Cornell International Law Journal

Volume 35 Fall 2002 Number 2

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Reprinted from
CORNELL INTERNATIONAL LAW JOURNAL
Volume 35, Number 2, Fall 2002
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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.

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† My gratitude to Camille Broussard, Elisa Gerontianos, and Jill Dworzanski for their helpful research assistance. Thanks to Ryan Goodman, Paul Kahn, Jack Snyder, Leslie Vinjamuri and David Wippman for their comments. Earlier versions of this Article were presented at faculty workshops at Columbia University at a conference on "The Politics and Political Uses of Human Rights Discourse," Georgetown University Law School, Harvard University's Weatherhead Center on Ethics and International Relations, New York Law School, and the University of California, Santa Barbara.

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, evidences 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.[1] 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.[2]

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.[3] 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 penetrates foreign policy realms in new

1. On realism, see John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY 5, 7 (1994). On the relevance of method and interpretive approaches to international law, see *Symposium on Method in International Law*, 93 AM. J. INT'L L. 291 (1999); Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117 (1991); Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 391 (2000) (discussing realism); David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 106 (1999) (discussing convergence of international relations and legal internationalism).

2. *See* Farer, *supra* note 1.

3. *See generally* DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE (1999) (discussing the globalization debate and drawing attention to the dangers of eliding globalization with concepts such as interdependence, integration, universalism, and convergence).

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."[4] 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,[5] 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.[6] The fall of the Soviet Union and the related rise of U.S. power,[7] 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.[8] 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

4. *See* THEODOR MERON, WAR CRIMES LAW COMES OF AGE (1998) [hereinafter WAR CRIMES]; Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000). On the dimension of human rights in international law, see MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 148-53, 941-62 (1981).

5. *See* Ruti Teitel, *Human Rights Genealogy*, 66 FORDHAM L. REV. 301 (1997).

6. *See* HELD ET AL., *supra* note 3; LARRY DIAMOND, DEVELOPING DEMOCRACY: TOWARDS CONSOLIDATION (1999); KEN JOWITT, NEW WORLD DISORDER: THE LENINIST EXTINCTION (1994) (discussing the political destabilization that occurred as a consequence of the collapse of communism).

7. *See* LEA BRILMAYER, 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").

8. *See* SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS 92 (1998) (referring to an "unbundling of sovereignty"); Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 49; Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 183-84 (1997) (arguing that "the State is not disappearing, it is disaggregating into its separate, functionally distinct parts"); *see also* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999) (discussing disaggregation of the federal regime).

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 transitional 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.

9. *See* SASSEN *supra* note 8, at 92; Slaughter, *supra* note 8, at 183-84; Spiro, *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: TOWARDS CONSOLIDATION (1999).

11. *See generally* INTERNATIONAL LAW AND ETHNIC CONFLICT (David Wippman ed., 1998) (discussing the contemporary proliferation of ethnic conflict). Recognition of the increase in world violence was made abundantly clear by the post-September 11 escalation in global terrorism. *See Measures to Eliminate International Terrorism*, G.A. Res. 55/158, U.N. GAOR 6th Comm., 55th Sess., Agenda Item 164, at 1-4, U.N. Doc. A/Res/55/158 (2001), available at http://www.un.org/documents/ga/res/55/a55r158.pdf (Jan. 30, 2001) (defining global terrorism); *see also* Jamie F. Metzl, *Information Intervention: When Switching Channels Isn't Enough*, 76 FOREIGN AFF. 15 (1997); Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFF. 22 (1997). Many of these political conditions existed since the Soviet collapse. *See* JOWITT, *supra* note 6.

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

13. *See generally* IMMANUEL KANT, PERPETUAL PEACE (Lewis White Beck ed., 1957); THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999); MICHAEL DOYLE, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205, 225 n.23 (1983).

14. For elaboration see *infra* text accompanying notes 157-72.

I. 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.

15. *See generally* HUMAN RIGHTS IN GLOBAL POLITICS (Tim Dunne & Nicholas J. Wheeler eds., 1999); LOUIS HENKIN, THE AGE OF RIGHTS (1990).

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 of justice. Indeed, the argument elaborated in my previous work is more limited and pragmatic. *See* Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L. J. 2009 (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 & Leslie Vinjamuri, Principles and Pragmatism in Strategies of International Justice, 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 IDENTITY IN WORLD POLITICS (Peter J. Katzenstein ed., 1996); THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 7-8, 236, 270-73 (Thomas Risse et al. eds., 1999) (using an approach 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).

18. For illustrations of these developments see Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Annex II, U.N. Doc. A/CONF. 183/9, *reprinted in* 37 I.L.M. 999 (1998) *available at* http://www.un.org/law/icc/statute/romefra.htm [hereinafter ICC Statute] (explicitly referring to and incorporating national law, as well as explicating its role in spurring contemporary changes in national law).

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

19. *See, e.g.*, TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS (1992); Ruti Teitel, *Nuremberg and its Legacy: Fifty Years Later*, *in* WAR CRIMES: THE LEGACY OF NUREMBERG 44 (Belinda Cooper ed., 1999). Compare the Allied intervention in World War II and the post-World War II Nuremberg Trials with the basis of international community involvement in Rwanda. In the latter case, the international community relied upon U.N. Charter, Chapter VII, not for authorization to intervene militarily, but first to place U.N. observers in the country and subsequently to establish the war crimes tribunal once the conflict subsided. *See* Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, U.N. SCOR, 54 Sess. U.N. Doc. S/1999/1257 (1999), *available at* http://www.un.org/News/ossg/rwanda_report.htm [hereinafter Rwanda Report]; *Implications of International Response to Events in Rwanda, Kosovo Examined by Secretary-General, in Address to General Assembly*, U.N. GAOR, 54th Sess., 4th mtg. (AM), U.N. Press Release GA/9595 (1999) (providing highlights of the Secretary-General's opening address to the General Assembly).

