economic and political expansion outward that characterizes industrialized states.58 As such, these changes ultimately redound to the legitimization of globalization processes. Indeed, what emerges is an apparently globalized jurisprudence.59

The advent of a new international legalism signals enhanced legitimacy for international law. Historically, international law was commonly thought to lack national law's traditional forms of legitimacy; namely the authority associated with state sovereignty. In the present globalizing order, however there is an evident shift in the sources of international law's authority as well as in the perception of its legitimacy.60 The humanitarian regime's expanded reach is best understood in relation to the broader phenomena of globalization, because changes in international law relate to the present conditions of global politics.

55. This is recognized in recent scholarship that emphasizes the growth of transnational law and focuses on the rise in transnational jurisdiction. See Harold Hongji Koh, Why Does It Matter What They Say? International Law and Its Sources, 106 Yale L.J. 2599 (1997); Dress & Slaughter, supra note 6 at 183-97. However, scholarly writing does not explicitly address the direction in the expansion of the international regime. See Goldstein et al., supra note 1, at 390 (outlining the shift in the role of law in international politics, but observing that legal scholars have failed to analyze the larger context of legalization).


58. Regarding this phenomenon of globalization see generally supra note 33; HENDLE ET AL., supra note 3; SASSEN, supra note 8.

59. There is a growing literature on this globalized jurisprudence. See, e.g., WILLIAM TUNWIN, GLOBALISATION AND LEGAL THINKING (William Twining & Christopher McCrudden eds., 2000); GLOBAL LAW WITHOUT A STATE, supra note 33; TRANSCONTINENTAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES (Michael Likensky ed., 2002).

60. For an elaboration, see infra text accompanying notes 69-79.

61. This phenomenon is associated with the most significant change in contemporary political circumstances—the Soviet collapse. On weak nation-states, see Stephen Holmes, Can Weak-State Liberalism Survive? Paper presented at New York University Colloquium on Constitutional Theory (Spring 1997) (unpublished paper on file with author).


national intervention. Contemporary humanitarian law is grounded on the preexisting scheme of the law of war where the legal precedents of the last century and more particularly, the human rights crises of the twentieth century, continue to guide the emerging humanitarian law regime.

This conventional framework lays the basis for the now transformed rule of law reflected in the prevailing international regime.

Currently, the humanitarian scheme is being applied to changing political circumstances. The core predicates of the postwar regime are undergoing a substantial transformation that goes to the basic structure and core values of the international legal system. However, these changes are hardly self-evident, nor do they comport easily with intuitions about the present direction of international law. Therefore, a better understanding of the constitutive interaction of law and politics necessitates the application of interpretive principles regarding the historical development of the international legal domain. From a positive law perspective, the historical law of war has expanded to merge with peacetime human rights law to constitute the new humanitarian regime. The evident tension in the background conditions of international humanitarian law—beyond war to peacetime—is definitional, as it moves the boundaries of the law of war beyond international armed conflict. In the contemporary moment, the humanitarian legal regime reaches beyond the realm of international relations as historically understood and transcends traditional international armed conflict to reach other situations of conflict occurring within the nation state.

A. The Rhetoric of Justice

When it is understood in the context of the heightened political disorder associated with the last two decades, the turn to humanitarian law and legal processes reveals the extent to which international criminal justice has become the basis for the now emergent global rule of law. The turn to humanitarian law represents a move, not only to an increased and expanded legalism, but also to a distinctive discourse of justice.

To begin, a historical vantage point elucidates the extent to which contemporary rule of law’s meaning in the international realm has become more and more coincident with international criminal justice. The meaning of international rule of law has evolved over time and reflects the accumulation of the use of law to manage conflict. A century’s experience lays the basis for the use of international criminal justice to legitimate interventions.

65. See ICC Statue, supra note 18, at arts. 11–19; see also Geneva Convention 1, supra note 23; ICTY Statue, supra note 23; ICR, supra note 23; Meron, supra note 23, at 354–55 (noting that despite some states’ efforts “to limit the reach of international law applicable to non-international armed conflicts, the criminal tribunals for the Former Yugoslavia and Rwanda have contributed significantly to the development of international humanitarian law and its extension to non-international armed conflicts”).

66. There is a growing literature on the emergence of relevant actors. See Kock & Sikkine, supra note 38.

67. These uses of international justice are analogous to other historical instances of the use of law to regulate territory through royal law and colonial law. See Margaret Shaw, Colony: A Comparative and Political Analysis (1981) (noting that a major function of courts in many societies is to assist in holding the countryside, providing an extraterritorial court to adjust relations among the occupying cadres according to their own rules, as well as a body of national law in order to facilitate central administration).

