Humanity's Law

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We are living in a time of destabilizing political and legal changes. Often, it seems difficult to know whether we are at war or at peace; to determine what sort of conflict is at stake in a given situation; and, relatedly, to decide how best to address the conflict and to protect the persons, peoples, and/or states that it threatens. While both the end of polarized relations and the advent of globalization have their appeal, the renewed engagement has frequently seemed to mean that we see the possibility of intervention, but that hope is too often thwarted. Yet the closer we look, the more one can see that this situation has too frequently been viewed from a twentieth-century, state-centered perspective. Recently, there have been profound changes in the nature of interstate relations and conflict—all of which have pointed in the direction of the paradigm shift toward humanity law and, to some extent, away from interstate international law, that is identified here.

After I finished my first book *Transitional Justice*, which explored legal and political responses to the transitions characterizing the end of the twentieth century, it became apparent that—despite lurches toward liberal democratic peace—conflict and violence not only were here to stay, but in some regard were ever more conspicuous, at least insofar as they were having a vivid impact on civilians. Indeed, it seemed that it was precisely during fragile transitions—that is, moments of weakness—that states were at their most vulnerable.

Another puzzle that arose was that of the role of law, and why legal mechanisms and solutions seemed to proliferate. How could this development best be explained? It was clear that the lens we were using—which viewed situations from a state-centric perspective—lacked sufficient explanatory power. But why might that be? The law’s role seemed problematic, given the changes we had witnessed in the nature of the violence. It was necessary to ask: To what extent is the law addressing the real sources of conflict? What sort of law should properly be applied to twenty-first-century conflicts?
Other changes, too, are under way, leading us to ask: Exactly who is the current subject in foreign affairs today? And, in a concededly globalizing politics, what exactly might be the role of actors beyond the state? Large numbers of civilians were being affected by conflict, and accordingly, it was vital to examine the role of a human-centered (not state-centered) politics and law in the search for legitimacy. Compounded vulnerabilities speak to other identities, which in turn illuminated the extraordinary rise in ethnic conflict. These persistent questions gave rise to the exploration here into the conditions for, the status of, and the changing role for law. They have led me to postulate that we are witnessing at least a partial change of legal regime, departing from the preexisting interstate regime and moving toward a regime I term "humanity law"—that is, the law of persons and peoples.

Pursuing a project of this sort necessitated taking an interdisciplinary perspective, as it involved exploring some of the legal developments in relation to (and as enmeshed in) politics and conflict. In this journey, I have been fortunate to have support and feedback from numerous workshops, colloquia, and institutions. Early ideas were presented at the Centre National de la Recherche Scientifique (CNRS) Colloque on World Civility, Ethical Norms and Transnational Diffusion (October 2002); Yale Law School, Globalization Seminar (May 2003); University of Essex Centre for Theoretical Studies in the Humanities and Social Sciences Seminar (October 2003) and its International Law Seminar in November 2005; and the University of Tel Aviv, Law and History Colloquium (April 2004), as well as the University's law-school-faculty workshop. Ideas were further developed through the London School of Economics Centre for the Study of Global Governance, International Law Seminar (November 2005). Moreover, ideas about the direction of global justice evolved at Hebrew University, in a short course on that subject at the law school, where I guest-taught in the summer of 2007.

Portions of chapter 4, on justice and war, were presented at my alma mater, Cornell Law School, at its Conference on Global Justice, in remarks responding to "Just War and the Noncombatant Defense" (April 2006), which were published as "Wages of Just War," in the Cornell Law School symposium issue (Cornell International Law Journal 39 [2006]). In the fall of 2006, I was grateful for the support of the University of Connecticut's Human Rights Institute, where I was given a visiting Gladstein Chair for Human Rights, as a result of which I gave three university-wide talks. These began with an overarching view of the project, "For Humanity: The Emerging Shift in the Rule of Law in Global Politics," and ended with a presentation on the evolution of the law toward a humanity law regime at the University of Connecticut Faculty Workshop (November 2006).
Over the next year, various chapters of this book benefited from workshops at American University, Washington College of Law; Georgetown Law School’s Constitutional Law Colloquium; Harvard Law School’s International Law Colloquium workshop series; and the Columbia Law School Associates Series, where I presented at its international law seminar. Chapter 3 benefited from discussions at Columbia University’s Associates-in-Law Workshop Series (February 2007); and a Fall Speaker series where I presented “Humanity’s Law: Regulating a World of Conflict” hosted by Columbia Law School's Center for Global Legal Problems (October 2007).

