

2008

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Recommended Citation

Ruti Teitel, *Humanity Law: A New Interpretive Lens on the International Sphere*, 77 Fordham L. Rev. 667 (2008).

Available at: <https://ir.lawnet.fordham.edu/flr/vol77/iss2/13>

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Cover Page Footnote

Ernst C. Stiefel Professor of Comparative Law, New York Law School. Many thanks to Robert Howse and Tony Sebok for their comments on an earlier draft of this essay and to the Fordham Law Review for their organization of the Symposium and for their help in the editing of this essay; my gratitude to Theresa Loken for research assistance and to Stan Schwatz for word processing.

HUMANITY LAW: A NEW INTERPRETIVE LENS ON THE INTERNATIONAL SPHERE

*Ruti Teitel**

INTRODUCTION

Globalization and the end of the cold war have set the scene for a renewed debate on the meaning of law, rooted in and reminiscent of the debate that occurred at the end of that century's previous great conflict, World War II. At the same time, the growing density and extended reach of international law have resulted in controversy and confusion concerning international law's role in global order.

In particular, we see increasing overlap and interconnection between the law of war and the law of peace, between international and other levels of legal order, and between the regimes regulating public and private spheres. Within the doctrinal structure of international law as such, there is an apparent fusion between human rights and humanitarian law. These tendencies have not eluded the attention of scholars: For example, Theodor Meron has written of the humanization of international law and others have noted the humanitarianization or militarization of international human rights law. A third strand, post-cold war, is the revival of legal discourse concerning the justice of war itself. Post-cold war politics fueled the demand for a more sweeping universal rights regime. While humanitarian norms originated in settings of interstate conflict, contemporary developments challenge accepted understandings of war and peace, international and internal conflict, and state and private actors, combatant and civilian. With today's conspicuous pervasiveness of violent conflict in many parts of the world, the law of war is expanding alongside the parameters of contemporary transnational conflict.¹

The emerging legal order addresses not merely states and state interests and perhaps not even primarily so. Persons and peoples are now at the core, and a non-sovereignty-based normativity is manifesting itself, which

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1. See Ruti Teitel, *Humanity's Law: Rule of Law in a Global Politics*, 35 CORNELL INT'L L.J. 356 (2002).

has an uneasy and uncertain relationship to the inherited discourse of sovereign equality. I call this new normativity “humanity law” and it might be viewed as the dynamic “unwritten constitution” of today’s international legal order—the lens through which many of the key controversies in contemporary law and politics come into focus.

In the aftermath of the Second World War, there was a vigorous debate in the world of Anglo-American jurisprudence about the relationship of law to morality. It was the transition out of Nazism, in particular, that awakened interest in this question. Leading legal philosophers, H.L.A. Hart and Lon Fuller, argued over what counted as law. Should an immoral law be recognized and enforced by judges as “law,” leaving to politics the task of aligning positive legal rules and moral truth? Or should an immoral law be eschewed as in tension with the very idea of rule of law? Half a century later, in the midst of a new flux in globalizing politics and economics, *inter alia*, a version of the debate over law’s relationship to morality has emerged in the context of international law’s changing role in contemporary politics.

On the one side—one might call them the “global legalists”—are those who strongly argue that the best way to rationalize the changes beyond the state and traditional sovereignty is through the law. Here, the lessons of history are conceived in terms of their alternative mirror image, where transformation is privileged over continuity. For global legalists, the relevant legal norms are deterritorialized, autonomous from the state, and therefore, are thought to abstractly give rise to the sovereignty of “global legalism”—a higher positive law beyond the state. This account is often entangled with a progressive teleological view of history. One speaks of “cosmopolitan law” (Jürgen Habermas) or a world government (David Held) or a “world state” (Alexander Wendt).

For cosmopolitans, as with liberal constitutionalists, the individual, rather than the state, is at the center—a position held to varying degrees by Habermas, Held, and Mary Kaldor.² The cosmopolitans’ faith in universal law assumes or depends on the truth of the normative substance of that law. The putative universalism of human rights law is clearly one inspiration for this faith, and underpins the many constitutional analogies used to articulate the normative supremacy of the new international law. The drive to normalize and generalize international criminal responsibility of individuals reflects a faith in the possibility of international law to reflect and realize foundational social morality. At the same time, we witness elements of a utopian vision of the law as insuring that politics is answerable to universal morality. For example, Habermas has called for “the normative taming of political power through law.”³

2. For an exploration of the challenges of cosmopolitanism in the contemporary moment, see KWAME ANTHONY APPIAH, *COSMOPOLITANISM IN A WORLD OF STRANGERS* (2007).

3. JÜRGEN HABERMAS, *THE DIVIDED WEST* 116 (Ciaran Cronin ed. & trans., Polity Press 2006) (2004).

But is it a genuine universalism with which we are dealing? As the legal skeptics (or realists) remind us, the cosmopolitan perspective is itself situated in a particular context—today this context is Europe more often than not. Indeed, a European, international law-based vision is often rightly or wrongly juxtaposed with the image of American exceptionalism.⁴ So it is, that we can see the ways the humanity law debates lie at the core of the current reconceptualization of the international sphere, contributing the parameters for a new version of global bipolarity. Thus, as Habermas has written in *The Divided West*, “the belief and adherence to law and particularly transnational law is depicted as the province of the new Europe, of the new sovereignty.”⁵ Others, such as Philippe Sands, have argued that the stature and centrality of law is constitutive of a transatlantic divide.⁶ By the same token, in the United States, political analysts and scholars, such as Joseph Nye and others, observe or characterize the centrality of law in opposite terms (i.e., in terms of the reverse move underway in the last two administrations away from law and what might be regarded as “soft power”).⁷ Nevertheless, what may be more important for us is that, whether or not the United States employs the same vocabulary, these pivotal debates serve to frame the tensions in U.S.-Europe relations, as well as other characterizations of outlaw, or rogue, states.

Thus, to a significant degree, this legalized discourse shapes and defines the parameters of the changing international realm as well as alliances in international relations. Beyond these markers, there is yet a further cosmopolitan claim: namely that the shifting balance and relationship between law and politics is a step in the direction of perpetual peace, of irreversible human progress. For cosmopolitans, the proliferation of the law is somehow isomorphic, and representative of underlying political and social realities—as well as a vindication of the truth of cosmopolitan law’s normative substance. Political progress is discerned from the mere actuality of juridical developments—the expansion, thickening, and deepening of law. However, this very connection in some sense depends upon the presumption of a cosmopolitan ideal couched not merely in the language of state self-interest, but rather, of heightened enlightened transnational interests (in other words, a postnational normative politics). In this light, the advent of what are, to date, largely judicially enforced norms is heralded as a sign of universal citizenship in the offing; this is ironic, perhaps, since the ascendancy of global judicial power has occurred in the absence of—and arguably to fill the gap created by an absence of—political consensus. This difficulty is finessed or obscured by the recourse to constitutional language. Again, Habermas states, “Following two world wars, the

4. See Bruce Ackerman, *Rooted Cosmopolitanism*, 104 ETHICS 516, 524 (1994).

5. See generally HABERMAS, *supra* note 3.

6. See PHILIPPE SANDS, *LAWLESS WORLD: MAKING AND BREAKING GLOBAL RULES*, at xii (2005) (referring to the Bush administration’s “full scale assault, a war on law”).

7. Compare JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004), with Suzanne Nossel, *Smart Power*, FOREIGN AFF., Mar./Apr. 2004, at 131.

constitutionalization of international law has evolved along the lines prefigured by Kant toward cosmopolitan law and has assumed institutional form in international constitutions, organizations and proceedings.”⁸

For Habermas, and other European cosmopolitans, “cosmopolitan law” is thought to be the great hope, offering governance at the level of the world community as an alternative to supposed American unilateralism. For cosmopolitans, the move to an ethico-human-rights-law discourse is construed as somehow opposite and superior to the classic or traditional language of state interest.⁹ Thus, Habermas characterizes “the new dispute . . . over whether law remains an appropriate medium for realizing the declared goals of achieving peace and international security and promoting democracy and human rights throughout the world.”¹⁰ Indeed, for some, this is their main virtue—that in a global system, humanity law offers standards of judging and delimiting the state from above. This approach represents one side of the polarized debate over the potential of the law.

Yet framing the relevant question at stake in terms of a debate about the law—whether for or against—seems artificial or at least simplistic, as it abstracts from much else that is going on in the world both politically and legally. Admittedly, the debate has been enriched by an essential part of the cosmopolitan claim, which depends on the law for its normative logic. While the cosmopolitan perspective effectively captures the spirit behind the proliferation of the law, because cosmopolitanism tends to essentialize this spirit as a timeless moral truth, it ignores or is blind to the range of historically contingent factors that *explain* the law’s normative direction in the present era. More problematic still is the cosmopolitan position’s dependence on the capacity of the law to function effectively as an authoritative ordering of individual rights and duties. This is implied in the cosmopolitan requirement of a universal ground of legitimacy, one that does not depend on political agreement or compromise between diverse multivariate political and moral claims. Here the cosmopolitan perspective cannot but fail to do justice to the complexity of the current situation, which throws up independent and conflicting individual—and group humanity—rights claims, all interrelated with the state and statehood. The advent of new processes and regimes allows not only for a greater multilateralism, but also for one of a fundamentally different kind, made more complex by the current expansion in the available representation of diverse state—and nonstate—interests in international affairs. This is seen, for example, in the conflict over the reconciliation of the protection of preservation rights of persons and peoples put into conflict in the Balkans, as well as in tensions over the human rights costs of humanitarian intervention.

8. See HABERMAS, *supra* note 3, at 115.

9. *Id.* at 116.

10. *Id.*

The most intransigent critics of the cosmopolitan view today are those whom one might characterize as the “law skeptics,” including realist scholars of international relations. Such skeptics downplay the significance of the changes that are highlighted by the cosmopolitans. They see the post-cold war moment in terms of a reassessment and realignment of state interests and interstate power relations.