68. See Teras, supra at 47, at 33–39.

69. As a historical matter, this is emphased by the emphasis in the Nuremberg Tribunals on the prosecution of the arch offenses of “aggression” and the “crime against the peace.” For an extensive historical account, see Taylor, supra note 19; Teitel, supra note 19, at 44.
The broader significance of this transformation is that the now emerging rule of law transforms the historical values associated with the long-standing Westphalian international security arrangement, which is primarily understood in terms of the stability of state borders. Moreover, the preexisting regime conceived of rights as nationality-based and protected by the sovereign state. Just as the prior international legal regime, premised on state sovereignty and self-determination, was associated with the growth of modern nationalism, the new legal developments of the emergent humanitarian law regimes are associated with the contemporary phenomena of political transition and globalization. The expanded humanitarian legal regime reestablishes the meaning of rule of law in the new global politics. Linking international criminal law to the broader project of peacemaking, the new codifications transcend ordinary rule of law values while giving expression to dynamic norms that reconstruct the relevant understandings of international security.

In the new humanitarianism, rule of law is not solely defined in terms of the prevailing statist lexicon of national self-determination and state sovereignty. Instead, the new discourse goes to the very core of the prevailing paradigm. The present move shifts the emphasis from the protection of state borders or territoriality, which is the core of the established state system, to other more juridical dimensions of the state such as the stability of peoples. The transformed discourse is appropriate for contemporary globalizing politics because it complements the prevailing state-centered approach and its attention to the protection of state borders, with an approach that is predicated on alternative humanitarian concerns.

B. The Role of Humanitarian Discourse in the New Global Politics

Currently, there is a heightened reliance on law, legal processes, and judicial structures in international politics, which raises a question about how to interpret these judicial developments. The emerging international

humanitarian legal regime has transformed a governmental discourse through its articulation of an international discourse of rule of law. Several dimensions of this regime are discussed below. Global rule of law both enables and restrains power in today's political circumstances in order to manage new conditions of political disorder through the rubric of law.

In the absence of a common world government or bank, it is the humanitarian legal regime that is used to lend authority and legitimacy to the international realm through its tribunals, procedures, legal language, and public justification processes. Humanitarian law and courts are the premier institutions and processes aimed at managing present global politics and representing the legalist view on how to advance the core international rule of law's goal of ending political violence.

Greater reliance on the judiciary is both a distinct institutional response and an alternative process for resolving international controversies. There are multiple bases for this institutional shift. New humanitarianism is the rule of law for contemporary political circumstances of heightened political disorder. Historically, courts have performed the societal function of managing social conflict, particularly concerning the governance of far-away territories. This managerial role has reemerged


82. See Teitel, supra note 21 at 177-93 (1999); see generally Sikkink, supra note 45 (discussing legalism).

83. These political circumstances have been characterized as those of "small wars and weak states." See Jack Straw, Mercenaries: Mid Nile Genesis in the Cold, Economist, Feb. 14, 2002, at 35; see also supra note 61 and accompanying text.

84. See Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983); Kenneth L. Karst & Keith S. Rosenn, Law and Development in
in recent politics.\textsuperscript{85} The judiciary's established management functions clarify the remarkable resurgence of extraterritorial law and courts associated with globalization. Once again, as in colonial times, the legal system's extension and penetration goes beyond the scope of existing political sovereignty. Law's jurisdiction extends beyond state borders to non-state actors, thus, echoing earlier historical understandings of the "law of nations."\textsuperscript{86} Under the global rule of law regime, political controversies are plausibly adjudicated by faraway third party judiciaries. These political circumstances, where courts operate on their own and lack other effective global mechanisms, highlight the singularly constructive potential of the law.

In its rhetorical function, the language of justice is mediating, building upon international adjudicative processes to help manage and legitimate international conflict. Indeed, the expanded humanitarian regime encompasses both the expression and enforcement of norms. This potential for judicial enforcement gives the new law norms a sense of reality. The current paradigm shift enables a move away from a merely political discourse of state interests vindicable in collective exercises of self-determination, to legalistic rhetoric of rights vindicable in courts of law.\textsuperscript{87} Juridical processes amenable to resolution convert matters of policy into matters of law.\textsuperscript{88} The new international legalism's regular justificatory processes offer the potential for rationalizing international policymaking.\textsuperscript{89} Structured processes of justification create a sense of a global order.

Humanitarian norms constitute the emerging global order and serve a primarily discursive function. More and more, a depoliticized legalist language of right and wrongs, duties and obligations, is supplanting the dominant political language based on state interests, deliberation, and consensus. An expanded humanitarian discourse offers an alternative basis for global governance, one in which the notion of rule of law is largely discursive and international legalism plays a distinctly constructive role.\textsuperscript{90} Law in transformative periods both enables and constrains political power. It enables a redefining and reconceptualizing of the interests at stake in international conflict. This is a change from conventional terms where security was defined largely in terms of state interests because now