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

21. *See* Ruti G. Teitel, *Bringing the Messiah through the Law*, *in* HUMAN RIGHTS IN POLITICAL TRANSITION: GETTYSBURG TO BOSNIA 177-93 (Carla Hesse & Robert Post eds., 1999).

22. *See infra* notes 151-54 and accompanying text.

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

23. *See* ICC Statute, *supra* note 18, at arts. 11-19 (setting out the Court's jurisdiction); *see also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31 (incorporating, for the first time, "armed conflict not of an international character" into the lexicon of the Law of War) [hereinafter Geneva Convention I]; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/25704, Annex (1993), *as amended by* S.C. Res. 1166, U.N. SCOR, Annex, U.N. Doc. S/RES/1166 (1998), *reprinted in* 32 ILM 1192 (1993) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute]. The Rwanda precedent makes this clear as the offences only relate to internal conflict. For discussion of some of these developments, see Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L. L. 554, 554-55 (1995) (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"). The first case prosecuted by the ICTY dealt with this issue. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment in Sentencing Appeals, *reprinted in* 39 I.L.M. 635 (ICTY App. Chamber, Jan. 26, 2000).

24. *See* ICC Statute, *supra* note 18 and accompanying text.

25. *Id.*

26. *See* U.N. CHARTER, art. 1.

27. In the traditional nation-state regime, the protection of individual human rights was connected to nationality. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 93-94, 1251-52 (2d ed. Oxford 2000).

view of the meaning of global order, as evidenced in the present expansion of the treaty regime defining the law of war.[28]

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]

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,[30] 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.[31] Consequentially, the protection of territorial sovereignty traditionally defined the international rule of law.[32]

In contrast, the new paradigm weds traditional humanitarianism with the law of human rights, causing a shift away from states[33] as the dominant subjects of international law to include "persons"[34] and "peoples."[35]

28. *See infra* notes 40-44; *see also* INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000), *available at* http://www.kosovocommission.org/ (last visited Nov. 21, 2002).

29. For a discussion of human rights as a language, see Kathryn Sikkink, *Activists Beyond Borders*, *in* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 211 (1997); NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 175, 177-78, 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); STARKE'S INTERNATIONAL LAW 85 (I. A. Shearer ed., 11th ed. 1994) (arguing that states are the principal subjects of international law); *see also* ROSALYN HIGGINS, PROBLEMS AND PROCESS: 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).

31. *See* U.N. CHARTER, art. 2(4); *see generally* J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 1 (4th ed. 1949).

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 AFF. 26-27 (2002).

33. *See infra* text accompanying note 58; GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

34. *See generally* A. H. Robertson, *Humanitarian Law and Human Rights*, *in* ÉTUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE/ STUDIES [STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET] 793 (C. Swinarski ed., 1984) (discussing the historical protections accorded to individuals under international humanitarian law); THOMAS M. FRANCK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM (1999) (discussing the contemporary treatment of individuals in international law).

A tiered subjectivity comes into relief in the extended legal personality of the expanded humanitarian regime. The nation-state is no longer the sole subject of international law because the new regime is also potentially applicable to groups and persons. These developments in the transforming juridical discourse reflect the paradigm shift now underway in the conceptualization of international rule of law. This new subjectivity is evident in the heightened enforcement of the expanded norms, which are directed beyond states to persons and peoples.[36] These new enforcement structures are elaborated upon below.

D. A New Institutionalization

Finally, another dimension of the juridical transformation is its enforcement and entrenchment through international institutionalization. The last decade of the twentieth century witnessed a remarkable expansion in the institutionalization of international law.[37] These new institutions, which range from the international courts to nongovernmental organizations,[38] mediate both public and private realms.

Currently, the humanitarian regime is being entrenched through codifications chartering new international judicial institutions that make criminal justice the primary means of enforcing international rights law.[39] Although international criminal tribunals began on an ad hoc basis, they have become the international community's primary response to humanitarian crises. A consensus on establishing a new institution dedicated to ongoing international adjudication of violations of humanitarian law[40] is seen in the convening of the ad hoc tribunals regarding the Balkans and Rwanda,[41] leading to the recent establishment of a permanent International Criminal Court. Consequently, there is now a turn to an expanded discourse of international criminal justice.[42] The charters that form bases of the new international tribunals complicate traditional understandings of

35. For a discussion of "peoples," see JOHN RAWLS, THE LAW OF PEOPLES (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 collectivity 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 (1995).

37. *See infra* notes 41-44 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).

39. *See* ICC Statute, *supra* note 18

40. *Id.* The ICC Statute became active when sixty ratifications were obtained. There are presently eighty-four ratifications and one hundred thirty-nine signatures. *See* http://iccnow.org/countryinfo/worldsigsandratifications.html (last visited Nov. 22, 2002).

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,[43] by extending international jurisdiction beyond national borders and situations of conflict to penetrate states during times of peace.[44]

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.[45] Moreover, criminal sanctions have distinctive constructive potential.[46]

Changes concerning the central elements of the expanded humanitarian regimes primarily signal a move towards a greater juridicization of foreign affairs. This shift illustrates the law's new constructivist potential.[47] 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.