In my last sabbatical, 2007-2008, I am grateful to Yale Law School for support in the way of an Orville H. Schell, Jr. Center for International Human Rights Fellowship, and for the feedback of students and faculty in the Schell Human Rights workshop, where I presented parts of this book (specifically, chapter 3). That spring, I was a visiting professor at Fordham Law School, where the Faculty Workshop offered a most hospitable environment to present parts of the book, particularly chapter 5. During that sabbatical, I was invited to teach at Columbia University, in the Politics Department, and benefited from presenting at the Columbia University Politics Speaker Series on November 7, 2008. I am also grateful to Fordham University Law School for discussions of chapter 3 that occurred in March 2008. Moreover, ideas on humanity law as the basis for interpretation, as discussed in chapter 7, benefited from presentation at Fordham Law School’s International Law and International Relations Theory Colloquium, as well as from part of an international law conference on interpretation and the Constitution, which would later be published in Fordham Law School’s Symposium Issue, “International Law and the Constitution: Terms of Engagement” (2008). My discussion of the area of applied humanity law in the global antiterror campaign benefited from a presentation at Oxford University’s Roundtable entitled “Human Rights and the War on Terror,” convened by David Rodin in November 2008. Chapter 4 benefited from a presentation at Georgetown International Human Rights Colloquium in January 2008, and a presentation at Temple Law School’s International Law Workshop in April 2008. I am grateful for exchanges relating to humanity law at London School of Economics over the last years in my capacity as visiting professor in Global Governance.

My home institution, New York Law School, has been very supportive, through its summer grant research assistance program and the Ernst C. Stiefel Chair, which for some years now has supported my research. Having had a chance to get to know the late Ernst Stiefel and his dynamic view of international law, I believe that he would have liked this book. I am very grateful to the New York Law School law library staff, and particularly to Ms. Camille Broussard and Margaret Butler. I also owe an enormous
debt to my terrific research assistants at New York Law School, without whom this book would not have been possible—most recently Luna Droubi, who somehow balanced this with her editorial role on the Law Review, Aman Shareef, as well as my former research assistants over the last three years: Sandra Dubow, Diane Bradshaw, Eric Grossmann, Theresa Loken, and William Vidal. I would also like to convey my gratitude and admiration to Human Rights Watch for their excellent research reports. In this project, as always, my assistant Stan Schwartz has been invaluable in word processing and other assistance.

Many friends and colleagues have been helpful: I owe thanks especially to my editor at Oxford, David McBride, who saw a spark in this project, and to three anonymous reviewers, all of whom pushed me in important directions. I would also like to express my appreciation for the helpful comments of Bill Alford, Michael Dorf, Michael Doyle, Martin Flaherty, Ryan Goodman, Aeyal Gross, Tom Lee, Joanne Mariner, Jeremy Paul, Iavor Rangelov, Anthony Sebok, Jack Snyder, Peter Spiro, Simon Teitel, Mark Tushnet, and Richard Wilson. To my family, many thanks for the distraction that is their humanity. Most of all, I am indebted to Rob Howse for his deep thinking and profound solidarity on this project.
CHAPTER 1

Introduction

Every Man, as Man has a Right to claim the Aid of other Men, in Necessity. And every Person is obliged to give it to him, if in his Power by the Laws of Humanity.

Hugo Grotius, The Rights of War and Peace, book 2, chapter 25 (1853)

[A]n evaluation of international right and wrong, which heretofore existed only in the heart of mankind, has now been written into the books of men as the Law of Humanity. This law is not restricted to events of war. It envisages the protection of humanity at all times.

Opinion and judgment of the tribunal of the Einsatzgruppen case (1948)

When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.

Kofi A. Annan, “Two Concepts of Sovereignty” (1999)

To brush aside America’s responsibility as a leader and—more profoundly—our responsibilities to our fellow human beings under such circumstances would have been a betrayal of who we are. Some nations may be able to turn a blind eye to atrocities in other countries. The United States of America is different. And as President, I refused to wait for the images of slaughter and mass graves before taking action.

Barack Obama, Remarks on Libya (March 28, 2011)

The end of the Cold War gave rise to hopes for a new peace, to be cemented by multilateral institutions and inspired by universal law. But, in short order, the collapse of communism released a wave of political violence. There followed a range of interventions and engagements undertaken in the name of “humanity”—from Kosovo to Darfur, to Afghanistan and Iraq. We have been confronted with new kinds of conflicts. The obsolescence or inadequacy of long-standing devices and doctrines—such as nuclear deterrence, spheres of influence, and “contain-
ment" approaches—to effectively manage conflict has become increasingly apparent. From the Balkans to Africa to the Middle East, we see a rising number of weak and failed states and increasing political fragmentation, civil strife, displacement, and migration, and we witness the plight of peoples whose very survival is under threat. Terrorism and religious extremism add to the pervasive sense of volatility and existential insecurity.

This history has created the context for a transformation in the relationship of law to violence in global politics. The normative foundations of the international legal order have shifted from an emphasis on state security—that is, security as defined by borders, statehood, territory, and so on—to a focus on human security: the security of persons and peoples. In an unstable and insecure world, the law of humanity—a framework that spans the law of war, international human rights law, and international criminal justice—reshapes the discourse of international relations.