For those who would see law in narrow, state-centric terms, the developments in legalism discussed here have little or no material effect because for them there would remain only one measure of the basis for legality. It is one that is largely postulated in state-centric terms, namely, in terms of the possibility of state compliance with rules to which states have consented. The analogy is clearly to the positivist account of domestic law, which gives primacy to the efficacy of command as a characteristic of legal order; international law is meaningful to the extent to which it is a set of effective commands to the states that are bound.¹¹

Notwithstanding the changes explored here, for realists, state power remains the fundamental category for explaining behavior in the international realm. The state continues to be the main actor in international relations and, therefore, realists question the degree to which there may be significant substantive transformation in the relation international law bears to the state-citizen relationship (for example, changes relating to the judicialization of the state) or any other citizen-collective relationship.¹² For much of the last decade, there has been a position associated with the Bush administration closely aligned with realism, or law skepticism, which is sometimes known as “neo-sovereigntism.”¹³ This view of law is reductive and does not recognize even the receptivity of the old common law to customary international law—an arcane originalism simply not adequate to address the current phenomena. In its American incarnation, it espouses a distinctive republican view on what it is that gives law its legitimacy. Neo-sovereigntists view popular sovereignty as the central or exclusive source of legal legitimacy; translated to the international level this position is unrelentingly state-centric, as it is only within states that republican popular sovereignty can be exercised, and thus state consent to international legal

11. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 192 (2005). For a discussion of the drift toward compliance as a central preoccupation, see generally Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters* (Mar. 6, 2008) (draft article, New York University School of Law, Institute for International Law and Justice, International Legal Theory Colloquium), available at <http://iilj.org/courses/documents/2008Colloquium.Session7.Howse.pdf>. See generally INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS (Edith Brown Weiss ed., 1997).

12. See generally *NEOREALISM AND ITS CRITICS* (Robert O. Keohane ed., 1986).

13. For discussion of this phenomenon, see generally JEREMY RABKIN, *THE CASE FOR SOVEREIGNTY: WHY THE WORLD SHOULD WELCOME AMERICAN INDEPENDENCE* (2004); Peter Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, *FOREIGN AFF.*, Nov./Dec. 2000, at 9.

rules becomes the essential proxy or vehicle for the democratic legitimization of international legal rules.

Oddly, considering that it comes close to denying any existence for international law autonomous from the will of states, this point of view has gained support not just among realist theorists of international politics, such as Stephen Krasner, but also among a group of legal scholars, who use it primarily to oppose the incorporation of international law into domestic law, particularly through adjudication.¹⁴ Therefore, what is at stake here goes beyond ostensible U.S.-European differences, which often seem a matter of transient perceptions of political power relations, or quarrels between the intellectuals and ideologues, to a more pressing debate regarding the current sources of legitimacy and the law, and the nature of expectations regarding the normative aims of the law.

The positivist view of international law is challenged by problems relating to changing political realities. There has been a "hollowing out" of the state with ramifications for the interstate system, particularly for the development and interaction of the public and private spheres. Understanding the dramatic increase in weak states and the evident pressures upon and the diminishment of state sovereignty in traditional terms may help to explain the puzzling developments that provide our context—that of greater international interconnection without greater consensus—and accordingly shifts the project of politics in significant measure to alternative adjudicative institutions and processes to provide important independent dimensions of global rule of law. It is in this particular context that such alternatives offer a legitimacy that permeates and diffuses itself through interpretation of our complex realities.

In any event, neither of the polarized positions can account for what law is actually doing here, especially in light of pronounced security threats, posed by the rise of conflict. While the fitful course of human rights in the late twentieth century is often explained in the extreme realist/idealist terms above, this formal approach cannot adequately clarify the present direction in international law and politics—a world of increasingly democratizing and transitional states, which implies persistent disorder and pervasive violence. Generally, the evaluation of foreign affairs tends to be driven by political variables independent of law.¹⁵ There are now neoliberal institutionalist views (for example, those of Robert Keohane and Anne-Marie Slaughter) that aim at a better integration.¹⁶ Like the cosmopolitans,

14. See Robert Dahl, *Can International Organizations Be Democratic? A Skeptic's View*, in *DEMOCRACY'S EDGES* 19 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, *DAEDALUS*, Winter 2003, at 47.

15. See John J. Mearsheimer, *The False Promise of International Institutions*, 19 *INT'L SEC.* 5, 7 (1994). For the extreme view, see Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1 (Stephen D. Krasner ed., 1983).

16. On the relevance of method and interpretive approaches to international law, see Stephen Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 *AM. J. INT'L L.* 291 (1999). See also Tom J. Farer, *Human Rights*

they can account for the instant trend toward legalism, where they have observed the rise of processes and institutions reflecting greater legalization of international policy making,¹⁷ yet, for them, it remains difficult to explain the direction of these developments. Other idealist views are similarly inapt to grasp international law's transformed role in global politics, as they tend to privilege formalist, but increasingly inadequate, conceptions of international law.¹⁸

This essay aims to move beyond the prevailing perspectives on law, whether from international relations or international law, because their theoretical structures are of limited explanatory value today, as they do not adequately comprehend present foreign policy making, which is itself undergoing change in light of contemporary transformations regarding law and politics. Mainstream approaches do not adequately register the transformations wrought by what I have called humanity law—the evolving merger of international human rights and humanitarian legal regimes, such as the changes in personality, judicialization, and enforcement.

There remains the central and overarching question: What is the principle of rule of law today? And, what is its relation to the present politics associated with the globalizing project? The legal debates taken up above seem to only indirectly address this question—namely, how entangled ought the law be in politics?

At the very time that the law seems to be both procedurally and substantively transnational, these critical questions often continue to be addressed in national terms, giving rise to the notion that the different views on global legalism today, somehow harking back to the spirit of the postwar debates, map onto transatlantic differences.¹⁹ Yet this is too simple. All that is clear is that the potential bases for the law—democracy, rule of law, and human rights—do not necessarily go hand-in-hand. Nevertheless, in the various legal debates about the meaning and status of “law,” globalizing law’s purposes are often collapsed or the critical relation is often framed in terms of artificial contradictions (that is, of due process versus democracy, human rights, or justice). Yet even where democracy, peacemaking, and human rights appear to go hand-in-hand, they are all ostensible purposes of the present recombined international law scheme. Thus, the humanity law

in *Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117 (1991); Judith Goldstein et al., *Introduction to Legalization and World Politics*, 54 INT'L ORG. 385, 391 (2000) (discussing realism). For a broader discussion of convergence of international relations and legal internationalism, see David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 106 (1999).

17. See Kenneth W. Abbott et al., *The Concept of Legalization*, in *LEGALIZATION AND WORLD POLITICS* 20–35 (Judith Goldstein, Miles Kahler, Robert Keohane & Anne-Marie Slaughter eds., 2001).

18. See generally CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS BETWEEN IDEALISM AND REALISM* (2003). For the history of this transformed role, see MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2001).

19. HABERMAS, *supra* note 3, at 116 (referring to the United States as engaged in a “moralization of politics”).

scheme can help us understand the ways the complexity of the subjects and the values can result in tensions and, therefore, do not move in a linear progressive direction.

The debate implicates the foundational question of what makes law, law. At the same time, it engages the relationship between different legal norms and regimes—international and domestic—and the question of international law's role in domestic adjudication. In the American context, issues of procedure, legal form, and legal substance are involved, as well as the sources of the law and its legitimacy.

My claim is twofold. First, approaching a range of prominent debates today about the law, which often seem unrelated, from a humanity law perspective will reveal that they have common and entwined elements. Moreover, rather than impose itself from above on these controversies, humanity law inserts and diffuses itself as interpretative practice. It rules from within, through interpretation, rather than from above.

So, for example, consider the many debates over the sources of international law today, such as regarding the meaning of the "law of nations." This term admits not just of one meaning, but instead, evolves and therefore remains in part indeterminate and based on human practices in time. Even with respect to treaty law, to what extent are the existing rules of interpretation—such as those set out in the Vienna Convention—an adequate basis for the interpretative activity of the proliferating adjudicative fora? Moreover, given the apparently increasing number of such fora, to what extent can normative pluralism and/or conflict be addressed via interpretation? With the growth of international law, and particularly concerning humanity rights, what is its relationship to domestic law in constitutional cases involving human rights?

The legal debates are often waged as if what is at stake is the actual "facticity" of law. Here, despite differing emphases or attitudes regarding legalism, this is a moment of positivistic tilt on both sides of the debate and the ocean. On the European side, one thinks of the philosopher Habermas's excursions into legal theory in *Between Facts and Norms*,²⁰ and more recently, arguing for the regulation of the progressive constitutionalization of international law. This is partly a conclusion based on his interpretation of the density of the law—the byproduct of the increasing number of agreements and processes.²¹ Against this background, the dynamic and pressing questions posed here by the pluralism of norms, and their sources, somehow get translated into a concern about the potential conflict between—and the hierarchical ordering of—those norms, and an inquiry into which of these norms are authentically "law."²² In the United States, this has produced a stultifying debate, reflecting a form of retrenchment in

20. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1998).

21. See HABERMAS, *supra* note 3, at 116.

22. See GOLDSMITH & POSNER, *supra* note 11, at 42–43 (arguing that "the behavioral regularities associated with customary international law lack universality or robustness posited by the traditional account"); Goldsmith & Krasner, *supra* note 14, at 47.

light of the many changes discussed here. Despite this reifying tendency in the debate, it yields a set of wildly opposite claims, anchored more in normative postures than facts on the ground. So, for some, international law is seen as “expanding” and becoming ever more important; while simultaneously for others, it is seen to be “fragmenting”²³—its domain and influence more and more diffuse. Properly understood, the controversy now underway transcends the essentializing antinomies that have tended to dominate these debates—of law versus politics, realism versus idealist/cosmopolitan, positivism versus natural law.²⁴

I. GETTING BEYOND THE REALIST/COSMOPOLITAN DEBATE

Examining the evolution of the international legal system from the perspective of humanity law entails understanding change in terms of the reinterpretation of an *acquis*. By offering an interpretative approach (one which derives from the humanity law norms themselves), humanity law opens a space for dealing with regimes sufficient to manage the recombinant humanity law regime.²⁵ The humanity law norm is able to recast many contemporary conflicts and, in particular, illuminate those many conflicts today that do not fit the classic statist or realist paradigm of power relations between sovereign “states.”

Humanity law thus fills an important gap. Human rights treaties have been subject to interpretation in a range of fora, including the European Court of Human Rights, the Inter-American Court, the U.N. Committee on Civil and Political Rights, and other domestic, regional, and international courts. For example, their discussion in the world court has been subject of some scholarly writing.²⁶ Human rights law jurisprudence in the deepest sense is still in its infancy. This is seen in that international law itself lacks a theory of interpretation—a gap that, as discussed below, has been made more vivid with the emergence of the humanity law regime. Existing theory does not adequately account for the effect of international law on international affairs in contemporary political circumstances. Understanding these contemporary changes requires moving beyond existing models, whether from international relations or law. Moreover, as will be seen, the results are neither necessarily linear nor progressive.