43. *See Developments in International Criminal Law*, 93 AM. J. INT'L L. 1 (1999).

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, ¶ 148-134; 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" even when they occur wholly within the state). The ICTR evidences another instance of expansion of international criminal jurisdiction which, while an international tribunal, prosecuted solely 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 internal 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 (1998); 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, TRANSITIONAL JUSTICE 4-6 (2000).

II. The New International Legalism

The purpose of analyzing the expanded humanitarian legal regime, particularly its influence on international affairs, is to provide a better understanding of the paradigm shift. Understanding this shift, which is caused by the new juridical regime and its influence in the international realm, should clarify contemporary changes in international politics.

A better understanding of changing legal and political realities requires new interpretive approaches to international law.[48] In the prevailing interpretive approach, international law tends to be externalized and thus largely understood as a mere epiphenomenon of international politics.[49] Moreover, theorizing on the law's relation to politics tends to be unidirectional in that political practices are treated as potential sources of norms, but not the other way around.[50]

By contrast, the interpretive approach advanced for here is a more dynamic, interactive relationship between international law and politics. This approach asserts that the emerging legal regime plays a role in shaping current political policymaking, chiefly by reframing and restructuring the discourse in international affairs in a legalist direction.[51] The expanded humanitarian regime, operating in the context of its new institutionalization, articulates a transformed structure and justificatory process that aim to rationalize and legitimate contemporary foreign policy, particularly as it relates to globalization.

To begin, the threshold dimension of the changes in the emerging international law regime affect the contemporary humanitarian law developments by transforming the structure of the international lawmaking processes. The emerging humanitarian regime transforms and diversifies international lawmaking processes. Classically, the state was the primary agency of norm-making in the international system,[52] conventional lawmaking dominated the international sphere, and international law, whether "conventional" or "customary," was defined in terms of state consent and practice.[53] Although this characterization is an over simplification, the state-centered paradigm is now dated,[54] contemporary norm making in the international realm is not simply an expression of interstate

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.

50. On the sources of law, see Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

51. Some of the ramifications of this structuring 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.

53. Namely, treaties and customary law. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); ICJ Statute, *supra* note 50, at art. 38. *See generally* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 185 (3d ed. 1999); *infra* note 57.

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 lawmaking processes go to the core of the existing structure and mechanisms of the international regime[57] and affect aspects of both political and legal sovereignty. Transformation in the sites and processes of international lawmaking 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 phenomenology 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 juridification. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); KECK & SIKKINK, *supra* note 38; Slaughter, *supra* note 8 at 183-97. However, this 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).

56. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 411 (1992); FRANCK, *supra* note 34; Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748 (1983); P. K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANSNAT'L L. & POL'Y 151 (1992). For example, the European Convention of Human Rights allows individuals to bring complaints. Recent decades have seen dramatic expansion in access by individual claimants. In some fashion, this process allows individuals to make international law. *See* European Commission of Human Rights, Survey of Activities and Statistics 1991, at 21 (1992).

57. As traditionally understood international law making consists largely of state agreements via treaty lawmaking. *See generally* HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 155-180 (1927); J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE LAW OF PEACE (Sir Humphrey Waldock ed., 6th ed. 1963).

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

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

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

The change in the perception of international law's legitimacy is occurring now for several reasons, all of which relate to a number of domestic and international developments. First, the enhancement of international law's authority relates to significant changes in political conditions on the domestic front through the weakening of national institutions. This weakening occurs in newly transitional states,[61] although the impact of the globalization process is also felt in consolidated nation-states.[62] The international legal system's transformation has evident domestic ramifications, particularly regarding foreign affairs decision-making processes[63] as evidenced in a recently invigorated debate in the United States over the appropriate role of international law in the American constitutional scheme.[64]

The international humanitarian regime's enhanced legal potential is also attributable to multiple institutional changes on the international

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).

62. An illustration is evident in the case of General Pinochet. *See* Regina v. Bartle, 2 W.L.R. 827 (H.L. 1999) (U.K.), *reprinted in* 2 All E.R. 97 (1999) *and* 38 I.L.M. 581 (1999).

63. A leading precedent in this regard was the extradition of Augusto Pinochet and its effects in the international realm and upon domestic decision-making. *See* Menno T. Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 HUM. RTS. Q. 940 (2001) (discussing the expanding reach of universal jurisdiction to adjudicate). *See generally* Paul W. Kahn, *American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1 (2000).

64. The question central to this debate is: "To what extent is international law part of national law?" *See* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley & Goldsmith*, 66 FORDHAM L. REV. 371, 376-77 (1997); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 528-29 (1997); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1569 (1984); *see, e.g.*, Symposium: *Foreign Affairs Law at the End of the Century*, 70 U. COLO. L. REV. 1089 (1999). *Compare* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (favoring the existing rule of treating international law as federal law) *with* Curtis A. Bradley & Jack L. Goldsmith *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law should not have the status of federal law, in the absence of authorization from the federal political branches); *compare* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (arguing for a broad interpretation of the treaty power whereby both the House and the Senate may conclude congressional-executive agreements as treaties with a mere majority) *with* Lawrence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (arguing for a narrower view of the sources of proper treaty-making authority). This interpretive debate is associated with other related questions, namely about the role of non-executive political actors in foreign affairs. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 378-79 (1998); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (denying states the power to make their own international human rights policy); Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI. KENT L. REV. 515, 532 (1991) (discussing the interpretation and effect of non self-executing declarations).

front; namely developments in the juridical regime such as the newly chartered international legal institutions and related proceedings.[65] The new humanitarian regime reconceives core international law principles regarding sovereignty and personality in the international order, and transforms dimensions of state obligations and individual rights in a globalizing politics. The new legal lexicon links the evolving political changes associated with globalization processes with changing standards relating to the protection of humanitarian rights in the international realm.