\textsuperscript{85} See Shapiro, supra note 67 (providing a comparative analysis of courts).
\textsuperscript{86} On globalization generally, see H EOS, supra note 3, at 62–67; Transnational Legal Processes, supra note 59, at 385–89. For historical discussion of the "law of nations," see W. Blackstone, Four Commentaries on the Laws of England 67 (1st ed. 1765–1769); see also HUGO GROTHUS, DE JURE BELL AC PACE 16 (Francis W. Kelsey trans., 1913).
\textsuperscript{87} See generally Hartz, supra note 45; Simon, supra note 45.
\textsuperscript{88} The turn to the language of law meditates the rhetoric of pure politics, on the one hand, and pure moralism on the other. On this point, see Hartz, supra note 45 at 212–22, 225–26; also see HENDIN, supra note 70, at 42–44, 88–90, 93 (2d ed. 1979).
\textsuperscript{89} See infra note 108 and accompanying text (discussing the ICTY's relation to NATO intervention in Kosovo).

Latin America: A Case Book (1973) (explaining that this was particularly true of colonial courts); Shapiro, supra note 67, at 23.

C. The Uses of International Criminal Law

The humanitarian legal regime is well suited for a changing global politics, because the language of criminal justice enables the reconceptualizing of conflict from the local and national to the global, and responsibility from the collective to the individual. Through the humanitarian legal regime's institutions and processes, a formerly purely local conflict exclusively amenable to domestic management is transformable into a situation meriting international attention. The new rule of law reconceives and delimits the prevailing principles of state sovereignty and self-determination in the global order by rendering national and international regulation ambiguous. By so doing, the new legalism offers a basis for reconceptualizing relevant interests in contemporary politics.

International criminal law processes appear to play a particularly important role in globalization because they enable a degree of reconceptualization of the public and private realms. International criminal law has significant constructive potential because international criminal enforcement introduces substantial flexibility into the characterization of conflict situations. Further, the expanded enforcement associated with the international law of armed conflict enables the transformation of traditional understandings of responsibility in the international sphere from the national to the International, and from the collective to the individual.\textsuperscript{91} Expanded enforcement lends new authority to the recognition of added legal personality in the globalizing system.\textsuperscript{92} This process of piercing the veil of state power began at Nuremberg, where the post-World War II Charter went beyond existing international law to reconstruct alternative concepts of international and criminal law jurisdiction. A core change emerging from the merger of the laws of war and human rights is the ongoing application of the rules of the regime beyond states.

As visible in the new international criminal codes, the scope of international criminal law has been entirely reconceived with extended jurisdiction to regulate the use of force beyond states.\textsuperscript{93} In this post-Westphalian rule of law regime, both state and non-state actors are potential subjects of the new humanitarian rights terminology defines the meaning of security more broadly in terms of the preservation of stability across national lines and population permanence.

\textsuperscript{91} See Teitel, supra note 21, at 177.
\textsuperscript{92} To some extent, this notion of "new" personality is in fact a revision to an earlier understanding of the subjects of international law of the eighteenth and nineteenth centuries. In the seventeenth and eighteenth centuries, there was a more comprehensive view of the scope of the "law of nations." See BLACKSTONE, supra note 86, at 65–67 (discussing the then application of international law to individuals).
the new legal system.94 This growing importance of non-state actors in
globalism is perhaps most evident in the law of human rights because the
individual is preeminently its subject.95 In this regard, the recently
expanded humanitarian regime goes beyond the traditional law of war and
its categorical distinctions of war and peace and combatant and civilian to
propose a broader view of protected status and personality in the system.96

Although to some extent international criminal law builds upon
existing understandings of rule of law in the domestic context, particularly
in the present political circumstances, the uses and forms of criminal law
in the international setting are distinguishable from those of their domestic
counterpart. Law does not have a unitary logic. The new international
ellymalism has been heralded as a form of transformative jurisprudence with
the ambitious aim of laying the foundation for global society in the absence
of predicate political consensus or accountability. In the new humanitarianism, law guides the definition of a transforming global rule of law, and
thus serves a mediating function.97 The new humanitarianism's primary role
is to offer a coherent discourse that rationalizes the dimensions of current
foreign policy and supports the international judicial regime's move from its
historical guardianship of nationalist politics to its contemporary guardianship of a globalizing politics.

III. The Effects of the Merger of Two Legal Regimes

A. Globalizing the Law of War

Parts I and II discuss the constitutive aspects of the new humanitarianism, particularly the dimensions of its potential applicability to foreign
affairs. This section examines the ramifications of the extended humanitarian regime on international law. The newly entrenched humanitarian regime is an odd hybrid of two previously autonomous legal regimes: the
law of war and the law of human rights. Their merger has significant ramifications for both regimes, as well as for the international legal system as
a whole. The awkward fit between the law of war and the international human rights regime exposes the tension and incoherence in both regimes.
Their merger, particularly seen in the expansion of humanitarian discourse, has numerous effects that alter international law's process of
lawmaking, structure, subject, and values.

and 38 I.L.M. 581, 644 (1999) (discussing the evolution of the concept of individual
responsibility under international law).