23. Martti Koskenniemi, Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, at 682, delivered to the General Assembly, U.N. Doc. A/CN.4/L. 682 (Apr. 13, 2006) [hereinafter Koskenniemi U.N. Report].

24. This history has already been told. See generally KOSKENNIEMI, *supra* note 18.

25. On interpretation generally, see MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* (1987). For discussion of the potential role of interpretation in the ongoing conceptualization of justice, see GEORGIA WARNEKE, *JUSTICE AND INTERPRETATION* (MIT Press 1993) (1992).

26. See Joseph Weiler, *Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century* (Feb. 14, 2008) (draft article, New York University School of Law, Institute for International Law and Justice, International Legal Theory Colloquium), available at <http://www.iilj.org/courses/documents/2008Colloquium.Session5.Weiler.pdf>.

In an era of globalization, international law's current mission and its functioning need to be better understood, especially the effects of the interaction of international law and politics in restructuring international society under the guiding concept of the rule of law. The law and its processes are increasingly moving from the periphery to the center so that it is law, and humanity law in particular, that supplies the pivotal categories for understanding the changing contours of an international society, and indeed casts light on the relevance of the nature of the political regime for the likelihood of its adherence to law.²⁷

The realist/cosmopolitan positivism/constructivist debate bears a resemblance to the postwar law/morals debate above. One position embraces law, while the other reflects a morality-tinged political power. In Habermas's words, "the new dispute . . . is over whether law remains an appropriate medium for realizing the declared goals of achieving peace and international security and promoting democracy and human rights throughout the world."²⁸

Yet, evidently, this representation is also flawed as the new role of law in global politics transcends any one particular debate and any one geographical space.

II. THE INTERPRETIVE TURN

Let us reconsider the debates regarding the meaning of global legalism in light of the paradigm shift above and the salient elements of the proposed humanity law scheme. These can best be understood to enable an interpretive space and normative direction that may help to defuse several areas of conflict.²⁹

Interpretation responds to the proliferation and fragmentation of legal orders, which renders immediately elusive the search for an original contextless "intended" meaning to the "law." Hence, one might say we are already and always in the mode of interpretation. Judicial interpretation is well suited to making sense of diverse normative sources, under conditions of political conflict and moral disagreement. Courts are inherently in dialogue with other courts and institutions that also play interpretive roles, and their decisions in individual cases can give meaning to law without purporting to give "closure" to normative controversy in politics and morals.³⁰

Thinking of humanity law in hermeneutic terms fits well with current legal and political conditions. Given the complexity of globalization (including legal globalization), the messy relationship of these forces to all levels of governance, and the related proliferation and fragmentation of

27. See generally Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457 (2000).

28. See HABERMAS, *supra* note 3, at 116.

29. See *supra* notes 9-11 and accompanying text.

30. See generally CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996); CASS SUNSTEIN, *ONE CASE AT A TIME* (1999).

legal regimes that are decentralized (i.e., not ordered hierarchically), the exercise of adjudication or dispute settlement simply cannot be framed in terms of the application of a rule based on the divination of the common will of the states that consented to that rule. Rather, the pursuit of norms that are reinforced by transnational parameters is governed by interpretive principles, as the norms are often downstream from any "original" national origins. These norms aim to address a conflict between regimes that demands "confirmatory principles."³¹ Particularly since humanity law involves transnational interests and norms, the relevant pursuit demands interpretation, and pluralist perspectives may often be at issue. Interpretation lends itself to this project. In the presence of different cultures and traditions, humanity-law-based interpretation offers the possibility of a ground of shared meaning. Humanity law, as an interpretative lens, navigates the narrow strait between the Scylla of difference and the Charybdis of the notion that these are known common values. But, since practice arises in real cases of individual rights, this ensures that this is not about an essential ideal, but rather concerns the evolution of a norm to guide and manage conflict.

Moreover, the inquiry, as will be seen farther on, is delimited by interpretation as praxis—especially the practice in adjudicative fora, where the parameters of state-citizen, citizen-society, and citizen-citizen relations are regularly contested. The subjects of the law are always linked up to the normative legal regime, with the potential for tension, and the demand for the reconciliation of a multiplicity of values elucidating what one might conceive as a guiding principle of interpretation.

What is at stake is our perception of the meaning, force, and authority of international law today and how to respond to the demand for a guiding "rule of recognition"—a principle that sets, at the basis for the sources and bases for law's authority and significance, some means of managing or resolving normative conflict.³² This goes to the weight of the relevant and diverse legal norms, the question of whether there is an institution or actor possessing ultimate interpretive authority over the norms in question, and, finally, what concerns or values might legitimately guide the decision making that informs the global rule of law. Humanity law may well help point the way.

III. FROM THE LAW OF NATIONS TO THE COVENANTS BETWEEN STATES— AND BACK AGAIN

Humanity law entails a shift in focus from the state to the human. Changes in the subject and aims of the law have implications for what counts in the concepts of legality and rule of law as an international matter. Ever since the last wave of constitutionalism, the classical tradition has been state-centric and rights-based, therefore depending for its enforcement

31. See *Lawrence v. Texas*, 539 U.S. 558, 574–77 (2003).

32. See H.L.A. HART, *THE CONCEPT OF LAW* 228–31 (1961).

on functioning states. Moreover, the shift in what constitutes rule of law normatively connects up to what counts as the legitimate and authoritative sources of law. Changes in legal personality, subjectivization, and judicialization go together here not only with related understandings of responsibility and accountability, but also with related shifts in the sources of lawmaking. With the addition of new personality and related regulation as a result of the amalgamation of the three sources of humanity law regimes, i.e., the complementing of international law with the law of conflict and of human rights, there is added agency and responsibility under multiple regimes. This, in turn, is making for a layered approach to rights and duties in a globalizing sphere. Where persons and peoples have humanity rights, there is an attendant opportunity to shape the law to which they are subject and to shape the relevant values. Of course, insofar as there is already a weakening of state-centric bases for legitimacy, this poses less of a challenge to the current system. This is often seen wherever individuals are helping to shape international law beyond strict expressions of state consent.

IV. HUMANITY LAW AND THE MEANING OF "LAW"

Hart's classic essay on international law in *The Concept of Law* describes the nature of international law and, in particular, what gives this law its authority.³³ Hart readily concedes that international law lacks many of the features that are thought to be characteristic of legal systems based on the paradigm of domestic law: central government, courts with compulsory jurisdiction, and effective sanctions imposed by a central authority.³⁴ Nevertheless, for Hart, these observed differences, instead of putting in question the character of international law as "law," lead to a rethinking of the necessary conditions that have to be present in order to characterize a normative order as "law."³⁵ Thus for Hart, "the proof that 'binding' rules in any society exist is simply that they are thought of, spoken of, and function as such"³⁶ by and for, those who voluntarily accept the far more strongly coercive system of municipal law. The motives for supporting such a system may be extremely diverse.

Further, in terms of its state of development in the prior century,³⁷ international law has been changing in directions that arguably bring it closer in its forms and ways to the domestic—for example, in the development of processes and institutions of judicialization and in the centralization of sanctions, but, even more importantly, in the degree to which international law has emergent potential for applicability and direct effect upon individuals. This alters the relationship of domestic to

33. *Id.* at 208–31.

34. *Id.* at 208–09.

35. *Id.* at 212, 222.

36. *Id.* at 226.

37. See H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 399, 405 (Achron Books 1966) (1933).

international law and, moreover, may also redefine the actualization of law, redirecting the channels for the law's normative effects away from diplomacy or even the legal adviser's office in foreign ministries. In this sense, the recent debates over compliance and the positivity of international law seem to miss the point or reflect the anxiety over the nature of the transformations addressed here.

Traditionally, with the very limited exception of *jus cogens*, state consent has been understood to be the preeminent source of legitimacy in international law. The theory was that the sovereign could only be constrained by its own will. Moreover, the object of international law—its core values and interests in the interstate system—had been traditionally seen in this light. Consider, for example, the jurisdiction of the International Court of Justice (ICJ): setting to one side the case of advisory jurisdiction based on referral of questions by the U.N. General Assembly, the ICJ's jurisdiction *over a state* depended upon the consent of the state in question, whether in the form of a compromise or a compromissary clause in a treaty.

Humanity law implies a different ordering of the sources of legitimacy. One fundamental ground of legitimacy, derived from a human, not state-centered, perspective is the expectation of a minimum threshold of decent behavior, below which conduct becomes inhuman. This notion underpins, explicitly or implicitly, many of the particular constraints on state conduct (and not only state conduct) in humanitarian and human rights law.

Moreover, there is greater awareness as to changes in the meaning of relevant practice informing current international law. The *locus classicus* for the sources of international law, Article 38 of the ICJ statute, refers to "international custom" as evidence of a general practice accepted as law.³⁸ Thus there are two dimensions to the proof of the existence of a customary rule: first, establishment of the "generality" of the practice and, second, of its acceptance as "law"—*opinio juris*.³⁹ Yet, contemporary approaches to custom tend to privilege *opinio juris* over the generality of practice itself. Indeed, some commentators, such as Meron, have observed that recognition of *opinio juris* may not depend entirely upon state actors.⁴⁰

Another area illustrative of humanity law's impact on the understanding of sources of international law is that of *jus cogens*. *Jus cogens* trumps any conflicting treaty norms, as is codified in Article 53 of the Vienna Convention on the Law of Treaties (VCLT). As illustrative of the growing complexity in conflicts involving states, persons, and peoples, consider the

38. See Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (June 26, 1945).

39. See MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 394–95, 405–07 (2005). See generally Koskenniemi U.N. Report, *supra* note 23.

40. See Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 817 (2005) (noting that the "modern approach to customary law, it is said, relies principally on loosely defined *opinio juris*").

tensions between the norms involved in the landmark case of *Prosecutor v. Tadic* in the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the Nicaraguan precedent in the ICJ. The case involved the question of how to gauge individual/state responsibility, where similar issues arise, even if in utterly different contexts.⁴¹ Therefore, this gives rise to a recognition of the need for a mapping of the transformed regime, the relationship between change in the weight of normativity, and what counts as the relevant sources and agents of law. Given the changes in normativity informing current rule of law, it would be surprising if this might not also lead to thinking about the sources and authority of law differently. This will in turn help us understand more profound questions about the meaning of legitimacy in current global politics.