Courts, tribunals, other international bodies, and political actors draw from the various elements of the framework, in assessing the rights and wrongs of conflict; determining whether and how to intervene; and imposing accountability and responsibility on both state and nonstate actors. In interpreting and elaborating the law of humanity, courts, tribunals, and other agents have had to address tensions between, and gaps within, the different traditional doctrinal sources of humanity law. In so doing, they have expanded rights and responsibilities to encompass wider and wider circles of conduct, and additional actors within conflicts. At the same time, they have also increased the legal responsibilities of states, even for the behavior of nonstate actors the Bosnian Serb militias, for example, in the case of Tadic, while exhibiting less deference to the traditional sovereign prerogatives of states, where doing so would interfere with the overriding goal of protecting persons and peoples.

All this engages the sources, content, institutions, and agents of international law. The law of war has traditionally included both *jus in bello*—which addresses the manner in which war is waged—and *jus ad bellum*, which sets the legal rules that determine whether going to war is permissible in the first place. *Jus ad bellum* has mostly been codified in the UN Charter, which bans the use of force by states against other states, except in self-defense or with the authorization of the Security Council. *Jus in bello* is codified to a significant extent in the postwar Geneva Conventions and Additional Protocol, substantial parts of which are now regarded as customary international law, binding on the entire community of states.

Among the most important norms set out in Common Article 3 of the 1949 Geneva Conventions are the prohibitions on murder, torture, and cruel treatment. The targeting of civilians is prohibited; the principle of
proportionality requires the avoidance of excessive force, demanding that it be proportionate to a legitimate military objective; and humane standards of treatment for prisoners of war are set forth. Additional Protocol 1 to the Geneva Conventions pertains to civil wars and is also widely considered to be operative as “customary international law.” Protocol 1, Article 48 formulates the basic rule relating to the protection of civilians—a treaty formulation of the customary rule of discrimination, aimed at ensuring respect for, and protection of, the civilian population and civilian objects. These duties primarily fall upon the signatory states, while the most serious are now enforced by international criminal tribunals.

Next, there is human rights law. The international law of human rights engages states in peacetime, primarily to protect certain individual and group rights of those who reside in their territory. But as the International Court of Justice has opined, its application extends to armed conflict as well, subject to relevant limits.

This body of law is usually said to have its source in the postwar Universal Declaration of Human Rights. Many of the rights in the Declaration have been elaborated in the International Covenant on Civil and Political Rights, a multilateral instrument that is binding on the majority of the world’s states, and that is enforced via an elaborate institutional apparatus for monitoring compliance and hearing complaints. The Covenant on Economic, Social and Cultural Rights has been more controversial, especially during the Cold War, when East-West ideological tensions were reflected in differing views on the meaning—and in some cases, on the very legitimacy—of the Covenant on Economic, Social and Cultural Rights. (The United States is still not fully bound as a party to this covenant.) Now, increasingly, as will be seen, these kinds of rights are the subject of litigation and decisionmaking in the Inter-American and European regimes and tribunals among others.

Finally, also informing the humanity law framework is the law of international criminal justice, which is closely associated with international humanitarian law, as it has evolved since the end of the last world war. Under the law of international criminal justice, enforcement focuses on individuals. This approach may be seen as beginning with the landmark International Military Tribunal at Nuremberg, and drawing from the law of war. It is central to the Torture Convention, and to the charters of the ad hoc international criminal tribunals that were constituted after genocides in Europe and Africa. This approach also characterizes the proceedings of the permanent International Criminal Court (ICC), and encompasses the concept of “universal jurisdiction,” as well as widespread norms that universally prohibit the most egregious of offenses, such as torture and slavery (“jus cogens”). Such norms allow—and, indeed, may even require—the prosecution of offenders by any state that is able to do so.
This book maps the rise of humanity law, and considers how that body of law is shaped by, and is reshaping, each of the three international legal regimes just discussed. While the book does not espouse a formal fusion of rules or doctrines, I argue that humanity law provides a framework that both legal and political actors employ in today's world, as they confront the challenges of conflict and of insecurity. This framework is most evidently at work in the jurisprudence of the tribunals—international, regional, and domestic—that are charged with applying a diverse range of legal materials to particular disputes, disputes that often span issues of internal and international conflict and security. Thus, throughout this book, I will discuss and analyze this jurisprudence. Most international legal scholarship focuses on individual regimes or tribunals, as if they operated in a relatively self-contained way. But under that approach, it is easy to miss the evolution of a jurisprudence that is being generated by a normative and interpretive framework that operates across these divides, and connects the mandates and decisions of diverse tribunals and institutions.

I explore the humanity law phenomenon by looking to its historical roots, its contemporary tendencies, and its effect on the discourse of international relations. By opting for this approach, I am seeking to elucidate the new dilemmas of engagement in global politics, and the increasing overlap and interconnection between the law of war and the law of peace; between international and other levels of legal order (domestic, regional, even subnational); and between and among the regimes regulating the public and private spheres.