95. See Michael Ignatieff et al., Human Rights As Politics and History 63-98, 109-13, 166-67 (Amy Gutmann ed., 2001) (discussing the individual's place in human
rights law); see generally McDougal & Reisman, supra note 4; Franck, supra note 34.

96. See Velásquez Rodríguez, Case 7920, Ser. C, No. 4, Inter-Am. Ct. H.R. 35, OEA/S.
C) No. 4 (1989); supra note 17 and accompanying text (judgment of July 29, 1988).

97. For a discussion of law's role in this process of global political transition and the
constructive force of international humanitarian law as incorporated in national criminal
adjudications, see Teltel, supra note 32, at 20-21, 33-34; see also Shklar, supra note 45 at 130.

At the same time it extends the humanitarian regime, the attempted
merger poses a threat to the continued existence of an independent interna
tional human rights discourse. Indeed, as is elaborated below, the
displacement of the established human rights vocabulary by that of the law of
war goes to the very heart of the meaning of "human rights."

The merger of these two regulatory schemes complicates the concept
of protected status as well as the related understandings of subjectivity and
personality in international law. First, consider the extent to which the law
of war limits state action in periods of conflict98 and human rights law
limits state behavior in periods of peace.99 Historically, the law of war had
an internal perspective because it was understood to involve states consen
uously agreeing to constrain themselves by setting the bounds of permis
sible conflict. In contrast, the law of human rights had an external
perspective, as persons were protected independently from their nation
state, potentially altogether independent of state action.100 At the juncture
of these two regimes, emerges a dichotomous constitutional self.

Humanitarian law’s expansion is generally regarded as a humanizing
and progressive step,101 because the expanded regime extends the protec
tions of the law of war beyond the conditions of international armed con
flict102 to citizens in peacetime.103 Whereas, under the law of war
the parameters of normative protection are themselves defined by the character
of the conflict;104 in human rights law the relevant protected status is
accorded on other bases.105 However, the historical law of war had given
rise to an apparent perversity in international law; a gap whereby non
nationals obtained greater protection than nationals under international
law.106 After all, historically the law of war protected so-called "enemy" aliens in conditions of international armed conflict.107

The expanded humanitarian law reconciles this contradiction. In the
globalized humanitarian regime, contracting states no longer have monop
olistic power over the protection of their citizens' rights. This expansion in
the scope and subject of humanitarian law has progressive normative con

98. See supra note 23.
99. See supra note 4.
100. See Advisory Opinion on the Effect of Reservations on the Entry into Force of the
American Convention on Human Rights, arts. 74 & 75, CCJ/2/82, Inter-Am. CER, Series A,
101. See Metzler, supra note 4.
102. Those protected included noncombatants in situations of armed conflict. See
War Crimes, supra note 4.
103. See, e.g., Metzler, supra note 4; Helsinki Watch, War Crimes in Bosnia Hercego
104. See Geneva Conventions, supra notes 23 and 73.
105. On human rights theory, see Theories of Rights (Jeremy Waldron ed., 1994);
Maurice Cranston, What Are Human Rights? (Ellen Frankel Paul et al. eds., 1973); Yoram
Dinstein, Human Rights in Armed Conflict: International Humanitarian Law, in Human
106. See Geneva Convention, supra note 23 (discussing treatment of combatants);
Dinstein, supra note 102, at 345, 347.
107. See War Crimes, supra note 4.
sequences because extending human rights beyond nationality is an important move away from status. Yet, as is elaborated below, the gain is modest because even under the new global rule of law the relevant status remains complicated, beyond nationality to subnational and transnational status. Therefore, the central normative work of the expanded humanitarian regime is to redefine the relevant norms, namely as appropriate to the globalizing order, protecting against violations of the laws of war and human rights on the basis of transnational "humanity" status.108

In this regard, the expanded humanitarian regime has normative dimensions aimed at strengthening international rule of law. While the present expansion of humanitarian law appears to be a progressive step in the direction of a global order,109 as currently conceived, the new rule of law is ambivalent. Nevertheless, it might be best understood as a globalizing of the law of war. As discussed above, post-Cold War democratization and other political transitions followed by not fully consolidated democratic institutionalization have resulted in diminished national sovereignty and heightened potential for political violence.110 Thus, the emergent regulatory regime is largely directed at managing systemic political violence.111

B. The New Human Security Rights

In the present political circumstances, while the humanitarian law scheme is centered upon the animating value of "humanity," it is protected largely in a negative sense.112 In this regard, the new humanitarian regime is paradoxical because although it implies greater enforcement of rights, the relevant "rights" are limited to those of the most urgent nature, namely those that protect personal integrity from extreme persecution and extermination.113 In some regard, the instant humanitarian rights are so unsubstantial that it seems incoherent to conceive of them as "rights" at all because they are the minimum personal security rights associated with the rule of law. To whatever extent, the emergent humanitarianism is the guarantee of "liberalism" in the new global order. It is a "liberalism of fear," a global spin on the night watchman state.114