There is also a legitimacy that derives instead from a conception of universal normativity—the humanity norm itself.⁴² Other debates concern the status and treatment of “customary international law” and its ongoing force and authority, especially in relation to treaty law. As establishing state consent (especially as evidenced through practice) has become less central in controversies concerning customary law, the basis for legitimacy has increasingly (whether implicitly or explicitly) shifted to some notion of a shared humanity-based normativity, at least somewhat more expansive than that which underpins *jus cogens*. Such a view of legitimacy facilitates the application of norms to situations that represent changes in the nature of international order not contemplated when the norms were codified through treaty law—for instance, the application of the Geneva Conventions to terrorism and noninterstate conflicts.

The debates concerning the status and reality of international law have been sharpest in the United States, where its peculiar system of separation of powers and federalism, as well as its layered historical experiences of both colonies and of empire, involving often contested projections of extraterritorial law,⁴³ have made it at once more sensitive to issues of sovereignty and consent, but also keenly aware of the potential for legal conflict and pluralism. As will be seen, there are other instances of judicialization wrestling with the issues of the paradigm shift and the reconstitution of the rule of law.

What makes international law, “law”? At some level, there is a historic debate between positivists and natural law advocates.⁴⁴ The positions in the debate go to the ways international law may well be distinguishable from

41. See *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment, ¶¶ 115–45 (July 15, 1999) (proposing “overall control”).

42. See Armin von Bogdandy & Sergio Dellavalle, *Universalism and Particularism as Paradigms of International Law* (N.Y. Univ. Inst. for Int’l Law and Justice Working Papers, Working Paper No. 2008/3, 2008) (discussing the various bases of universalism as a paradigm of international law).

43. See generally Teemu Ruskola, *Canton Is Not Boston: The Invention of American Imperial Sovereignty*, 57 AM. Q. 859 (2005).

44. E.g., HART, *supra* note 32, at 222 (distinguishing between international law and morals).

domestic law in terms of core rule of law values, such as generality, applicability, and adherence. Yet, given the phenomena here, the debate has taken off in recent years—both in and out of the academy—regarding the proliferation of international law here and the related potential for changes in its authority. The various approaches in the debate tend to be remarkably polarized, with, at one extreme, the view that apparently rejects the changes in personality and subjectivization of humanity law's impact on international lawmaking. Here, as we have already seen, and as will be elaborated further, there is considerable resistance to the postwar phenomena incorporating individuals into international law both as objects and subjects of the law, and ultimately and relatedly as lawmakers.

Medellín v. Texas raises the issue of who is the ultimate expositor on the meaning of a treaty in the United States—the top political actors, or an international tribunal (here, the World Court).⁴⁵ The current situation is characterized by overlapping authorities and apparent normative conflict. Over recent years, several debates have surfaced regarding changes in international law, overlapping with areas involving human rights in constitutional law, as well as domestic and international humanitarian law—reflecting the shift, as argued here, to a humanity-centered understanding of rule of law.

V. TRANSNATIONAL GLOBAL LEGALISM: ILLUSTRATIONS

A decade or so ago, legal scholars Jack Goldsmith and Curtis Bradley began to question the aegis, pedigree, and relevance of international law. This attack began with a challenge to the role of custom today—a source termed customary international law (CIL), and a claim they say is generated by human rights advocates, sympathetic pundits and academics, whose point of view they label, rather oddly, the “modern position.” The challenge to international law, while first more particularly aimed at the role of custom, was dramatically extended in a subsequent book, *The Limits of International Law*.⁴⁶ The crux of the argument is that the contemporary developments that manifest themselves as legalization and judicialization distort international law's traditional sources and, therefore, along the way, result in a loss of its essential rationale and legitimacy. International law is seen at its core as legitimate only when facilitating mutually self-interested cooperation between states. Traditional rules are interpreted in this light, and therefore appear as little more than crude default rules that would usually be improved through bargaining between states to an agreement. Where does custom go when convention also increases? State consent undermines the notion of the force of custom grounded in and legitimated

45. See Curtis Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59; Martin Flaherty et al., *Medellín v. Dretke: Federalism and International Law*, 43 COLUM. J. TRANSNAT'L L. 667 (2005).

46. See generally GOLDSMITH & POSNER, *supra* note 11.

not by democratic process per se but by state practice. Their approach at once draws from present positivism, but also arcane originalism.

While acknowledging the changes in international law, in particular, in its sources,⁴⁷ beginning with the postwar genesis of the human rights revolution and picking up steam with the end of the cold war with the last two decades of the twentieth century, these scholars portray the legal developments in the understanding today of customary law as a perverse distortion, largely attributable to a handful of academics making international pronouncements—the “modern CIL of human rights.”⁴⁸ Yet, even as this account harks to the distant past, it manages to be utterly reductive of the humanity law phenomena discussed so far. While Goldsmith and Bradley concede and bemoan the changes, they also simultaneously misstate the bases of these changes and their normative implications.

On the opposite side of the debate are human rights scholars and advocates for customary law—the objects of critique by the likes of Goldsmith—who insist on continuing the longstanding tradition of the common law’s receptivity to custom.⁴⁹ Thus, these apposite positions appear, at some level, to be existentially important, as each independently frames the relevant question at stake as a matter of core statement—each position serves as an alternative stance on the bases for legitimacy in the international realm today.

The heart of the problem is the continued adherence to the notion that only state consent can be legitimating, even when it comes to legal developments in the area of human rights. In the extreme state-centric approach, the authority of international law—whether via customary international law or treaty—continues to depend on agreement among states.⁵⁰ The legitimizing impact is weaker where the state is nondemocratic, or, where executive and expert elites hegemonize the lawmaking processes on behalf of the “state.” Still, state consent stands (if often in an attenuated or distorted way) for the principle of democratic self-determination. Whereas, the profound question raised by critical legal study today is, “Why does customary international law persist, especially given the rise of conventional law?” This essay argues that it persists because there is a distinct legitimacy to this other form of lawmaking, as is taken up below, which makes clear that what is at stake is a normative and evolving matter of humanity rights, involving the claims of persons and

47. Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2264 (1998).

48. *Id.*; see also *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 279 (2d Cir. 2007) (“[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations[,] and as evidence of these to the works of jurists and commentators” (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004))).

49. See, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997).

50. See, e.g., GOLDSMITH & POSNER, *supra* note 11.

peoples, made more and more on a universalizing basis, going to the heart of its justificatory aims and logic.

Indeed, the tribunals (and the law they generate) are now wrestling with the problem of the changing legitimacy of law, wherever it may depart from sources other than state consent—such as custom, and, relatedly, the “principles of law recognized by civilized nations.”⁵¹ This can be seen, in particular, wherever courts have been called upon to apply the “law of humanity.” Such controversies have already been alluded to in prior parts of this essay, especially regarding how to understand some of the changes in international legality as they appear both procedurally, such as struggles over personality or jurisdiction, or substantively, such as some areas discussed here. These areas include: private actions for violations of the law of nations; adjudications of international humanitarian law in a variety of settings beyond traditional state consent; the global antiterror campaigns; and instances of adjudication of individual rights in domestic constitutional law that seek to draw upon and reconcile foreign and domestic norms, particularly as concerns humanity-related rights.

Humanity law is neither utopian nor aspirational in content inasmuch as it is grounded in common practices that imply at least a minimal common normative ground.⁵² Ultimately, the appeal is to threshold norms of preservation and decency, arguably inseparable from the idea of rule of law.

VI. AN EVOLVING LAW OF NATIONS?

Since the origins of international law, its contours have been defined along the principles of the law of nations, the criminalization of offenses which were considered to be plainly those of the concern of the international community, and of justice. Even historically, the law of nations normative meaning relates to offenses which do not map on fully to states, though these, nevertheless, were considered of import in having an impact in constructing international society. Indeed, as the founder of international law, Hugo Grotius, put it, such violations—in and of themselves—were those constituting and laying a basis for justice in that they justified either punitive/legal or forceful intervention. Indeed, this conception highlighted the evident nexus of the procedural and the normative. More recently, one might say there has been a revival of the law of nations. This has taken place in a number of areas—international criminal justice as discussed above, but also in the line of litigation

51. See Statute of the International Court of Justice, *supra* note 38; *Sosa*, 542 U.S. at 734 (referring to works of jurists and commentators “as evidence” of “the customs and usages of civilized nations” (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900))); see also *Khumani*, 504 F.3d at 268–77 (discussing whether aiding and abetting international law violations constitutes violation of law of nations).

52. See *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 193 (1815); Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570 (2004) (reviewing *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (Norman Dorsen et al. eds., 2003)).

involving the law of nations under the Alien Tort Claims Act (ATCA)—as instances of the modern return to the principle holding tortfeasors responsible for their adherence to the law of nations. Indeed, this cause of action dates back to America's early origins, where jurisdiction was created to allow suit by foreign diplomats involving the relation of foreign states vis-à-vis individuals who were brought together by harm by the French. This was a situation of potential miscarriage of justice that was conceived as a necessary guarantee to prevent destabilizing interstate conflict from harming individual persons.⁵³

More than two decades ago, in the landmark case, *Filartiga v. Pena Irala*, foreign nationals and Paraguayan citizens brought suit in U.S. federal court against a fellow Paraguayan from their home country for the wrongful death of their relative by torture in that country.⁵⁴ The case begins in the absence of conventional law: since the plaintiffs' claim was not grounded in a specific treaty, the question for the U.S. Court of Appeals for the Second Circuit was whether, under ATCA, the torture alleged violated the law of nations.

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to *the customs and usages of civilized nations*; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.⁵⁵

The court chose a dynamic approach to interpreting the meaning of the law of nations as deployed in the statute. The standard here was an evolving one as "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."⁵⁶ Furthermore, to count as part of the law of nations, a particular rule must be "a settled rule of international law" by "the general assent of civilized nations."⁵⁷ After consulting various international law sources, the court held that official torture is prohibited by the law of nations. As for purposes of civil liability, "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."⁵⁸

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. In the modern age, humanitarian and practical considerations have combined to lead the

53. See Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 481–93 (1989) (distinguishing her concept of the purposes of the ATCA from the "denial of justice" view of the original purpose); Thomas Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006) (on the historical basis for the statute).