Today, when violent conflict is conspicuous and pervasive in parts of the world, the law of war is expanding alongside the parameters of contemporary transnational conflict. Heightened violence, particularly across state borders, coincides with the ascendancy of a humanity-driven discourse in politics. I will elucidate the tension between the ascendant rule of law and the management of the use of force, by exploring the changed law of humanity and its impact on the traditional law of war and human rights law.

The shift in the role of law in managing conflict reflects a changed political consciousness—and the change at issue goes to the very values and principles associated with legality itself. The law and discourse of humanity law are penetrating the sphere of foreign policy decisionmaking, as can be seen in the increasing frequency with which situations of conflict that have hit a political impasse are being referred to court—as has occurred, for example, in the Balkans, Sierra Leone, Darfur, Lebanon, and most recently Libya.

Moreover, as we will see, this framework informs our analysis of globalization and the current economic crisis—raising the vital question “What do we
owe each other?" The "responsibility to protect" ("RtoP") means, in the first instance, the duty of the state to protect its citizens against the worst sorts of political violence, such as ethnic cleansing and genocide. But even absent those extreme circumstances, that duty still points to a shared responsibility. The kinds of legal norms that are often assumed to be epiphenomenal (that is, functioning largely outside a given situation, and retrospectively) in politics—for instance, the norms imposed by the laws of war regarding limits on harm to civilians—are now invoked prospectively, to justify military interventions, such as those that have occurred in Kosovo, Afghanistan, Iraq, and recently Libya. The North Atlantic Treaty Organization sought to justify its bombing of Kosovo and Serbia by making the following statement before the World Court, in which the very purpose of armed intervention is argued in legal terms: "To safeguard ... essential values which also rank as jus cogens. Are the right to life, physical integrity, the prohibition of torture, are these not norms with the status of jus cogens?" 5 Similar justifications to limit political violence against solutions appear in the Security Council's resolution legalizing the intervention in Libya: "[a]uthoriz[ing] Member States ... to take all necessary measures, ... to protect civilians and civilian populated areas under threat of attack." 6

The extent to which this new (or transformed) language of justification is actually altering states' perceptions of their interests, and changing the underlying determinants of state behavior is, of course, a matter for further social-scientific investigation and debate. But the first step to take here is to properly define and understand the grammar and syntax, as it were, of the new language of justification; its origins; and how it has developed in response to changing political realities.

The interstate system is challenged by the claims of new subjects such as persons and peoples, organized along affiliative ties (such as race, religion, and ethnicity) that extend beyond the state and even beyond nationality. These claims range from demands for secession and sovereignty to assertions of novel rights, to claims for protection, assistance, and accountability for past wrongs, both individual- and group-based. We also see the interstate system facilitating both the civil and the criminal accountability of nonstate actors, while making a strong statement about the universal reach of the rule of law, and the universalizable content of the core humanity law norms.

These developments have gone hand in hand with the rise of nonstate actors in international law as bearers of both rights and duties, and the interconnected tendency toward judicialization. Here, one thinks of the emergence of international criminal law processes and institutions, as well as the prevailing regional courts, and how they are being shaped by individ-
uals’ involvement in adjudication, and also of the appellate jurisprudence of the World Trade Organization—a legal system that formally remains within the classic interstate model yet is unable in its lawmaking to resist the shift to non-state-centric subjectivity, as seen by its judge-made decisions entertaining amicus submissions from nonstate actors and in its decision to open hearings to the public.

What might explain the appeal of the new humanitarianism? To what extent does it play to the longing for universalism in a divisive and skeptical age? Is it perhaps addressing the failure of traditional state-based processes and institutions to cope with, and adjust to, changed political realities?

THE PARADIGM SHIFT

At issue is the extended reach of legality. This extension takes as a departure point classic conceptions of state sovereignty and state interests, and moves toward the incorporation of humanitarian concerns (such as concerns for the protection of the rights to life of persons and peoples) as a crucial element in the justification of state action. Under the classic state-sovereignty-based approach, states were largely unconstrained in terms of what they did within their own borders (except for the minimus standards relating to the treatment of aliens—the law of diplomatic protection). And externally, apart from jus cogens, states were constrained only by norms to which they had consented, either by explicit agreement (as in the case of conventional law), or by state practice and opinio juris (as in the case of customary law). As it developed with the UN Charter, this system contemplated only very limited justifications for the use of force: Force could be justified only by the need for the maintenance or reestablishment of international peace and security, and only where authorized or coordinated multilaterally (through the Security Council). Accordingly, Article 2(4) of the UN Charter provides as follows: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”

The UN Charter did recognize one exception: the “inherent” right of self-defense. For, Article 51 provides that, “nothing...shall impair the inherent right of individual or collective self-defence if an armed attack occurs.” At least until the Security Council had been able to act, the right to self-defense may be exercised unilaterally or through other collective institutions (such as NATO, etc.). Of course, as conceded by the 1990s-era UN Secretary-General Kofi Annan, in reality, this “old orthodoxy” was never absolute. The UN Charter, after all, was issued in the name of “the peoples,” not the governments, of the United Nations. As Annan has commented,
the Charter’s aim was not only to preserve international peace but also “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person”; thus, Annan observed, “The Charter protects the sovereignty of peoples. It was never meant as a license for governments to trample on human rights and human dignity.”