Although framed in the language of individual rights, the law of humanitarian rights does not necessarily offer an affirmative understanding of "universal" human rights. Instead, the new humanitarian regime protects "humanity," in terms of the "peoples" that make up global humanity.115 While the hybridized regime is nominally in the language of individual human rights, the particular rights protected such as those regarding "persecution" and "ethnic cleansing" are peculiarly and impliedly rights predicated on the collective.116 This is the peculiar relevance of the humanitarian regime in the present transition to globalization. The emergent legal regime grounds "humanity" rights not on nationality or universal moral notions, but instead upon a shared rule of law baseline represented by the historical law of war.117

C. A New Minorities Regime

Further as is explicated above, while the "rights" defined in the new humanitarian law are individual rights of a group character, they are also linked to territorial stability.118 The expanded humanitarian regime reaches beyond the longstanding international legal regulation of state sovereignty...
ereignty to protect the territorial stability of ethnic and other groups. Insofar as the expanded humanitarian regime defines new norms, relating to the treatment of "peoples" it destabilizes international law's historic nexus between international security with national sovereignty.

However, the scope of transnational rule of law protection is limited to the presumptive right against the transfer of ethnic collective from their present territory, directed at maintaining population permanence. In this regard, the emerging doctrine of humanitarian intervention is best understood as a principle that limits the existing international system of state sovereignty. The regime is a rule of law for a concededly more interconnected world, particularly due to its proposed limiting of ethnic politics on a humanitarian basis, which introduces a normative ceiling on the longstanding political principles of nationalism and self-determination guiding the international realm.

As such, the expanded humanitarian scheme constitutes a minorities regime for the global age. Offering an enforceable standard for the protection of persecuted groups, the contemporary humanitarian scheme limits national jurisdiction and extends international jurisdiction beyond its traditional scope. In the emergent minorities scheme, the new gravamen of the definition of "race." Notwithstanding the inherent problematic of the historic definition of the protected "group," note 23, at art. 48; 125 concededly more.

See supra notes 4 and 8. However, see the U.N. CHARTER, art. 55, referring to the rights of "self-determination of peoples.

121. On population permanence and the definition of the state, see JAMES BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 569-73 (5th ed. 1998).

122. Historically, the "minority treaties" were the conventional law that protected international law protection of national minorities. In the nineteenth and early twentieth centuries, particularly following the first World War, countries entered into so-called minority treaties that usually protected ethnic minorities within states. See, e.g., Minority Schools in Albania, 1935 P.C.J. (ser. A/8) No. 64.

In the post-World War II II statutes, the definition of the protective group of collective has expanded beyond nationality—to race and religion. See, e.g., International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (hereinafter ICESCR); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). Article 1 of the ICESCR guarantees the rights of "all peoples" but does not mention ethnicity per se as a protected class. Article 2 notes that "race, color, religion, [or] national origin or social origin" are protected status. See also ICC Statute, supra note 18, at art. 7(1)(h) (defining "persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender, or other grounds" as a crime against humanity).


124. This is evident in the definition of "ethnic cleansing" under international law. See Annex, Final Report, supra note 119, at 33 (defining "ethnic cleansing" as a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas). See ICTY Statute, supra note 23, at art. 48; see also Van Schack, supra note 108; Teitel, supra note 21.

125. For a philosophical discussion, see generally RAWLS, supra note 35.


127. See Teitel, supra note 21 (discussing the ICTY and proposing that the proceedings "fall short because they cannot offer the thick form of reconciliation necessary for reconstructing a community inhabited by citizens." id. at 189).

128. For a more comprehensive argument for empire theory, see M. HARDY & ANTONIO NEGRI, EMPIRE (2000) arguing that sovereignty has taken a new form, com-


130. See supra notes 4 and 8. However, see the U.N. CHARTER, art. 55, referring to the rights of "self-determination of peoples.

131. On population permanence and the definition of the state, see JAMES BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 569-73 (5th ed. 1998).

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134. However, their argument is flawed insofar as the offenses that are often at issue, such as massive persecution, tend to involve systemic policy. These policies of systematic persecution involve a mix of individual and collective responsibility. Further, when the law aims to deter future persecution it nevertheless creates the risk that representation of ethnic persecution, albeit in the judicial context, may further ethnicize the political discourse.