Thus, in the transforming legal regime there is a shift in the relevant locus of authority from the national to the international and from the state to transnational institutions and other political actors implicated in various dimensions of globalization processes.[66] This demonstrable move to law, with or without the state, represents a turn to an alternative source of authority, a development that relates to the aims of globalizing politics.[67]

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.[68] 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.[69] 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 inter-

65. *See* ICC Statute, *supra* note 18, at arts. 11-19; *see also* Geneva Convention I, *supra* note 23; ICTY Statute, *supra* note 23; ICTR, *supra* note 23; Meron, *supra* note 23, at 554-55 (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* KECK & SIKKINK, *supra* note 38.

67. These uses of international justice are analogous to other historical instances of the use of law to regulate faraway territories through royal law and colonial law. *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 23 (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* TEITEL, *supra* 47, at 33-39.

69. As a historical matter, this is exemplified 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.

national intervention.[70] 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,[71] continue to guide the emerging humanitarian law regime.[72] This conventional framework lays the basis for the now transformed rule of law reflected in the prevailing international regime.[73]

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.[74]

70. *See* MICHAEL WALZER, JUST AND UNJUST WARS 51-63 (2d ed. 1992) (discussing the legalist paradigm).

71. *See* U.N. CHARTER, art. 1, para. 7.

72. *See* Teitel, *supra* note 5, at 301-15. Historically, the paradigmatic bases are the two predecessor international legal regimes established, first, by the Westphalia treaty after the Religious Wars, and then subsequently by the treaties following World War II. On the development of the law of war, see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (2000); see generally WAR CRIMES, *supra* note 4.

73. *See* GEOFFREY BEST, WAR AND LAW SINCE 1945 (1994); Geneva Convention I, *supra* note 23; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 47, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1948, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 1, *reprinted in* 16 I.L.M. 1391 (1977); Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (1979), *reprinted in* 16 I.L.M. 1442.

74. For discussion of this issue in the context of a case challenging the jurisdiction of the ICTY, insofar as it extends beyond international armed conflict, see *Prosecutor v. Tadic* (Judgment), Case No. IT-94-I-A, Int'l Criminal Tribunal for the Former Yugoslavia, (App. Chamber, July 15, 1999, 38 I.L.M. 1518 (1999); *reprinted in* 94 AM. J. INT'L L. 571 (2000), *available at* http://www.un.org/icty/ind-e.htm; Prosecutor v. Tadic, No. IT-94-I-AR12, Jurisdiction Appeal Case (1995) (referring to the distinction between international and internal conflict as "more and more blurred, and international legal rules have increasingly have been agreed upon to regulate internal armed conflicts"); see also WAR CRIMES, *supra* note 4.

The broader significance of this transformation is that the now emerging rule of law transforms the historical values associated with the long-standing Westphalia international security arrangement, which is primarily understood in terms of the stability of state borders.[75] 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,[76] the new legal developments of the emergent humanitarian law regime 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.[77]

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.[78] 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

75. *Compare* R. B. J. Walker & Saul H. Mendlovitz, *Interrogating State Sovereignty*, *in* CONTENDING SOVEREIGNTIES: REDEFINING POLITICAL COMMUNITY 1 (R. B. J. Walker & Saul H. Mendlovitz eds., 1990) (arguing that states no longer pretend to be autonomous and that the most important forces affecting people's lives are global in scale and consequence), *with* RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT (1999) (contending for transformation in the values of state autonomy over time).

76. *See* STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 182-83 (1999) (discussing the link between the rise of nationalism and international legal sovereignty).

77. *See* U.N. CHARTER, arts. 51, 52, 53 in light of U.N. CHARTER, art. 2, para. 4. These provisions attempt to reconcile the statist norm of sovereignty with the growing justifications for international humanitarian intervention. Increasingly, humanitarian intervention is being justified under U.N. Charter, art. 52(1)'s authorization of regional "enforcement action." *See* Louis Henkin, Editorial Comment, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L. L. 824, 827-28 (1999) (noting that proponents of a "living Charter" would support an interpretation of the law and an adaptation of UN procedures). For critical discussion of the notion of an evolving right of humanitarian intervention, see GRAY, *supra* note 72, at 26-31 (evaluating the notion of a legal doctrine of humanitarian intervention).

78. *See infra* text accompanying notes 120-26 (discussing population permanence).

humanitarian legal regime supports a transformation of global politics through its articulation of an international discourse of rule of law.[79] 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[80] or bank,[81] it is the humanitarian legal regime that is used to lend authority and legitimacy to the international realm through its tribunals, proceedings, juridical language, and public justificatory processes. Humanitarian law and courts are the preeminent 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.[82]

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.[83] Historically, courts have performed the societal function of managing social conflict, particularly concerning the governance of far-away territories.[84] This managerial role has reemerged

79. On the role of human rights language, see Ruti Teitel, *The Future of Human Rights Discourse*, 46 ST. LOUIS U. L.J. 449, 454-58 (2002); Ruti Teitel, *Millennial Visions: Human Rights at Century's End in* HUMAN RIGHTS IN POLITICAL TRANSITION: GETTYSBURG TO BOSNIA 339-42 (Carla Hesse & Robert Post eds., 1999); Harold Hongju Koh, *Introduction*, U.S. State Dep't, Bureau of Democracy, Human Rights and Labor, 1999 Country Reports on Human Rights Practices (released Feb. 25, 2000), *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/overview.html (referring to human rights as one of three "universal languages"). Koh describes this "third globalization" as "the rise of transnational human rights networks of both public and private actors." *Id.* at xv; *See also* KECK & SIKKINK, *supra* note 38. *See generally* LOUIS HENKIN, HOW NATIONS BEHAVE 42-44, 88-90, 93 (2d ed. 1979). On law as language, see generally James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985) (suggesting that law is most usefully seen as a branch of rhetoric and defining rhetoric as "a central art by which community and culture are established, maintained, and transformed").