Over the last decade, humanitarianism’s meaning for the international legal system has been hotly contested. For some, humanitarianism has become a source of resistance to economic globalization. Yet humanitarian law is actually redefining the struggle for justice in terms that focus not on the preservation of state autonomy against the global legal order, but on the effects of law on persons and peoples, and on our evolving understandings of human security. In Annan’s words,

state sovereignty, in its most basic sense, is being redefined—not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty—by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties—has been enhanced by a renewed and spreading consciousness of individual rights. When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.

For centuries, international law worked hand-in-glove with statism to reinforce modern nation-building. The commitment to self-determination as set out in Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States was qualified by the sanctity of borders, and the persistence of the traditional doctrine of recognition, which looked to facts such as control of territory (as embodied in the Montevideo Convention). From the basic understanding of security that is spelled out in the UN Charter and through to the baseline of state responsibility, and even to the understandings of rights in the international sphere, the state-centered vision still held sway. But that vision is now in the process of being transformed and relativized by a normative order that is grounded in the protection of humanity. Drawing from the postwar moment, as Justice Robert H. Jackson declared at Nuremberg, it has become clear that “humanity need not supplicate for a Tribunal in which to proclaim its rights.... Humanity can assert itself by law. It has taken on the robe of authority.”

Of course, sovereignty is in no way disappearing, but it is losing its traditional status of primacy in the legal ordering that governs matters that
occur beyond the level of the individual state. Sovereignty is no longer a self-evident foundation for international law. This shift is driving the move from the state-centric normative discourse of global politics—which had prevailed until recently—to a far-ranging, transnational discourse in which references to changed subjectivity have consequences. That new discourse is constructed more along humanity law lines.

Debates about the legality and legitimacy of the use of force by states increasingly center on the rights and claims of persons and peoples rather than on the interests and prerogatives of states as such. More and more, humanity law is being extended beyond situations that involve protected persons in interstate conflict to situations that occur outside international conflict, under both national and international supervision. Examples of such situations include interventions or protracted occupations, or involve the "war on terror."

Humanitarian commitments have been broadened and deepened by treaties providing for new forms of conflict regulation of a humanitarian nature, such as the Landmines Convention, and by certain UN Security Council processes and resolutions. Humanitarian enforcement has also been furthered by new regional or international judiciaries, such as the International Criminal Court (ICC), that are invested with various new supervisory and adjudicatory powers. Yet because the ICC lacks certain enforcement resources (such as a police force), the ICC must depend on state and interstate cooperation to bring the accused before the court, detain suspects, acquire evidence, and so forth. Security Council actions are now not just operating on the state but also—and increasingly—targeting individuals and holding them responsible. This dynamic can be seen especially in the war on terror, where sanctions have been imposed on identified individuals who are alleged to have some involvement in terror.

More institutions are invested with juridical law enforcement powers that are meant to allow them to protect humanity law-related rights and duties. Among these institutions are international and regional tribunals—for example, the European Court of Human Rights, the Inter-American Court of Human Rights, the ICC, and the Inter-American Commission on Human Rights. Meanwhile, domestic courts, too, consider humanity law claims involving violations of the law of nations, under customary law and doctrines of "extraterritorial" or universal jurisdiction. For example, the UK House of Lords accepted that Spain had jurisdiction to try deposed former Chilean dictator Augusto Pinochet for violations of *jus cogens* prohibitions of, and protections against, torture so long as the conduct was seen as criminal under the UK law at the time. Such developments reframe and reconceptualize the meaning of accountability in the international realm, enabling a move away from the state and its collective responsibility,
through the reconception of the law in terms of the primacy of individual responsibility. This reconceptualization is creating alternative and potentially independent paths to conflict resolution, occurring often without explicit state consent while arguably also, over time, building a sense of shared global community.

INTERNATIONAL CRISSES REFLECT THE SHIFT

The 1648 Westphalia Peace Treaty allowed states to acknowledge each other's exclusive authority, and created a defining split between international and domestic law, relegating interstate conflict to the orbit of international law. This "classic" international law was rarely enforced or interpreted by courts and tribunals. Instead, it usually elaborated by a small circle of academic commentators and "foreign office" legal advisers. Classic international law was often regarded as autonomous—that is, entirely separate from any nation's domestic law—though some constitutional traditions, such as that of the United States, incorporated elements of international law, as discussed by David Golove.11

Thus, in the words of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Prosecutor v. Dusko Tadic, the tribunal held that "a state-sovereignty-oriented approach have [sic] been gradually supplanted by a human-being-oriented approach.... Why protect civilians from belligerent violence or ban rape, torture or the wanton destruction of hospitals, churches...as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State."12

In present political conditions, there is a growing gap between the older bases of legality and contemporary understandings of legitimacy, which are informed by an evolving norm of humanity law. For example, "emerging slowly but...surely is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty."13 The new understanding of legitimacy is reflected in a reshaped legal order, staked out in terms of interests in humanity. The relationship between this new, altered legal order and the subsisting traditional order of interstate relations, embodied by sources such as the UN Charter's rules on use of force, remains tense and unresolved.