54. *Filartiga v. Pena Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

55. *Id.* at 880 (emphasis added) (quoting *The Paquete Habana*, 175 U.S. at 700).

56. *Id.* at 881.

57. *Id.*

58. *Id.* at 890.

nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.⁵⁹

From a humanity law perspective, one way to understand the law here is to link up the substantive rights to their original protective values and purpose. The aim is to avoid conflicts with foreign nationals that could otherwise escalate into diplomatic tensions and even hostilities between states. In its landmark *Paquete Habana*⁶⁰ case, the U.S. Supreme Court held that “resort must be had to the customs and usages of civilized nations” as reflected in “the works of jurists and commentators” where the norm at issue of respecting humanitarian values against the confiscation of fishing vessels constituted “an established rule of international law, founded on considerations of humanity.”⁶¹ The *Filartiga* court suggested that this area reflects changes in other sources listed at Article 38 of the Statute of the International Court of Justice, such as the bases for interpretation of the law of nations as so held by jurists and publicists—that is, the potential experts’ or publicists’ role in the pronouncements and recognition of what is customary international law.⁶²

While this landmark case opened the door to the litigation of seemingly private/international law claims in federal courts, almost twenty-five years later, in *Sosa v. Alvarez-Machain*,⁶³ a case involving an alien claims challenge, in the context of the tort alleged, the Supreme Court held that arbitrary arrest and detention did not meet the test for Alien Tort Statute (ATS) eligibility,⁶⁴ but nevertheless, maintained that “the door is still ajar” to such litigation, even though “subject to vigilant doorkeeping.”⁶⁵ Even among those opposed, this would be understood to recognize the viability of judicial interpretations of the law of nations,⁶⁶ and, one might say, relatedly, to invite other involvement by jurists and civil society in such adjudicative lawmaking.

As with other sources or elements in humanity law discussed previously—invocation of offenses against humanity as the basis for just war, the “Martens Clause,” the Geneva Convention, Common Article 3

59. *Id.*

60. 175 U.S. 677.

61. *Id.* at 700, 708.

62. See generally Bradley & Goldsmith, *supra* note 47; Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639, 666–67 (2000).

63. 542 U.S. 692 (2004).

64. *Id.* at 763 (Breyer, J., concurring).

65. *Id.* at 729.

66. See generally Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153.

references to the “inhumane,” or the criminalization of “crimes against humanity”—the cause of action based on the law of nations reflects an element of constancy that, in implying a universally applicable normativity, risks being unbounded in the range of situations to which it applies. Here, actual usages and practices serve an important delimiting function.

But these are merely illustrative—they do not create a set of frozen categories that exclude the possibility of the law evolving and expanding. What claims will be eligible for ATS litigation remains open-ended: the Supreme Court referred to the congressional intention that the ATCA “remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.”⁶⁷ Accepting that open-endedness is a constant in this area of law, the Supreme Court, while recognizing a cognizable cause of action, which it said needs to be like the historical violations of the law of nations, remains open to interpretation; for it also said the relevant claim “must be gauged against the current state of international law.”⁶⁸ Federal courts retain the ability to “adapt[] the law of nations to private rights” by “recognizing any further international norms as judicially enforceable today.”⁶⁹

While *Filartiga* required only that ATS claims be based on a settled rule of international law “by the assent of civilized nations,” in *Sosa*, the scope of ATS claims was depicted in more complicated terms referring to three spheres: first, what might be thought of as the prevailing interstate view—“the general norms governing the behavior of national states with each other”—and then beyond, to two spheres that one might see as reflecting the growing humanity law, that is, the “conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.”⁷⁰ Also, the “rules binding individuals for the benefit of other individuals overlap[] with the norms of state relationships.”⁷¹ Indeed, here, the Court invoked the cause of action’s historical roots: “It was this narrow set of violations of the law of nations, admitting of a judicial remedy and, at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the [ATS] with its reference to tort.”⁷² Offenses against ambassadors, violations of safe conduct, and individual actions arising out of prize captures and piracy were, according to the Court, “[u]ppermost in the legislative mind.”⁷³ “Any claim based on the present-day law of nations,” the Supreme Court asserted, should “rest on a norm of international character accepted by the civilized world and

67. *Sosa*, 542 U.S. at 728 (quoting Torture Victim Protection Act, 28 U.S.C. § 1350 (2000)); see also *id.* at 725 (articulating the standard for courts hearing “any claim based on the present-day law of nations”).

68. *Id.* at 733.

69. *Id.* at 728, 729.

70. *Id.* at 714–15.

71. *Id.* at 715.

72. *Id.*

73. *Id.* at 720.

defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”⁷⁴

Before *Sosa*, the ATS’s reach had already been construed to include summary execution, disappearance, genocide, war crimes, crimes against humanity, and cruel, inhuman, or degrading treatment.⁷⁵ Post-*Sosa* cases recognize crimes against humanity as actionable, as well as “cruel, inhuman and degrading treatment.”⁷⁶ In *Doe v. Saravia*, a California district court relied on sources of international criminal law, from Nuremberg to the International Criminal Court (ICC) Rome Statute, to trace the prohibitory norm of “crimes against humanity,” declaring, “[t]he prohibition against crimes against humanity constitutes . . . a specific, universal and obligatory norm.”⁷⁷ Similarly, in its 2005 affirmance in *Cabello v. Fernandez-Larios*, the U.S. Court of Appeals for the Eleventh Circuit allowed a cause of action for crimes against humanity.⁷⁸ Indeed, support for the actionability of crimes against humanity appears in Justice Stephen Breyer’s concurrence in *Sosa*, where he argues that crimes against humanity and other international crimes could be litigated under the ATS on the basis of “universal jurisdiction.”⁷⁹ “Today international law will sometimes reflect not only *substantive* agreement as to certain universally condemned behavior but also *procedural* agreement that universal jurisdiction exists to prosecute a

74. *Id.* at 725.

75. *See, e.g.,* *Kadic v. Karadzic*, 70 F.3d 232, 241–44 (2d Cir. 1995), *reh’g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996) (genocide, war crimes, summary execution, torture); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475–76 (9th Cir. 1994) (summary execution, disappearance); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (cruel, inhuman, or degrading treatment); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1360–61 (S.D. Fla. 2001), *aff’d*, 402 F.3d 1148 (11th Cir. 2005) (crimes against humanity). In *Mehinovic v. Vuckovic*, the U.S. District Court for the Northern District of Georgia found bases for action under the ATS for cruel, inhuman, or degrading treatment, arbitrary detention, war crimes, crimes against humanity, and genocide, noting “[t]he United States has explicitly endorsed the approach of the [International Criminal Tribunal for the Former Yugoslavia] Statute and the convening of the Tribunal.” 198 F. Supp. 2d at 1344. In laying out the standard, the court invoked Judge Harry T. Edward’s concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984), which looked to the Restatement of the Law of Foreign Relations to identify its claims, including but not limited to state-practiced, encouraged, or condoned genocide; slavery or slave trade; murder or disappearance; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and consistent patterns of gross violations of internationally recognized human rights.

76. *See Doe v. Qi*, 349 F. Supp. 2d 1258, 1306 (N.D. Cal. 2004) (torture, cruel, inhuman, and degrading treatment or punishment, and prolonged arbitrary detention for twenty days, and command responsibility); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004) (extrajudicial killing and crimes against humanity for single act of assassinating Archbishop Romero, and aiding and abetting liability); *Cabello*, 157 F. Supp. 2d at 1345 (conspiracy and accomplice liability for crimes against humanity).

77. *Saravia*, 348 F. Supp. 2d at 1154–57.

78. *Cabello*, 402 F.3d at 1148.

79. *Sosa*, 542 U.S. at 761 (Breyer, J., concurring).

subset of that behavior. That subset includes torture, genocide, crimes against humanity, and war crimes.”⁸⁰

Therefore, whatever the current status of the law of nations, what appears abundantly clear is the recognition of ongoing space for evolving normativity in this peculiar area of the law where accountability lies at the nexus of public and private rights. Still, courts diverge on issues such as whether the prohibition on cruel, inhuman, or degrading treatment is sufficiently specific to be actionable under the ATS.⁸¹ In *Doe v. Qi*, the district court asserted that “[i]t is not necessary for every aspect of what might comprise a standard . . . [to] be fully defined and universally agreed before a given action meriting the label is clearly proscribed under international law,”⁸² and that “conduct sufficiently egregious may be found to constitute cruel, inhuman or degrading treatment under the ATCA.”⁸³ Accordingly, “the question under the ATCA is whether that conduct is universally condemned as cruel, inhuman, or degrading.”⁸⁴ The court further noted that “[t]his approach is entirely consistent with *Sosa*.”⁸⁵ The U.S. Congress has not only not stepped away from this reading of the law but rather has extended its logic in the Torture Victim Protection Act, affording democratic legitimization to the judiciary’s approach.⁸⁶

This jurisprudence reflects the evolving normative space that the ATCA inhabits, which can be seen as an established, structural feature of humanity law. Moreover, it reflects the ways that agreement on procedures may be a step toward consensus on substance. Or, rather, perhaps, as some scholars, such as Habermas, have argued,⁸⁷ there is a reflexive relationship of proceduralism to substantive normativity. This area defines, in an ongoing way, elements of contemporary rule of law, as it creates a space redefining

80. *Id.* (emphasis added).

81. *Qi*, 349 F. Supp. 2d at 1321.

82. *Id.* at 1321–22 (quoting *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995)).

83. *Id.* at 1322; *see also* *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1348 (N.D. Ga. 2002) (noting that “[g]enerally, cruel, inhuman, or degrading treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of ‘torture’ or do not have the same purposes as ‘torture’”).

84. *Qi*, 349 F. Supp. 2d at 1322.

85. *Id.* However, the U.S. Court of Appeals for the Eleventh Circuit rejected this approach in 2005 in *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005). The court interpreted *Sosa v. Alvarez-Machain* narrowly, holding that there is no basis in law for recognizing an ATS claim for cruel, inhuman, degrading treatment or punishment. The court noted that previous courts upholding such claims had relied on the International Covenant on Civil and Political Rights, but that under *Sosa*, the Covenant did not “create obligations enforceable in the federal courts.” *Id.* In November 2006, certiorari was denied. The approach of the district court in *Doe v. Qi* has nevertheless been followed in subsequent cases. *See, e.g.,* *Bowett v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008).