80. *See* Andrew Strauss & Richard Falk, *For a Global People's Assembly*, INT'L HERALD TRIB. (Neuilly-sur-Seine, France), Nov. 14, 1997, OP/ED at 8, *available at* http://www.globalpolicy.org/ngos/issues/falk.htm (last visited Nov. 22, 2002); Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT'L L. 191 (2000).

81. As in unified Europe. *See, e.g.*, Patrick Deller, *The European System of Central Banks: Quo Vadis?*, 21 HOUS. J. INT'L L. 169 (1999); John Linarelli, *The European Bank for Reconstruction and Development and the Post-Cold War Era*, 16 U. PA. J. INT'L ECON. L. 373 (1995). On other unifying conceptions of Europe, see J. H. H. WEILER, THE CONSTITUTION OF EUROPE: DO THE NEW CLOTHES HAVE AN EMPEROR? AND OTHER ESSAYS ON EUROPEAN INTEGRATION (1999).

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

83. These political circumstances have been characterized as those of "small wars and weak states." *See* Jack Straw, *Mercenaries: Mad Mike Comes in from the Cold*, ECONOMIST, Feb. 14, 2002, at 55; *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. ROSEN, LAW AND DEVELOPMENT IN

in recent politics.[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."[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 contemplates 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 purely political discourse of state interests vindicable in collective exercises of self-determination, to legalist rhetoric of rights vindicable in courts of law.[87] Juridical processes amenable to resolution convert matters of policy into matters of law.[88] The new international legalism's regular justificatory processes offer the potential for rationalizing international policymaking.[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.[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

LATIN AMERICA: A CASE BOOK (1975) (explaining that this was particularly true of colonial courts); SHAPIRO *supra* note 67, at 23.

85. *See* SHAPIRO, *supra* note 67 (providing a comparative analysis of courts).

86. On globalization generally, see HELD ET AL., supra note 3, at 62-87; 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 GROTIUS, DE JURE BELLI AC PACIS 16 (Francis W. Kelsey trans., 1913).

87. *See generally* HART, *supra* note 45; SHKLAR, *supra* note 45.

88. The turn to the language of law mediates the rhetoric of pure politics, on the one hand, and pure moralism on the other. On this point, see HART, *supra* note 45 at 212-22, 225-26; see also HENKIN, *supra* note 79, at 42-44, 88-90, 93 (2d ed. 1979).

89. *See infra* note 108 and accompanying text (discussing the ICTY's relation to NATO intervention in Kosovo).

90. *See* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 895-96, 901-02, 904 (1998).

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.

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.[91] Expanded enforcement lends new authority to the recognition of added legal personality in the globalizing system.[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.[93] In this post-Westphalia rule of law regime, both state and non-state actors are potential subjects of

91. *See* Teitel, *supra* note 21, at 177.

92. To some extent, this notion of "new" personality is in fact a reversion 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 66-67 (discussing the then application of international law to individuals).

93. *See* ICC statute, *supra* note 18; *Minimum Humanitarian Standards: Analytical Report of the Secretary-General submitted pursuant to Commission on Human Rights Resolution* 1997/21, U.N. Doc. E/CN.4/1998/87, para. 74 (1998).

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 legalism 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.

94. *See* Regina v. Bartle, 2 W.L.R 827 (H.L. 1999) *reprinted in* 2 All E.R.97 (1999) *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 IDOLATRY 63-98, 109-13, 166-67 (AMY GUTTMAN 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/ser. L/V/III.19 doc. 13 (1988); *reprinted in* 28 I.L.M. 291 (1989), Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988); *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 Teitel, *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 international 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 conflict[98] 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 consensually agreeing to constrain themselves by setting the bounds of permissible 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 protections of the law of war beyond the conditions of international armed conflict[102] 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 monopolistic 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* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948).

100. *See Advisory Opinion on the Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, arts. 74 & 75, CC-2/82, Inter-Am. CER, Series A, No. 2, para. 30 (982), *reprinted in* 22 I.L.M. 37 (1983).

101. *See* Meron, *supra* note 4.

102. Those protected included noncombatants in situations of armed conflict. *See* WAR CRIMES, *supra* note 4.

103. *See, e.g.*, Meron, *supra* note 4; HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERZEGOVINA 1-2 (1992).

104. *See* Geneva Conventions, *supra* notes 23 and 73.

105. On human rights theory, see THEORIES OF RIGHTS (Jeremy Waldron ed., 1984); Maurice Cranston, WHAT ARE HUMAN RIGHTS (Ellan Frankel Paul et al. eds., 1973); Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in HUMAN RIGHTS IN INTERNATIONAL LAW 345, 347 (Theodor Meron ed., 1984).