The international community's failure to respond to the Rwandan genocide, coming on the heels of Bosnia, prompted a marked shift in expectations about the protection of humanity. In particular, there emerged a strong demand to protect humanity rights, even if state sovereignty had to
be compromised—as, for example, through military intervention. In the words of then Secretary-General Annan, “it has cast in stark relief the dilemma of what has been called humanitarian intervention: on one side, the question of the legitimacy of an action taken by a regional organization without a UN mandate; on the other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences.”

When ethnic persecution returned to the heart of Europe, it eventually led to NATO military action, including the bombing of Serbia’s capital, Belgrade, on the basis of the need to enforce humanity rights. The long-standing prohibition on the use of force except in self-defense or with the Security Council’s approval was jettisoned in favor of a claim to the right to wage a “just war” in the name of humanity. More generally, responses to contemporary foreign affairs crises involving weak states and large-scale human rights violations display the limits of the classic view of international legality, which has been premised on state sovereignty and territorial integrity. In the case of NATO’s bombing of Kosovo and Serbia, a subsequent investigation by the UN-appointed Independent Commission of Experts concluded that the NATO military intervention was “illegal but legitimate.” The Commission concluded that the intervention was illegal because it lacked prior approval from the UN Security Council. Yet in the Commission’s eyes, the intervention was still justified because all diplomatic avenues had been exhausted, and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.

Hence, for many in the international community, the effort to put a decisive end to “ethnic cleansing” in Kosovo was thought to be justified morally, even if not legally, as an otherwise unauthorized NATO intervention. Now, the way has been paved for a “duty of protection” to be invoked, regarding the possibility of intervention in places like Darfur and, as was recently seen in the first Security Council authorized humanitarian intervention in Libya, taken up at chapter 4. The recognition of a responsibility for the protection of others is also seen in the emerging “human security” focus of a range of political and legal fora and actors—for example, in the United Nations, and in the Human Security Commission and Report, where appeals to justice increasingly are being framed and justified in humanity law terms.

Various post-9/11 political developments have accelerated the rise of the humanity-centered regime. Fear of terrorism, coupled with the concern about the proliferation of weapons of mass destruction, has heightened anxiety regarding the potential for humanitarian disaster on a global scale.
In an increasingly interdependent world, few discernable lines demarcate interstate interests in security from interests that are based simply on our common humanity. As former U.S. president Bill Clinton put it, "philosophers and theologians have talked for millennia about how we are interdependent because of our shared humanity. Politicians have taken it seriously at least since the end of World War II, the dropping of the bomb, and the establishment of the United Nations. But now it is a reality that no ordinary citizen of the world anywhere can escape." 

**THE DILEMMAS OF GLOBAL ENGAGEMENT AND HUMANITARIAN INTERVENTION**

As noted, the humanity law framework reconceives security in terms of the protection and preservation of persons and peoples. Once the relevant subjects and goals in the international realm are reconceived in this way, the meaning and challenges of security in both war and peacetime become blurred. Contemporary conflict is complex: There are a large number of situations where humanity rights are at stake that cannot easily be classified as either a state of war in the classic sense or a state of peace or normal legality. Under classical international law, the state enjoyed a monopoly on the use of violence within its territory—a precept that informed the traditional view of revolutionary and secessionist movements, and that has its source in the early modern political thought that created the grounding of classical liberalism, going back to Hobbes, and others. But that precept becomes highly problematic when the law is made in the name not of states but of humanity; and when the law supports claims not only for universal human rights but also the self-determination of peoples. Such claims have spurred a demand for forceful intervention in "humanity's" name, not in the name of the state.

Meanwhile, too, the trend toward the legalization of conflict has arguably marginalized, or even displaced, elements of normative political and diplomatic discourse. Hence, we can see, for example, in the Middle East, that the political claims underlying violent conflict in the last war in Lebanon and the intervention in Gaza have now taken second stage to competing claims concerning humanity law violations. Genuine political and ideological conflict reemerges, but as a conflict over humanity's multiple meanings and, in particular, over what rights pertain to peoples. Such a contest, however, occurs among diffuse actors, in many sites at once. Present political conditions pose a real challenge to the universal realization of human security, and put into question the degree to which humanity rights are protectable on a transnational basis.
In the chapters that follow, I seek to articulate and elucidate the implications of a humanity-centered global turn. The new “humanity law” translates into a changed language for policymaking, and describes the transformation of international normative order: its constitutive principles, processes, and values. The book confronts and seeks to discern both order in and tension among a rich, interrelated set of legal materials and phenomena—including multilateral treaties and conventions; the foreign-relations-related decisions of domestic courts; the writings of international legal scholars; the advocacy of NGOs and popular movements; the rulings of international courts and tribunals; debates about legality in diplomatic and political fora (such as the UN Security Council); and even, to some extent, in the media and in domestic politics. This is a greatly expanded juridical-philosophical landscape, where, as I shall show, arguments, doctrines, and interpretations shift with great speed from one site to another, and from one level of political or social ordering to another. Tracing the logic that governs these movements—a logic that is susceptible, to a significant extent, I argue, to a “humanity law” interpretation—is a major goal of this book.