135. The present reversion to international treaties that sound in minorities' regimes illuminates the extent to which the new international law is analogous to and associated with the jurisdictional conditions of the early twentieth century multinational regime. The twentieth century dramatically displayed the failure of the minorities' regime associated with multinational empires. Nevertheless, a form of minorities' regime is occurring in globalizing's analogous and unstable political conditions. The new
humanitarian regime contemplates a tiered approach to the rule of law whereby states are initially responsible for the protection of their minorities; however, the regime also lays a basis for international intervention should the states’ national mechanisms fail. International intervention is deemed preferable to destabilizing ethnic secession, or transnational intervention. However, where human rights standards are linked to the humanitarian regime—in particular to its distinctive enforcement mechanisms—the hybrid legal system potentially threatens the independent normative status of human rights law. Indeed, the risk of normative conflict is evident in the mixed regime’s extension of the bases for humanitarian intervention. The next Part illustrates some of the potential for normative conflict and discusses the full policy implications of changes that are not yet fully transparent.

IV. Foreign Policymaking in the Shadow of the Law

This Part illustrates the context for foreign policymaking in the shadow of the law by exploring the recent humanitarian dilemmas in the Balkans and Rwanda. An examination of these scenarios highlights the role of humanitarian law and some of the problems created by its indeterminacy and risks of politicization. As a rule of law for periods of political change, the new regime both constrains and enables state power in addition to providing a basis for unilateral state military intervention.

A. Rethinking Security

The new international legalism has a normative impact on global politics because the changing rule of law both constrains and enables exercises of state power. The emerging juridical regime transforms the prevailing historical view of international rule of law premised upon the protection of national sovereignty and the borders of the nation-state. This development seems to challenge state sovereignty since the new humanitarian rights contemplate the penetration of conventional state sovereignty and territoriality in order to protect persecuted collectives. In the new global scheme, violations of ethnic sovereignty are no longer regarded as

posessed of a series of national and super-national organisms united under a single logic rule, and that the new global form of sovereignty is what they call “empire.” It establishes no territorial center of power and does not rely on fixed boundaries or barriers. It is a decentralized and deterritorializing apparatus of rule that progressively incorporates the entire global realm within its own, expanding frontiers.” Id. at xii.

129. See infra notes 154-72 and accompanying text.

130. See infra notes 166-70 and accompanying text.

131. There is expanding literature on humanitarian intervention. See Francis Kofi Assu, The Evolution of the Doctrine and Practice of Humanitarian Intervention (1999); Gray, supra note 72, at 24-51; Sean D. Murphy, Humanitarian Intervention: The United Nations in an Evolving World Order (1997); Brien R. Roth, Governmental Illegitimacy in International Law (1999); Fernando R. Teson, Humanitarian Intervention: An Inquiry into Law and Morality (2d ed. 1997); Antonio Cassese, A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis, 10 EUR. J. INT’L L. 791 (1999); NATO’s Kosovo Intervention, 93 AM. J. INT’L L. 824, 824-60 (1999); W. Michael Reisman, Unilateral Action and the Transformations of the World Constitutive Pro-

2002 Humanity’s Law

domestic matters, but as matters of consequence for the international community.

However, the humanitarian scheme creates divergent and complex conflicts for state sovereignty because the regime both constrains and enables state power. The new legalism offers an ongoing justificatory apparatus for unilateral and multilateral international intervention. As such the new regime, while explicitly oriented towards peace and stability, also predicates norms that offer new bases for the exercise of state power and military intervention based on humanitarian grounds. These legal developments signal a marked change in the meaning of security in the international realm.

While human rights are often juxtaposed against state security interests, under the new humanitarian scheme that juxtaposition presents a complex tension. The new humanitarianism redefines the meaning of international security by substituting the longstanding understanding of security as protection of state borders with a transformed construction grounded in the discourse of human rights. Under the new humanitarian scheme, protective human rights operate as proxies for national borders in a globalizing politics. The humanitarian rights at stake are “preservative” in two senses. First, these rights protect against persecution and ethnic cleansing in order to preserve a collective’s ability to survive. Second, these rights promote population permanence and residence in particular territories. As such, human rights under the new humanitarian scheme constitute juridical constructs of state borders that redefine the meaning of security in global politics. For instance, a threat to a collective’s preservative rights may affect the permanence of that population, thus endangering peaceful global coexistence. It is precisely this threat that would otherwise not be protected under the currently prevailing rule of law norm of state self-determination, which might well point instead to ethnic secession. The expansion of international jurisdiction aims to stabilize the global order by protecting against the persecution and migration of peoples, threats to territorial integrity in surrounding areas and the balance of political power in the global order. Under the new humanitarian regime, these protected ethnic and other group-related rights limit the currently prevailing ethos of self-determination as the defining dimension of security in the international realm, in so doing redefining and broadening the meaning of stability and security in international law and the global order.