86. *See* Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2000).

87. *See generally* HABERMAS, *supra* note 20.

the elements of the most egregious sources of conflict in global order and directs where the remedy should be.⁸⁸

Beyond the expansion of this cause of action, in terms of the normative value at stake in the offenses, also lies the question of the responsible subject. Put otherwise: Who is the self at the heart of the regime? To what extent is responsibility conceived as limited to state actors or beyond? The dynamic interplay of the procedural with the substantive is evident here, where the revival of this cause of action not only illustrates the growing role of persons and peoples in international humanitarian law as potential subjects of the regime, but also, their role as lawmakers.

Traditionally, only nation-states (and certain intergovernmental organizations) have been viewed as the subjects of international law. Therefore, in *Filartiga*, the court's analysis under the law of nations was aimed at the responsibility of states and its officials.⁸⁹ But, the notion of this as a clear line has been challenged regularly in subsequent case law, beginning with a case involving terrorism in *Tel-Oren v. Libyan Arab Republic*, where, in a suit for redress against the Palestine Liberation Organization for a terrorist attack, the U.S. Court of Appeals for the District of Columbia Circuit—confronted with whether *Filartiga* applied to nonstate actors—stopped short of extending liability. The concurring opinion noted the growing support for individual responsibility under the law of nations.⁹⁰ Later, in *Kadic v. Karadzic*, a case arising out of the Balkans atrocities, the Second Circuit held that certain forms of conduct violate the law of nations, regardless of whether they are undertaken by those operating under the auspices of a state.⁹¹ Finally, in *Sosa*, the Supreme Court appeared to tie the jurisdictional question at issue—of its aegis over the private actor—to the evolution of the normativity, observing that “whether a norm is sufficiently definite to support a cause of action” raises a “related consideration [of] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor, such as a corporation or individual.”⁹² To illustrate, more recently, in 2007, *Khulumani v. Barclay* involved a suit against a class of corporate defendants for apartheid-related claims, which dealt with indirect liability for egregious human rights claims, in particular, the responsibility of the private sector. In this case, a majority of the Second Circuit found jurisdiction over such claims when connected to the most serious violations of humanity law rights, with Judge Robert A. Katzmann in his concurrence looking to the precedents of a variety of international criminal tribunals to bring these to bear on the U.S.

88. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“[R]esort must be had to the customs and usages of civilized nations.”).

89. *Filartiga v. Pena Irala*, 630 F.2d 876, 889 (1980).

90. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 792 (D.C. Cir. 1984) (Edwards, J., concurring).

91. *Kadic v. Karadzic*, 70 F.3d 232, 239–40 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

92. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 & n.20 (2004).

court's decision.⁹³ Yet, a dilemma raised by such universal jurisdiction was the extent to which taking jurisdiction in U.S. courts raised rule of law implications for the foreign country's court. For example, to what extent is there a message about the inadequacy of domestic rule of law as a matter of the measure of the availability of rights/remedies, especially where human rights related policy is at stake?⁹⁴ One might conceive this problem in terms of the ramifications to the prevailing state-centric system for their failure to expand the humanity rights regime.

Indeed, the question of interpretation became pivotal to the decision. The personality and subjectivization changes characterized by humanity law today, suggest that, so long as there is some nexus, the ATCA claims clearly extend beyond state actors (i.e., Khulumani), reflecting humanity law's broader structuring role in establishing expectations regarding areas of controversy in current globalizing politics.

The broader point here is that these developments do not, and need not, lead in one normative direction. Humanity law aspires to regulate the interrelationship of persons, peoples, and states, recognizing that some of the most serious rights violations transcend state borders or the interests of any one state. Indeed, this returns to the origins of ATCA and the concern to protect against destabilizing engagements, which bring together individuals and states in risky connection. This nexus goes back to the very origins of international law in the law of nations, in which the core concerns are those offenses that, either because of their extreme gravity or because of the peculiar nature of the attack upon the person (as in the "alien tort"), have the propensity to transcend the individual to the collective. This could be because of their horrific, inhuman means (e.g., torture on the body) or, because of other related ways the persecution reaches the group dimensions, such as those involving race, ethnicity, and religion, such that these attacks, unless they are addressed, could produce large scale conflict that could destabilize not just the implicated state, but the broader international society.

Here one might recall the writings of the postwar theorists who, at the time, also conceived of attacks on human collectivities, in—and not in spite of—their particularity, as first and foremost attacks on humanity. Protecting this idea was seen as critical to the legalism project. This goes back to the beginning of the international idea.

93. See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 270–81 (2d Cir. 2007) (Katzmann, J., concurring).

94. See Ginger Thompson, *South Africa to Pay \$3,900 to Each Family of Apartheid Victims*, N.Y. TIMES, Apr. 16, 2003, at A7 (referencing South African President Thabo Mbeki's speech to Parliament, in which he criticized lawsuits filed in U.S. courts for apartheid damages).

VII. OF STATE CONSENT AND HUMANITY RIGHTS: AN ATTEMPTED RECONCILIATION

Humanity law has significant purchase on the problem of the interpretation of treaties. Here, the doctrinal points of departure are the prevailing canons of interpretation, as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31 has often been interpreted, most notably in the jurisprudence of the World Trade Organization, along the lines of “plain meaning” as used by domestic courts, despite the fact that Article 31 emphasizes not only the “ordinary meaning” of the words of the treaty text being interpreted, but also emphasizes purpose, object, and context, with an expansive view of this last concept. Moreover, Article 31 itself recognizes that there is a broader normative universe in which the treaty operates; thus Article 31(3c) refers to other relevant rules of international law applicable between the parties. Thus, as Joseph Weiler has argued, Article 31.1 does not mean that we do not try to find the ordinary meaning of words or their aims, but rather, more subtly, that ordinary meaning is inseparable from these.⁹⁵ The ICJ opinions in the *Oil Platforms* case recognize that the emergence of humanity law may well necessitate moving beyond the “strict” framework of Article 31—that this provision ought to be conceived as nonlimiting, given the challenge of treaty interpretation in the contemporary context characterized by multiple regimes.⁹⁶ Thus, at present, there is already recognition of a vivid struggle in the courts over what the appropriate sources for the current interpretation of conditions to deal with humanity law are, and the need for interpretive guidance. In deciding the meaning and precedential value of ICJ decisions adjudicating treaties where individual rights in domestic courts are at stake, the Supreme Court has said that the first step is interpretation. It proposes an “interpretive approach.”⁹⁷ As the Court observes, given that the parties making the law are states, this is not an instance of self-execution.⁹⁸

Dimensions of this struggle are evident in the interpretation of humanity law in the context of the “global war on terror.” Here humanity law becomes entangled in controversies concerning the separation of powers—the relationship of the executive, judiciary, and legislative branches. These debates are often perceived as rooted in American exceptionalism, insofar as they involve the peculiarities of the American federal system. At the same time there are general questions of legitimacy at stake that go to the very recognition of legal norms, of legal authority, and the status of international juridical norms as “law.” Therefore, the approach this essay proposes aims to reconceive these as part of a broader problem, as

95. See generally Henrik Horn & Joseph H. H. Weiler, *European Communities—Trade Description of Sardines: Textualism and Its Discontent*, in *THE WTO CASE LAW OF 2002* (Henrik Horn & Petros C. Mavroidis eds., 2005).

96. See Koskeniemi U.N. Report, *supra* note 23, ¶¶ 451–60.

97. See *Medellin v. Texas*, 128 S. Ct. 1346, 1361–63 (2008).

98. *Id.*

characteristic of the current fragmentation and amalgamation of humanity law, which often lies outside the context of strict domestic control, calling for guidance in the interpretation of conflict. These conflicts arguably transcend traditional interstate conflict, and therefore require reconciliation with other areas of law, such as human rights law or constitutional law. As will be seen, here, too, humanity law will be of interpretive guidance.

The legal responses to the "global war on terror" (i.e., in the counterterror campaign), raised the issues concerning the interpretation of humanity law, such as, those arising in the current work done by Geneva Conventions, Common Article Three. Consider the *Hamdan v. Rumsfeld* decision, in which the Supreme Court sought to avoid the potential morass of textual or source-based interpretation by simply assuming that the Geneva language meant jurisdiction existed over the terror-related conflict, and, therefore, by holding that Geneva Common Article Three applied. It made possible a first line of protection of humanity rights.⁹⁹ Indeed, the invocation of humanity law here helped to illuminate a way to avoid an essentialized view of the apparent conflict of regimes before the Court, regarding whether the law of war was to apply, and, instead, to reconcile the regimes via interpretation in keeping with humanity law values.

Another instance that is relevant to humanity law as an interpretive device is the ICJ case law surrounding the application of the Vienna Convention on Consular Relations, in situations where a suspect who is a foreign national faces charges for an offense that may carry the death penalty. In the last decade, domestic and international courts have become enmeshed in issues concerning life and death, situated between the procedural and the normative; politics and doctrine; the international and the domestic; the individual and the state. From the perspective of the state, the cases appear to raise the question of what the ICJ's efforts are, but they also raise the broader question of just how it is that international law judgments regarding consular rights get enforced in U.S. courts.

To what extent might these treaty rights be self-executing at the level of the individual? In a contemporary instance, *Medellín* raises the questions of the redress for failure to read consular rights to a foreign national; the extent to which such treaties are self-executing; whether these conventions gave rise to duties and remedies that could be directly applied to individuals and accord them rights; and, in the process, whether domestic courts properly rely on foreign judgments, such as those of the ICJ.¹⁰⁰ To what extent are international court interpretations self-executing, and apt to surpass domestic interpretation—whether judicial or executive? Here, the pressing question at issue is often conceptualized as involving a matter of conflict of laws, and the need to resolve this conflict through reconciling hierarchies of power, whether judicial or political.¹⁰¹ Here we might distinguish between

99. *Hamdan v. Rumsfeld*, 548 U.S. 557, 557 (2006).

100. *Medellín v. Dretke*, 544 U.S. 660 (2005).

101. See generally Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

the U.S. Supreme Court and the ICJ in their way of thinking about the relation of rights to remedies—judicial, political, etc.—as exemplified in *Medellin*.