106. *See* Geneva Convention, *supra* note 23 (discussing treatment of combatants); Dinstein, *supra* note 105, 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 ascriptive 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 is 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 regulative 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"

108. *See, e.g.*, ICC Statute *supra* note 18, at art. 7(1), defining a "crime against humanity" and providing jurisdiction irrespective of nature of the conflict. Under the Rome Charter, the "crime against humanity" means inhumane acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." One of the inhumane acts is "persecution" which is defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of group or collectivity." *Id.* at art. 7(2)(g). According to the Charter of the current ad hoc Tribunal for the former Yugoslavia, "crimes against humanity refer to inhumane acts of a very serious nature . . . committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the former Yugoslavia, such inhumane acts have taken the form of so-called ethnic cleansing. *See* ICTY Statute, *supra* note 23, at 1173 art. 48; *see also* Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787 (1999); Ruti Teitel, *The Universal and the Particular in International Criminal Justice*, 30 COLUM. HUM. RTS. L. REV. 285 (1999). *See generally* GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (2000).

109. *See, e.g.*, SASSEN, *supra* note 8; HELD ET AL., *supra* note 3 (noting among other things, that there is a debate about whether globalization as an analytical construct delivers any added value in the search for a coherent understanding of the historical forces shaping the socio-political realties of everyday life).

110. *See supra* note 6 and accompanying text. To illustrate, these political conditions were particularly evident in the Balkans. *See generally* JOWITT, *supra* note 6 (discussing the character, development, extinction, and legacy of the Leninist phenomenon).

111. On globalization as a regime of military governance, see generally HELD ET AL., *supra* note 3, at 87-149.

112. On the notion of humanitarian rights as the basis of "human security," see FEN OSLER HAMPSON ET AL., MADNESS IN THE MULTITUDE: HUMAN SECURITY AND WORLD DISORDER 17-18 (2002). On humanitarianism's protections, see generally Jean S. Pictet, *Red Cross Principles*, ICRC, Geneva, 1956, 14-31, also available at www.icrc.org.

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 humanity 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 sov-

113. *See* ICC Statute, *supra* note 18, at arts. 5-8.

114. For a political theory of rights based on freedom from fear, see Judith N. Shklar, *The Liberalism of Fear*, in LIBERALISM AND THE MORAL LIFE 21 (Nancy L. Rosenblum ed., 1989) (proposing a nexus exists between political crises and theories of justice). For this negative view of humanity as a source of international criminal law, see generally STEVEN RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS: ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY 46-49 (2d ed. 2001).

115. For historical discussion, see Pictet, *supra* note 112 at 14-31. *See also* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 268 (1994) (discussing the charge against Eichmann in precisely these terms, in particular, in the account of the "destruction of the Jewish people." Arendt strives to explicate how aiming to destroy a "people" constitutes an attack on humanity).

116. Thus, under the rubric of individual rights against "persecution," the humanitarian regime impliedly offers broader recognition of "peoples" under international law.

117. This is evident, in particular, in the evolution of the "crime against humanity." For the historical conceptualization, see Nuremberg Charter, art. 6(c) (applying only to the persecution during the war); Van Schaack, *supra* note 108.

118. The proposed "Rome Standards of the International Criminal Court" defines a "crime against humanity" as "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . grounds . . .." *See* ICC Statute, *supra* note 18, at art. 7.

ereignty to protect the territorial stability of ethnic and other groups.[119] 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.[120]

However, the scope of transnational rule of law protection is limited to the preservative right against the transfer of ethnic collectives from their present territory, directed at maintaining population permanence.[121] 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 apt 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.[122] 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

119. For the definition of "ethnic cleansing," see *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), Annex,, U.N. Doc. S/1994/674 at 33 [hereinafter Annex, Final Report] (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").

120. *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 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 569-75 (5th ed. 1998).

122. Historically, the "minority treaties" were the conventional law that provided 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.I.J. (ser. A/B) No. 64.

In the post-World War II statutes, the definition of the protective group or 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 or social origin" are protected statuses. *See also* ICC Statute, *supra* note 18, at art. 7(1)(h) (defining "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds" as a crime against humanity).

Recent codifications responding to contemporary ethnic conflicts further expand the definition of the protected "group." *See* Prosecutor v. Akayesu, Case No. CTR-96-4-T, Judgment, Sept. 2, 1998, *reprinted in* 37 I.L.M. 1399 (1998) (applying the Genocide Convention Article 2 to all "stable and permanent" groups); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶98 (1999). For discussion of these precedents see William A. Schabas, *Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda*, 6 ILSA J. INT'L & COMP. L. 375 (2000).

"international" jurisdiction protects territorial borders on the basis of nationality as well as ethnicity and related bases.[123] In this new regime, the historical rule of law norm in the international sphere, namely the protection of national sovereignty within the borders of the nation-state, is complemented by an alternative norm that links territorial protection with the rights of "peoples." Premising international jurisdiction on ethnicity implies the extension of preservative rights under international law beyond their preexisting nexus with nationality in two ways.

First, and perhaps the most evident, international law is being extended beyond the nation-state borders. The second, less transparent dimension goes to the substantive right at stake, namely under what circumstances and basis international protection is accorded.[124] While "peoples" have not yet acquired full personality under international law, the new humanitarian regime to some extent implicitly recognizes their protected status under the law.[125]

However, the emphasis on ethnicity has significant consequences. Legalists argue that the law can be used to depoliticize ethnicity through the use of the criminal law and its attribution of individual responsibility for ethnic-based persecution.[126] 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 juridical context, may further ethnicize the political discourse.[127]

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 juridical 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 globalization's analogous and unstable political conditions.[128] The new

123. *See generally* Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L. L. 414 (1998) (discussing "indigenous peoples"); Schabas, *supra* note 122.