As previously discussed, the political effect of the humanitarian regime’s legal developments is to protect threshold preservative rights. The new humanitarianism allows for a rethinking of the public and private by regulating internal state conflicts. However, the extent to which it does so is highly limited because the newly expanded humanitarian regime takes


133. See ICC Statute, supra note 18, at art. 5.
the present territorial status quo as a given. Moreover, under the humanitar­
ian regime the question of how economic security relates to military and
territorial security is not contestable.134 Instead, the apparent role of the
new rule of law is to sustain the status quo, reinforcing the present territo­
rial balance of global politics, while facilitating globalization processes 135
The emergence of the instant juridical regime, discussed here in contem­
orary globalizing conditions involving extensive migration of capital rights,
reflects that these expectations do not abide in regard to the movement of
peoples. 136 Just the reverse, the juridical developments discussed here are
best understood, not as articulations of ideal human rights norms, but
rather as provisional measures simply aimed at managing the present situ­
atu of heightened disorder associated with contemporary globalizing polit­
ics in the international realm.

B. From the Borders of the State to those of the Collective

The above understanding of the implications of the current humanita­
rian rule of law also resonates in some liberal political theorizing, which
reflects uncharacteristically chastened expectations. For example, in The
Law of Peoples John Rawls offers a plausible standard for global rule of law
by presenting a largely positive account of human rights' role in present
political realities. 137 In The Law of Peoples, Rawlsian human rights operate
as a preservative norm, a floor that functions largely to maintain the pre­
vailing values and structure of present international relations. 138 Prin­
ciples of national sovereignty and self-determination in the international
realm continue to occupy a central role. 139 Also, the uses of "human
rights" as the basis for international rule of law are strictly limited to justi­
fying humanitarian intervention as a response to "expansionist" policies—
nevertheless the Rawlsian emendation is to conceive of the contemporary
understanding of what constitutes "expansionism" to extend within
national borders. 140 Here again as previously discussed, 141 a contem­
porary version of the historical minorities regimes emerges in the "law of
peoples."142 Thus, the relevant protected rights are "peoples" rights—namely
extensions of collective rights to self-determination beyond national to
International deliberations concerning the human rights crises in the former Yugoslavia and Africa illustrate the tragic choices that accompany rule of law dilemmas. The events in Bosnia and Rwanda were instances of international inaction, despite apparently universally accepted imperatives against gross and systematic rights violations, and thus were evident failures of the international legal order. In contrast, although lacking full legality due to the absence of a United Nations mandate, humanitarian actions taken in Kosovo reflected a newly emerging legitimacy. The gap between what traditionally constituted legality in the international legal system, namely protection of national sovereignty and a new understanding of legitimacy, signals the contradictions in the prevailing meaning of rule of law in the international realm.

Recent deliberations by the international community over humanitarian intervention in Bosnia, Rwanda, and Kosovo reflect the expanded role of international law in policy discourse. The relevant policy debates regarding these crises were informed by changing assumptions about the meaning of international rule of law. The crises brought home the extent to which the preexisting international system was inap to handle post-Cold War dilemmas by underscoring the lack of an international military or other alternative enforcement mechanisms and spurring the present momentum for change in the international legal regime in light of the current shift in global power relations.

The dilemmas, chiefly in the Balkans, over humanitarian intervention reflect the contestation over and transformation of the meaning of international rule of law. While in the old "Westphalian" political order, rule of law in international affairs was defined largely in terms of state interests in self-determination, in contemporary transforming politics the protection of this norm no longer adequately comprehends the sense of adherence to global rule of law. To the contrary, under the new regime, the primary basis of legality under the prior system, namely penetrating national sovereignty, may well be treated as justified intervention.

Indeed, recent human rights crises illuminate the changing norm regarding the meaning of international rule of law. Under the new humanitarian regime, the relevant policy questions run the gamut from when humanitarian intervention may be justified to when it might be required—law itself is deemed to define the peace. Justice’s aim transcends the backward looking to do forward-looking work. To illustrate, the international adjudications ongoing in the International Criminal Tribunal for the former Yugoslavia introduced a remarkable aim for international law: advancing the aim of "deterrence" of prospective humanitarian tragedies through international criminal processes as a way to achieve peace and reconciliation of ethnic conflict in the international realm.

Standing alone, the notion that international law is the way to peace is not new—indeed this was a traditional belief common to the nineteenth century. What, now is, is the notion that law itself can define what constitutes peace and stability internationaly, and further that it could somehow displace politics to resolve international conflict. The justification for applying international criminal law may constitute a facile extension of domestic criminal legal rationales of deterrence, yet at the international level, the success of these legal mechanisms remains largely unproven. Indeed, heinous massacres continued in the Balkans despite ongoing prosecutions at the ad hoc Yugoslavia Tribunal proceedings. Similar doubts persist about the effects of legal responses relating to the Rwandan genocide. These instances raise doubts about any direct nexus regarding


151. This awareness has been underscored post-September 11.


153. See U.N. Charter, art 2; Walzer, supra note 70.

154. See infra notes 166-170 and accompanying text.

155. See id.

156. See U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/168 (1999) (arguing that it was urgent not only that international law was a means to peace, but that it was the only road to that end. All other forms of political action not only could be neglected; they were regarded as undesirable). See Tucker, supra note 75; Immanuel Kant, Toward Perpetual Peace: A Philosophical Sketch in Kant’s Political Writings 109 (Hans Reiss ed., H. B. Nisbet trans., 1977).