It is better to conceive the challenge as that of horizontal dialogue between domestic and international courts and tribunals wherever humanity-based normativity is at stake.¹⁰² Indeed, one might say that this is already to some extent embedded in the prevailing interstate system where, for example, as contemplated by U.N. charter, Article 94-1, states have their own law implementation duties. The International Law Commission's Articles on State Responsibility are predicated on state responsibility being engaged by actions and omissions regardless of the "branch" of government, including the judicial organs.

In the cases under discussion, a majority of the Supreme Court asserts that the reliance on other judicial interpretations is clearly required—particularly, wherever humanity rights are at stake, i.e., the norms concerning the right to life and related preservation rights for persons and peoples. As Justice Ruth Bader Ginsburg has observed, the Supreme Court has enforced those World Court judgments relating to individual rights.¹⁰³ Once again, this points to the way one might see that human-centered normativity is entangled in the relevant jurisdictional questions. Nevertheless, this case was ultimately closely decided against the notion of automatic self-execution under the Vienna Convention on the Law of Treaties Article 36(1), despite the ICJ's contrary holding, a conclusion which goes to the sense of the status of humanity rights as emergent, but not yet consolidated. In the most recent iteration in *Medellin v. Texas*, the U.S. Supreme Court distinguished between treaties involving directly applicable individual rights by seeking to delineate those norms that are amenable to judicial remedies associated with the prevailing interstate system.

As the number of obligations is growing, it is in the area where international law generates more than one duty that interpretation is likely to be in greater demand and play a most important role.¹⁰⁴ Indeed, at the heart of the decision in *Medellin* is the question of what law applied to the case—often blurring procedural/jurisdictional questions with the substantive merits.

The problem of the nature of the evolving connections between the individual and the state both legally and morally is taking on more and more resonance. This is clear from a number of landmark opinions by the international judiciary in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*

102. See Teitel, *supra* note 52, at 2584–87 (discussing the role of comparativism and dialogue).

103. See *Medellin*, 544 U.S. at 670 (Ginsburg, J., concurring). Justice Stephen Breyer observed that there is weight to the ICJ judgment. *Id.* at 693–94 (Breyer, J., dissenting).

104. See Zachary Elkins, Andrew T. Guzman & Beth Simmons, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 1, 201.

(*Bosnia & Herzegovina v. Serbia & Montenegro*),¹⁰⁵ *Tadic*, and *Nicaragua* on the question of what standard of individual responsibility pertains to the enforcement of humanity rights. Not only does state responsibility not shrink as individual responsibility expands, but the reverse occurs. In the first instance, it is states that are responsible even for the behavior of private actors under international treaties, illustrating the ways humanity law leads to a pervasive global rule of law.

The ICJ, in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, deployed a strict standard, invoking an “effective control” test in assessing the existence of responsibility.¹⁰⁶ In the same vein, the more recent *Tadic* case, involving prosecution in the ICTY, deployed a lower standard of nexus for making out responsibility, looking to “de facto control,”¹⁰⁷ clearly reflecting the ways the guiding interpretive principle draws inevitably from the relevant subject of the interpretive enterprise. *Tadic* involves the prosecution of violations of humanity-related rights and therefore guides the interpretation of the understanding of individual responsibility in the service of greater protection of the normative humanity rights.¹⁰⁸

Now consider *Bosnia v. Serbia*, involving a suit in the World Court conceived by states but involving human rights, raising the question again of what standard of responsibility should apply—this time in a context arguably where we have come full circle from the traditional interstate situation—where what is at stake is a case of inferring from individual responsibility, in order to reconceptualize state or collective responsibility.¹⁰⁹ Now, post-*Nicaragua* and post-*Tadic*—with the advent of tribunalization and its individuation of responsibility in the international realm—the question that emerges has become “Against whom do human rights obligations run?” In a recent series of cases, the ICJ sought to elide these precedents, reverting to the prior norm and suggesting that there was no clear hierarchy in terms of substantive doctrinal development.

What cases such as *Medellin* make very clear is that, unlike many of the other prevailing treaties, the consular obligations, like the Genocide Convention and like much of international humanitarian law discussed here, do not just raise a matter of obligations between state parties. Rather, they also imply duties owed to humans, therefore, positing a teleological value that may well inform the direction of the doctrine. Indeed, in this regard

105. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 91, ¶¶ 396–407 (Feb. 26) (application of the Genocide Convention on the Prevention and Punishment of the Crime of Genocide) [hereinafter *Bosnia v. Serbia*].

106. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 64–65, ¶ 115 (June 27).

107. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶¶ 115–45 (July 15, 1999).

108. *R (on the application of Al-Skeini and others) v. Secretary of State for Defence*, [2007] UKHL 26, ¶ 129 (Lord Brown) (“[E]xcept where a state really does have effective control of territory, it cannot hope to secure Convention rights within that territory . . .”).

109. *Bosnia v. Serbia*, *supra* note 105, ¶¶ 396–413.

one might analogize to the extradition of the Chilean dictator, Augusto Pinochet, raising conflict between the adherence to traditional state-centric immunities, and the challenge of countervailing claims of human rights. This analogy may offer another example in which judicial powers—local, regional, and international—may well differ regarding the appropriate standard of individual responsibility, but, where, ultimately, the normativity transcends and goes to the humanity law subject and values. This, in turn, serves to reopen debate about state responsibility with global effects, at least in terms of discursive impact, as it opens a dialogue as to what would constitute rule of law in the contemporary context.

VIII. "INTERNATIONAL" LAW IN "DOMESTIC" COURTS: JUDICIAL RECOGNITION OF EMERGENT GLOBAL HUMANITY RIGHTS

A final illustration involves a vivid debate over international and foreign law in domestic courts that squarely reflects some of the dilemmas posed by the globalization of humanity law and its broader normative impact. Once again, these bring together the domestic and the international judiciary, the individual and the state, and procedural, jurisdictional, substantive, and normative rights. Particularly, where the controversy in question raises humanity rights issues, there now is an evolving interpretative debate regarding the force and authority of foreign law in domestic constitutional law. This last area involves the question of what guides interpretations of international humanity rights where they interface with constitutional law.

From a humanity law perspective, the debates involve areas where there has been a distinct change, as a result of the expansion in and proliferation of international humanitarian law in the overlapping and recombination of regimes in the law, which at a minimum spur reinterpretation. These are judicialized controversies, and they all deal with rights of humanity. In particular, the controversies at issue concern claims made based on widely shared practices regarding the rights to life of humankind, as set out in a variety of human rights conventions, as well as enforced in international humanitarian law charters. As previously discussed, these are rights of a basic sort, such as to decent treatment and to the preservation of persons and peoples. Ultimately, the prism of humanity law can help us understand these debates as related to the ongoing evolution of the law insofar as they involve the dynamic relationship of the local and the international systems, particularly relating to the protection of basic rights and the sites of related duties regarding what one might term global humanity rights. Here, the judicial enterprise—particularly its comparativist dimensions—gains a significant new foundation if we assume the common ground of "humanity law" and a horizontal interpretative dialogue between domestic and international tribunals—in a world of multiple regimes, where there isn't centralization or monopoly or hierarchy of interpretative authority, and where interpretative legitimacy pertains to nonstate actors as well.

IX. HUMANITY LAW AND INTERPRETING DOMESTIC CONSTITUTIONS

Around the world, courts are engaging more often with foreign sources in their constitutional jurisprudence. A consensus appears to be forming regarding the relevance of foreign sources, at least within circumscribed parameters. Legal debates are currently considering this development. Generally, the justification for comparativist analysis is couched largely in functionalist terms (i.e., as a basis for the resolution of specific domestic constitutional issues), particularly, in areas of unsettled law. This is as true of Europe and the United States, as of the Middle East.¹¹⁰ But, from the humanity law perspective, one can see it is a development that is broader, reflecting other dimensions of global legalism and the related dimensions in the paradigm shift.

Jeremy Waldron has employed the term *jus gentium*¹¹¹ to articulate his notion of a "universal law administered in all civilized countries" that has always been used to solve problems.¹¹² There was always an overlap historically between the law of nations in this specific sense and international law, just as there was always an overlap between domestic law and international law. In fact, there was always a basis for importing foreign law in the domestic context¹¹³ (uses which predate the modern state but continue to pertain today), to what extent does *jus gentium* graft back to older tradition in international law? Beyond the common law, historically, the idea of "higher" law was always informed by international and foreign sources.¹¹⁴ Indeed, the notion of universal rights, as a matter of higher law, underlies the theory of international law. Thus, here we might consider the link between comparative constitutional law and the sources of international law. Indeed, one might see comparative constitutionalism as interrogating foreign mores with a view to tracing the contours of a universal legal normativity.

Historically, *jus gentium*-like cases raised questions where there exist common norms of humanity.¹¹⁵ Indeed, the argument that a *jus gentium* has emerged can be seen as extending the historical notion of the law that protected aliens—which followed them as they traveled—to the extent that this law was undergirded by justice, not just concepts of reciprocity.¹¹⁶ In today's globalized world there are the many problems relating to persons and peoples on the move—whether issues involving rights of aliens, the rise

110. For the critique of the functionalist view of the role of comparativism, see generally Gunther Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 434-40 (1985).

111. See generally Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005).

112. *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889).

113. See generally Waldron, *supra* note 111.

114. See Statute of the International Court of Justice, *supra* note 38 (providing that international custom offers evidence of a general practice accepted as law); K. ZWIEGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Oxford Univ. Press Inc. 1998) (1977).

115. See Teitel, *supra* note 52, at 2592-95.

116. See *id.*

of migration of minorities, or of peoples. That is, if one of the oldest meanings of *jus gentium* is as a common law to regulate dealings with aliens, with globalization, one might suppose that this concern gains a renewed significance today. Here, we can see that in the current global order something has changed relating to the greater movement and interaction of persons and peoples across state boundaries.

The potential role for comparative constitutional law in what one might say is the constitutionalization of international law and vice versa has recently taken on new urgency. But from a humanity law perspective, one can see that the aims do not reasonably relate to any grand constitutional scheme.¹¹⁷ While this is clearly reflected in U.S. case law, its usages reflect a drawing upon material from a common fund of normative practice, with a commonality depending on the assumed, if often not fully spelled out, humanity law foundations.

The value of comparative constitutionalism is captured by Justice Breyer: “[Foreign authority] may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem”¹¹⁸ One might say this rationale largely points backward, in that it underscores statism and originalism, if not outright exceptionalism.