A ROADMAP

Chapter 2 addresses the genesis and evolution of humanity law. At each stage or moment of its development, humanity law has been sharpened by the particulars of its political conditions and structures. In this chapter, I also explore affinities with earlier periods—for example, the older law of empire and the premodern “just war” tradition.

This genealogy elucidates the normative force of humanitarianism, and its potential for transnational diffusion. This value is apt to transcend national and cultural differences. Yet the prospect of universalizing humanity law’s extension across state borders can come into genuine tension with political realities relating to the maintenance of the interstate system. The problem of humanitarian intervention arises today within the context of post–Cold War global realities that, unlike their historical counterparts, are distinguished by interconnection—but lack of integration. This situation points to the relevance, and importance, of humanity law as a transnational juridical framework. Despite its universalizing appeal, humanity law is inevitably particular, and associated with the distinctive politics of the time and place: Neither progress nor return, here is a multi-layered, normative framework that best captures the tension, and constitutes the principles, that are apt to guide the present global order.
Chapter 3 articulates the book's central claim, concerning a paradigm shift in the rule of law. It aims to delineate the salient dimensions of the proposed legal framework, by identifying humanity law's discursive and constitutive roles in global politics and economic concerns. Humanity-centered law constitutes a leading contemporary discourse. Reaching beyond the state and the prevailing international system, it offers a new basis for legitimation and interpretation—first, of many traditionally diffuse and diverse legal norms and doctrines and structures in international law, and second (more tentatively but equally importantly), of political actions and claims. This capacious discourse involves diverse political actors, both state and nonstate, reflecting its widespread presence and persuasiveness as a language of justification.

In addition, chapter 3 reviews the dimensions that characterize the humanity law regime; its changed subjectivity in the international system, as it moves beyond states to persons and peoples; its applicability beyond instances of conflict; and its guarantee of minimum order. The humanity law regime, as it extends across the law of war and human rights law, reaches beyond states and their interests and obligations, to the rights and responsibilities of persons and peoples. Despite the emergence of the humanity law regime, many institutional structures are not yet formally changing, and therefore, given institutional rigidity, there are concomitant tensions. Such tensions make it all the more important to adopt appropriate principles of interpretation, so that the transition may be managed (a subject taken up in chapter 7).

New forms of humanity-based law are aimed at bridging the gap between prevailing forms of legality and changing sources of legitimacy. In this context, the proliferation of decentered adjudicatory processes and fora is aimed at fairly representing and reconciling diverse and potentially conflicting aims, such as the aims of justice, security, and peace, reflecting their complex role in present-day politics.

Chapter 4 explains how humanity law frames the use of force, and explains its legitimacy through the lens of crime and punishment. This chapter discusses the uses of tribunals that are convened in the midst of ethnic and political conflict. In such conflicts, the transformation in the perception of the legitimacy of the use of force is seen in the imperative of adjudicating *jus ad bellum*, as well as in the prosecution of *jus in bello*, by addressing the humanitarian violations occurring in conflict. Perhaps the greatest departure humanity law makes from the long-standing understanding of international humanitarian law lies in its inclusion, among its "most serious crimes" category, of the offense of "aggression." That offense, although thus far undefined, would give the now-permanent ICC a routine,
ongoing authority that would extend beyond the cessation of the conflict, as classically understood. This development goes together with the "normalization" of humanity law as a regime that is applicable generally, whether in war or peacetime.

Chapter 4 ends by evaluating the complex relationship between the uses of punishment and the use of military force, as alternative means of protecting humanity rights. It begins by looking to the apparent rise of international criminal justice as means of enforcement of humanity rights. Recent foreign policy discourse reflects an evident return to the concept of the "just war" and its uses as an international sanction. At the same time, however, this return to the "just war" concept occurs against the present context of legalism and judicialization, which imposes added constraints on the waging even of an ostensible just war. This dilemma is evident in the contemporary use of military interventions, where traditional national security is being reconceived in terms of human security: the preservation of persons and peoples. This chapter explores the relationship of the classic approach to the waging of war, to the newer just war logic—showing how these approaches and logics exist in palpable tension with one another. Recognition of this tension, it is suggested, might well clarify the difficulties of some of today's military engagements, such as Afghanistan, Iraq, and most recently Libya.