157. ICC Statute, supra note 18, at Preamble.

158. See Teitel supra note 47, at 33-39, 49-51. Here the analogy to domestic law is thin. The role of law is not unitary, and its domestic functions are derivable from its international role.


160. See, e.g., Rwanda Report, supra note 19.
international criminal justice and the advancement of global rule of law.

Finally, there are less transparent dimensions of the new humanitarian discourse, particularly how the new rule of law constitutes both a constraint and an expansion of the exercise of power and, in turn, international relations. The legal developments described above ultimately point to a marked expansion of the law of conflict. Whereas historically international humanitarian law was limited to rationalizing the use of force after the fact, the current expanded regime would come in earlier and potentially play a broader role in policy deliberations. While the new international rule of law does not necessarily reflect a political consensus on humanitarian intervention, the emergent legal regime does lay the basis for its potential uses. The new humanitarian regime manifestly expands upon the historical bases for humanitarian intervention, namely the protection of state self-determination, to include other bases such as the protection of internal minorities. This change subtly shifts the political debate regarding humanitarian rights cases, thus allowing for a growing interventionism. Perhaps, this is to be expected in a globalizing and thus more interconnected international order.

This development was evident on the international relations road from Bosnia to Kosovo. In a report on recent humanitarian crises, United Nations Secretary-General Kofi Annan observed that human rights abuses, such as war crimes, crimes against humanity, and threats of genocide, constitute legitimate justifications for Security Council intervention under Chapter 7 of the United Nations Charter. Moreover, he asserted that scope is a leading factor on which to predicate a recommendation of intervention based on breaches of the new humanitarian law. Therefore the broader the bases for adjudicating humanitarian law, the broader the bases for military intervention—one justifies the other. The exploding bullet of the new humanitarian regime is that it ostensibly offers a legal and nonviolent means to uphold the rule of law while also laying a basis for justifying potential military intervention, should the political will for such action emerge. The legalization of NATO intervention in Kosovo illustrates the potential power of the new regime, because there policymaking reflected clashing views of rule of law and thus what may well be perceptibly illegal, was nevertheless legitimate in the public eye.

The question arises as to what extent the potential for humanitarian intervention comes into conflict with the core international law commitment against the use of force. Humanitarian intervention is generally considered to pose a challenge to the United Nations Charter's commitment to state sovereignty, as recognized by the conclusions of the Independent Commission on Kosovo's finding that NATO intervention was "illegal yet legitimate." However, as the above discussion suggests the global rule of law comprehends multiple values. The fact that the same norms can pull in potentially conflicting directions underscores the indeterminacy and extent to which the global rule of law, as it is currently framed, constitutes a highly manipulable regime that lends itself to politicization. In this regard, reliance on an international judiciary and discourse of justice reflects a concern for the appearance of principled decision-making processes in foreign affairs. The new humanitarianism advances the construction of a normative international discourse. Understood in discursive terms, the enhancement of international legalism expresses the sense that there is a regulation of the international realm, a legitimate international law, and an international community with shared threshold norms.

Conclusion

The new humanitarianism walks a thin line. The emerging legal system is intended to advance the goal of rationalizing foreign policy decision-making and to assist in the legitimization of the new globalizing order. However, the enterprise has troubling ramifications that are not readily transparent. To a large extent, the humanitarian regime aims to ensure minimal preservative rights that rationalize the protection of the territorial status quo in contemporary foreign affairs. Beyond the role of the law as constraint, the proposed regime would also authorize the expansion of the bases for military intervention beyond its historical goal of protecting national sovereignty to the broader goal of protecting collectives in ways that are likely to become politicized. Finally, the emergence of an expanded humanitarian regime threatens to erode the human rights discourse and value system, which was formerly an independent perspective that allowed for normative critique of the global rule of law in prevailing political realities.

FOREIGN AFF. 116 (1999); Henkin, supra note 64; Reisman, supra note 131; John Yoo, What's Wrong with International Law Scholarship? The Dogs That Didn't Bark: Why Were International Legal Scholars MIA on Kosovo? 1 Cm. Int'l. L. 149 (2000) (arguing this exemplified a politicized rule of law).

162. See supra note 131.
163. See supra note 70.
165. See supra notes 69-79.
166. See Secretary-General's Report, supra note 152, at para. 67.
168. The ultimate legitimacy of the NATO intervention is still a matter of substantial controversy. See generally Jonathan I. Charney, Anticipatory Humanitarian Intervention in Kosovo, 93 AM. J. INT'L. L. 834 (1999) (arguing the intervention's "legality remains questionable" and "presents an unfortunate precedent"); Thomas M. Franck, Sideline in Kosovo: The United Nations' Demise Has Been Exaggerated; Break it, Don't Fakes it, 78