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 Schaack, *supra* note 108; Teitel, *supra* note 21.

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

126. *See, e.g.*, Prosecutor v. Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 12 (Oct. 9, 1995), *available at* http://www.un.org/icty/ind-e.htm (hearing on Rule 61); *see also* BROWNLIE, *supra* note 121, at 183-89.

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 MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (2000) (arguing that sovereignty has taken a new form, com-

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.[129] 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.[130]

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.[131] In the new global scheme, violations of ethnic sovereignty are no longer regarded as

posed 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 open, 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 an expanding literature on humanitarian intervention. *See* FRANCIS KOFI ABIEW, 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); BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW (1999); FERNANDO R. TESÓN, 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 Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000). For applications and discussion, see *infra* Part IV(B).

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,[132] 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, preservative 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.[133] As such, human rights under the new humanitarian scheme constitute set 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, the 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

132. For one such argument about the contemporary conflict see Michael Ignatieff, *Is the Human Rights Era Ending?*, N.Y. TIMES, Feb. 5, 2002, at A25.

133. *See* ICC Statute, *supra* note 18, at art. 5.

the present territorial status quo as a given. Moreover, under the humanitarian 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 territorial balance of global politics, while facilitating globalization processes.[135] The emergence of the instant juridical regime, discussed here in contemporary 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 situation of heightened disorder associated with contemporary globalizing politics 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 humanitarian 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 prevailing values and structure of present international relations.[138] Principles 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 justifying 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 contemporary 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 nationality to

134. *See* Kennedy, *supra* note 1, at 111 (exhorting globalization as an opportunity for deliberation over social justice).

135. Rights against persecution and ethnic cleansing are "group rights" and implicate property rights, see generally RAWLS *supra* note 35.

136. Indeed, this understanding builds on traditional definitions of the state in terms of permanence of populations. *See* HELD ET AL., *supra* note 3.

137. *See* RAWLS, *supra* note 35, at 25-30 (proposing a view of justice in the international order conceived in terms of "peoples" rather than "states").

138. *Id.*

139. *Id.* (espousing traditional statist views and comparing it to his theory of the "law of peoples").

140. *See id.* at 37-38.

141. *See supra* Part III, note 126.

142. For discussion of the interwar minorities' regime, see *supra* note 35 and accompanying text.

other ascriptive bases, such as ethnicity.[143] Protection of these rights is used to justify international intervention.[144]

Rawl's positive approach to global rule of law, which draws from present political practices, is a far cry from more aspirational cosmopolitan schemes.[145] Although both schemes conceive contemporary human rights in terms of bases that are independent of exclusive state sovereignty, cosmopolitan schemes go much farther in conceptualizing an affirmative constitutive role of human rights operating independent of bases analogous to the principles of state sovereignty and nationality.[146]

C. Illustrations

This Article has discussed the ways in which the present understanding of international rule of law is now undergoing a paradigm shift. This section addresses how these changes are beginning to influence foreign policy discourse,[147] evincing the paradigm shift in the conception of rule of law. Recent foreign policy deliberations reflect varying assumptions about the meaning of international rule of law. The statist view is associated with adherence to longstanding understandings of state sovereignty through the maintenance of international order through the principle of geopolitical stability. In contrast, the new humanitarian standards treat the invocation of the principle of state sovereignty as a rationalization for lawlessness and consider rule of law to depend on the potential of greater international intervention.[148] On one hand, humanitarian intervention could be a slippery slope because it threatens the stability of the international order. On the other hand, such intervention is crucial to maintaining rule of law in the international realm. These competing views of rule of law, apparently contradictory and irreconcilable, represent the currently shifting paradigm.

143. *See* ICC Statute, *supra* note 18, at arts. 5-8.

144. *See supra* note 35.

145. For an explanation of what cosmopolitan law entails, see HELD ET AL., *supra* note 3, at 70-74 (explaining that cosmopolitan law refers to "those elements of law—albeit created by states—which create powers and constraints, and rights and duties, which transcend the claims of nation-states and which have far-reaching national consequences." These elements are meant to define and protect basic human rights values that no political agent should in principle be able to cross). *Id.* at 70. The cosmopolitan project attempts to specify the principles and the institutional arrangements for making sites and forms of power, which presently operate beyond the scope of democratic control. *Id.* at 449-50. For examples of the cosmopolitan approach, see CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1999) (advocating a cosmopolitan approach); STANLEY HOFFMAN ET AL., THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION (1996); Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751 (1992). *See generally* CHARLOTTE BRETHERTON & GEOFFREY PONTON, GLOBAL POLITICS: AN INTRODUCTION (1996).

146. Such as ethnicity, race or religion. *See* Kingsbury, *supra* note 123; Schabas, *supra* note 122.

147. For a discussion of the "legalist" paradigm in foreign relations, see WALZER, *supra* note 70, at 58-62.

148. *See generally* BEITZ, *supra* note 145.