Chapter 5 considers the implications of the shift toward a humanity-centered perspective for a number of areas of policymaking, where security is being reconceived in terms of the protection of persons and peoples. The expanded humanity-based legal framework has a wide-ranging impact on the meaning of the rule of law in foreign affairs—redefining the rule of law in terms not just of states, but of persons and peoples as well. This chapter will look at several case studies involving recent international controversies that raise dilemmas about the ongoing legitimation of the use of force. It examines situations where the existing legal order coexists with the humanity law regime's rights-based predicates for forceful intervention, in instances of massive humanitarian rights violations. It also asks what is the legal scheme that is normatively appropriate for, and applicable to, the "war against terror." Moreover, it inquires as to how the relevant debates about this campaign also reflect the advent of the humanity-centered response, as well as laying the basis for law enforcement–based constructions regarding who is inside, and outside, the relevant international community. Under the humanity law regime, the appeal of universalizable terms of protection, deriving from a human rights scheme, is now stronger than ever; in the humanity-centered view of agency, responsibility devolves on the individual,
Changes in legal concepts of personality and agency are inextricably associated with related procedural and normative changes in the global order. The heart of the human-centered perspective is that more and more rights and responsibilities in the international system are being reframed to extend beyond the interests of states, and to recognize the interests of persons and peoples. There is a clear expansion of the procedural dimension, in the proliferation of tribunalization and in the increased demand for the ability to adjudicate issues involving individual rights and responsibilities in a variety of spaces, such as the European Court of Human Rights; UN tribunals; and international, hybrid, and local fora. The normativity is also seen in the proliferation of institutions adjudicating jus cogens, norms seeking to provide a modicum of security for persons and peoples around the world. Such norms involve, for instance, protection against crimes against humanity and anti-genocide laws. These developments reflect the evolution of rights to human security, as they are transformed along a procedural/substantive divide that is importantly informing the normative meaning of global justice.

Chapter 6 articulates how the humanity law framework exposes substantive principles of justice. The rise of humanity-centered law informs a changing conception of global justice that centers on a principle of human security with formal and substantive dimensions. The rise of a discourse of "global justice" across a broad range of areas is itself evidence of the humanity law transformation.

Across a broad swathe of areas—including politics, law, economics, ethics, and public health—a vital vision is emerging, which depends on a threshold consensus on the need to guarantee the humane treatment of persons and peoples, and ensure their preservation. Hence, under the humanity law regime, political and economic rights and freedoms are not artificially separated. Rather, the humanity-centered principles of security and the rule of law span these rights regimes—thus constituting a modality whose locus exists between human rights and the interests of states. It is from this responsibility of care for persons and peoples that other rights and entitlements follow. This human-security focus is reflected in the discourse of a range of political and legal fora and actors—including multilateral institutions such as the UN Human Security Commission and Report, where appeals to justice are being framed and justified in humanity law terms.

Chapter 7 presents the humanity law framework as an interpretive lens, examining how its teleology and normative lens informs and shapes—consciously or, often, implicitly—the way courts and tribunals (international, regional, and domestic) interpret and apply the law that governs the
humanity's low

Some of the underlying issues include: To what extent do individual rights stop at state borders? To what extent are individual rights to be recognized and enforced transnationally? To what extent are interpretations through the lenses of the humanity law framework reshaping the categories of the discourse that are dominant among political actors, and the multiple agents of globalization? 

Chapter 8, building on the argument of the prior chapters, seeks to distill the normative contours and significance of humanity law. It explores the implications of the shift to a humanity-centered discourse, and humanity-centered values and institutions, for contemporary international politics. In particular, it focuses on the role of judgment and of interpretation in clarifying humanity law norms in an ongoing way. Beyond the role of judgment, chapter 8 examines the parameters of the basis for the rule of law—moving beyond the state to the protection of persons and peoples—and it shows how these policy decisions forge an evolving conception of international society. In the now emerging global society, the protection of peoples is being reconceptualized—as a protection that goes beyond the protection of the state itself, and bears a dynamic connection to an overarching humanity. The force of the book's thesis is that it offers a coherent account that both illuminates present-day politics and maps the contours of an emerging vision of global social order—one with tremendous potential for transforming human relations and creating greater solidarity between peoples and across state borders.

Finally, the last chapter draws from prior chapters regarding the bases of humanity law to explore the ramifications of this logic for foreign affairs, for conflict, and for the protection of human security. Humanity law puts into motion a comprehensive value system and set of mechanisms and processes. This framework provides the basis for the legitimation of foreign policy decisionmaking. Hence, understanding how a humanity law-based perspective operates practically should elucidate and contribute to a better understanding of current foreign policy controversies, particularly concerning conflict and security. Indeed, the terms of engagement are now at the heart of political strategy, and have become an independent goal of interventions that are justified along humanity law lines. Finally, the conclusion seeks to show some of the practical takeaways of the humanity law perspective that prior chapters have articulated.