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.[149] 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.[150] 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 inapt 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.[151]

The dilemmas, chiefly in the Balkans, over humanitarian intervention reflect the contestation over and transformation of the meaning of international rule of law.[152] While in the old "Westphalian" political order, rule of law in international affairs was defined largely in terms of state interests in

149. *See* Rwanda Report, *supra* note 19; *Implications of International Response to Events in Rwanda, Kosovo Examined by Secretary-General, in Address to General Assembly*, U.N. GAOR, 54th Sess., 4th mtg., *reprinted in* U.N. Press Release GA/9595 (1999) (providing highlights of the Secretary-General's opening address to the General Assembly). In his opening address, Secretary-General Kofi Annan was notably among those calling for humanitarian intervention—statements giving rise to the so-called Annan Doctrine. *See, e.g.*, A GLOBAL AGENDA: ISSUES BEFORE THE 55TH GENERAL ASSEMBLY OF THE UNITED NATIONS 1 (John Tessitore & Susan Woolfson eds., 2000); *Secretary-General Presents His Annual Report to the General Assembly, reprinted in* U.N. Press Release SG/SM/7136 GA/9596 (1999); *Secretary-General Calls For Renewed Commitment in New Century to Protect Rights of Man, Woman, Child–Regardless of Ethnic, National Belonging, reprinted in* U.N. Press Release SG/SM/6949 HR/CN/898 (1999); *Secretary-General Says Renewal of Effectiveness and Relevance of the Security Council Must be Cornerstone of Efforts to Promote International Peace in Next Century, reprinted in* U.N. Press Release SG/SM/6997 (1999).

150. *See supra* note 6; Kosovo Report, *supra* note 28, at 186; *see also Statement on the Situation in Kosovo, Federal Republic of Yugoslavia, issued by the Movement of Non-Aligned Countries*, U.N. SCOR, 54th Sess., Annex, U.N. Doc. S/1999/451 (1999) (arguing that the primary responsibility for maintaining international peace and security and, thus, for authorizing the use of force in a humanitarian intervention rests with the U.N. Security Council).

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

152. *Report of the Secretary-General to Security Council on the Protection of Civilians in Armed Conflict*, 54th Sess., U.N. Doc. S/1999/957, at 7 (1999) [hereinafter *Secretary-General's Report*].

self-determination,[153] 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 illegality under the prior system, namely penetrating national sovereignty, may well be treated as justified intervention.[154]

Indeed, recent human rights crises illuminate the changing norm regarding the meaning of international rule of law.[155] 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.[156] 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.[157] However, what is new is the notion that law itself can define what constitutes peace and stability internationally, and further that it could somehow displace politics to resolve international conflict.[158] The justification for applying international criminal law may constitute a facile extension of domestic criminal legal rationales of deterrence,[159] 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.[160] Similar doubts persist about the effects of legal responses relating to the Rwandan genocide.[161] These instances raise doubts about any direct nexus regarding

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/808 (1993).

157. *See* SHKLAR, *supra* note 45, at 129 (noting that in the nineteenth century "[i]t was urged 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* TUCK, *supra* note 75; Immanuel Kant, *Toward Perpetual Peace: A Philosophical Sketch* in KANT'S POLITICAL WRITINGS 105 (Hans Reiss ed., H. B. Nisbet trans., 1977).

158. ICC Statute, *supra* note 18, at Preamble.

159. *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 differentiable from its international role.

160. This was most glaring at the time of the Srebrenica massacre. *See* Teitel, *supra* note 21, at 178; *see also Security Council Strongly Condemns Humanitarian Law Violations by Bosnian Serbs, Paramilitary Forces; Cites Summary Executions, Mass Expulsions, reprinted in* U.N. Press Release SC/6149 (1995) *available at* http://www.un.org/News/Press/docs/1995/19951221.sc6149.html; *Security Council Condemns Continued Grave Human Rights Violations in Bosnia and Herzegovina, Croatia, reprinted* in U.N. Press Release SC/6122/Rev. 1* (1995), *available at* http://www.un.org/News/Press/docs/1995/19951109.sc6122.r1.html.

161. *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.[162] Whereas historically international humanitarian law was limited to rationalizing the use of force after the fact,[163] 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,[164] to include other bases such as the protection of internal minorities.[165] 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.[166] 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,[167] 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.[168]

162. *See supra* note 131.

163. *See* WALZER, *supra* note 70.

164. *See* MORTON H. HALPERIN ET AL., SELF-DETERMINATION IN THE NEW WORLD ORDER (1992).

165. *See supra* notes 69-79.

166. *See Secretary-General's Report*, *supra* note 152, at para. 67.

167. *See* U.N. SCOR, 53rd Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998), U.N. SCOR, 53rd Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998), U.N. SCOR, 53rd Sess., 33937th mtg., U.N. Doc. S/RES/1203 (1998); *see generally* Henkin, *supra* note 64.

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, *Sidelined in Kosovo: The United Nations' Demise Has Been Exaggerated; Break it, Don't Fake it*, 78 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 CHI. J. INT'L L. 149 (2000) (arguing this exemplified a politicized rule of law).

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,[169] as recognized by the conclusions of the Independent Commission on Kosovo's finding that NATO intervention was "illegal yet legitimate."[170] 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.

169. *See also* Peter Hilpold, *Humanitarian Intervention: Is there a Need for a Legal Reappraisal?* 12 EUR. J. INT'L L. 437, 437-67 (2001) (discussing arguments for a new right to humanitarian intervention, and arguing that despite its shortcomings the prohibition of the use of force in the U.N. Charter may constitute a better protection than its abandonment). *See generally* Henkin *supra*, note 64.

170. KOSOVO REPORT, *supra* note 28, at 186. For a critical view, see Alfred P. Rubin, Book Review, 6 J. CONFLICT & SECURITY L. 147-55 (2001) (critiquing THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, KOSOVO REPORT (2000)).