By contrast, in a growing number of cases where human rights are at stake, the comparative practice is justified not as backward looking to rationalize the source of the state’s interests (i.e., as a way to legitimate the interpretation), but instead on humanity-centric terms. For example, now-retired Justice Sandra Day O’Connor asserted that “[o]ther legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit.”¹¹⁹

What is “foreign” authority actually doing here? Upon a closer look, the broader issue of the relevance of “foreign” authority plays a role analogous to the role of humanity rights. Constitutional interpretation is best rationalized in terms of practices in conditions analogous to those of constitutional change, primarily involving discrete areas of unsettled law. It informs the interpretation of norms for the resolution of conflict. However, that is just the point. One might say that the bases for comparativism’s revival today go further than the functionalist enterprise because what is at stake is not merely problem solving at present, but rather the uses of humanity law—in and of themselves—help to define our sense of the relevant issues that are perceived as in “common.” Humanity law generates and transforms the meaning of the enterprise, redefining the weight and relevance of the law of the human community, so helping to shape an alternative rule of law.

117. Cf. HABERMAS, *supra* note 3, at 32.

118. *Printz v. United States*, 521 U.S. 898, 977 (1997).

119. Sandra Day O’Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT’L JUD. OBSERVER, June 1997, at 2.

X. COMPARATIVISM IN HUMANITY LAW: INFORMING GLOBAL RULE OF LAW

In a number of areas, there are apparent overlapping and recombinant legal regimes, with an impact on both international and domestic law, particularly domestic constitutional law, a movement whose bona fides occur primarily in the area defined here in terms of the "law of humanity."

For the first half of the twentieth century, in U.S. constitutional jurisprudence, the relevant nexus of language was the basis of a community, notably of "English-speaking nations."¹²⁰ Yet, this principle was ultimately abandoned as it lacked workable parameters.¹²¹

In the modern cases, the relevant constitutional parameters regarding foreign authorities are often derived from the "common law" or "Anglo-American heritage."¹²² However, in the lower courts, one might see the following of Anglo-American jurisprudence as simple adherence to a system of binding authority. In the Supreme Court, such common law norms reflect a broader concern about remaining within the legal tradition. These norms perhaps draw from historical inquiry into preconstitutional traditions,¹²³ or, perhaps are grounded in common political cultures that are "democracy-based" or of a "civilized nature," such as in the current reliance on the jurisprudence of the European Court of Human Rights,¹²⁴ harking back to historical understandings of unified law on the continent. In *Lawrence v. Texas*,¹²⁵ the Supreme Court invoked the European Court of

120. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (arguing that the regulation at issue "involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty'"); *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (referring to "the history and the basic constitutional documents of English-speaking peoples"); *Malinski v. New York*, 324 U.S. 401, 413-14 (1945) (interpreting due process in light of "the history of freedom of English-speaking peoples"); *Otis v. Parker*, 187 U.S. 606, 609 (1903) (referring to constitutions as "generally understood by all English-speaking communities").

121. See *Rochin v. California*, 342 U.S. 165, 175-76 (1952) (Black, J., concurring) (questioning a limit to "English-speaking" peoples).

122. See *Knight v. Florida*, 528 U.S. 990, 995-97 (1990) (Breyer, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (relying on "nations that share our Anglo-American heritage"); *Adamson v. California*, 332 U.S. 46, 54 (1947) (regarding "Anglo-American legal tradition" as the basis for the relevant connection).

123. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 952-53 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (noting that "the historical traditions of the American people" began with "[t]he common law which we inherited from England"); *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (justifying the American law as in "accordance with the standards of this common-law tradition"); *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968) (questioning "whether . . . a procedure is necessary to an Anglo-American regime of ordered liberty"); *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958) (noting that the constitutional idea of "due process" began with the English Declaration of Rights of 1688 and the Magna Carta).

124. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 572, 576 (2003) (citing decisions of the European Court of Human Rights); see also *Thompson*, 487 U.S. at 830 (considering the views of "leading members of the Western European community").

125. 539 U.S. 558.

Human Rights rulings and “Western tradition” to discredit a domestic ruling limiting privacy and humanity rights.

Here, we are dealing with something less narrow than *jus cogens* but with a stronger, or more emphatic, normative pull than the notion of “general principles of law of civilized nations”—a threshold rights-centered international legal normativity, reflecting a strong enough sense of universal practice to justify general application (or at least a strong interpretative presumption that this core is consistent with and must be respected in any reading or application of particular treaties and particular domestic legal rules, even, and perhaps especially, constitutional ones). Substantial common ground on this plane exists among national constitutions, and conformity with international conventions demonstrates a consensus on basic human rights, as well as on the protection of decency¹²⁶ and integrity.¹²⁷ From these data points, one might infer a bounded universal “law of humanity,” the logical peak of the comparativist project. Yet this bounded universalism is limited by the nature of humanity law itself. “Humanity rights” are pivotal in the present globalizing regime, which is again distinguished not by integration, but by interdependence, and therefore spurs a related demand for shared rights wherever interdependence is on the ascent. One might say comparative constitutional law’s current extension offers an alternative conception of legitimacy, grounded in core human rights and needed to reinforce a nascent global order.

Comparative constitutionalism is now extending its quest for conformity into the sphere of due process, where the phenomenon has been most evident in developments within criminal procedure. Yet, the normative desirability of such integration, much less convergence, may well be debatable,¹²⁸ given the extant differences in legal cultures and political traditions,¹²⁹ hence, the connection between procedure and normativity.

126. See, e.g., *Knight*, 528 U.S. at 995 (Breyer, J., dissenting) (citing the Privy Council regarding the “inhumanity” of death penalty delays).

127. See *Lawrence*, 539 U.S. at 564 (describing Fourteenth Amendment “due process” rights understanding); *Atkins v. Virginia*, 536 U.S. 304, 311–17 (2002) (analyzing Eighth Amendment jurisprudence); *Washington v. Glucksberg*, 521 U.S. 702, 785–87 (1997) (Souter, J., concurring) (referring to the law of the Netherlands when discussing the right to assisted suicide); *Thompson*, 487 U.S. at 830 (plurality opinion) (holding that the execution of juveniles violates norms of the Western European community); see also *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O’Connor, J., concurring in part and dissenting in part) (noting the relevance of Nuremberg Trials procedures regarding consent standards for medical experimentalism); *Trop*, 356 U.S. at 101 (plurality opinion) (inquiring into “evolving standards of decency”).

128. On convergence in criminal law, compare GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* (1998) (arguing for convergence), with JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003) (discussing divergence among American, German, and French criminal justice policies). On the risks of comparativism’s misinterpreting similarities, see William P. Alford, *On the Limits of “Grand Theory” in Comparative Law*, 61 WASH. L. REV. 945, 955 (1986).

129. See Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 844–47, 851 (1997)

Comparativism's normative role in constitutional interpretation is most evident in current American constitutional jurisprudence in the context involving life and death, where the Court has been willing to turn outward to invoke an understanding of evolving human decency in a global order. Interpreting the Eighth Amendment protection from "cruel and unusual punishment," through case law from *Thompson v. Oklahoma*¹³⁰ through *Stanford v. Kentucky*,¹³¹ and *Atkins v. Virginia*,¹³² there is an increasing reliance on foreign sources of law. In *Stanford*, Justice William Brennan, in dissent, relied on comparative materials to support the view that "contemporary standards of decency" would preclude the execution of juveniles.¹³³ Over a vigorous dissent challenging foreign law's relevance, a plurality in *Thompson* relied on such experience to inform the meaning of "civilized standards of decency"¹³⁴ to the "fundamental beliefs of this [n]ation."¹³⁵ In *Atkins*, a majority found that "the world community" "overwhelmingly disapproved" of execution of the mentally retarded.¹³⁶ In the latest Supreme Court death penalty case (in which the issue was invoking the death penalty for rape), the Court pointed to an attempted equivalence approach—acceptance of death only when life or death humanity rights are at stake.¹³⁷ In *Lawrence*, the criminalization of sodomy was said to violate a due process "liberty" in reliance upon European authority and "values we share with a wider civilization."¹³⁸ While in these decisions we see comparativism's uses expanding humanity rights, in other humanity-rights-related areas, such as abortion and euthanasia, humanity rights conflict; as such, we can see that comparativist practices are similarly being justified by the humanity-centered norms themselves.¹³⁹

("[T]ransplantation of fact finding arrangements between common law and civil law systems would give rise to serious strains in the recipient justice system.").

130. 487 U.S. 815.

131. 492 U.S. 361 (1989).

132. 536 U.S. 304.

133. *Stanford*, 492 U.S. at 389–90 (Brennan, J., dissenting).

134. *Thompson*, 487 U.S. at 830–31 (plurality opinion).

135. *Id.* at 868 n.4 (Scalia, J., dissenting).

136. *Atkins*, 536 U.S. at 316–17 n.21; *see id.* at 324–25 (Rehnquist, C.J., dissenting) (refusing to find other countries' views relevant to the judicial ascertaining of "contemporary American conceptions of decency").

137. *See generally* Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (prohibiting the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim).

138. *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003) (describing the right at issue "as an integral part of human freedom in many other countries").

139. *See* Washington v. Glucksberg, 521 U.S. 702, 710 n.8, 718 n.16 (1997) (citing *Rodriguez v. British Columbia*, [1993] D.L.R. 342, 404 (Can.) (discussing assisted suicide laws in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

When developed by a transnational judiciary, jurists, and civil society, comparativism offers independent potential for global solidarity.¹⁴⁰ The concerted turn outward enables alternative justifications to form the basis of sometimes shared but always principled decision making.¹⁴¹ Through pluralizing rationales, comparativism in judicial review offers potential cosmopolitan effects that may well transcend the consent-based authority of any one state. This view derives some support from the significant contemporary increase in the use of comparative analysis in domestic constitutional courts. This globalizing potential is most evident as it concerns humanity rights. Moreover, judge-made law is informed not only by the form of the conflict resolution, but also by actors more broadly involved in adjudication, and interpretation—e.g., judges, scholars, and civil society. Since the judicial arena has become the site of conflict resolution among overlapping and recombinant regimes, this area has spurred the rise of independent principles of interpretation. Indeed, here we see the particular link between conflict resolution, international law, and interpretation—a strand that connects all of the three illustrations in this section, and reflects the bases for the rise of jurisdiction in the managing of conflict in global society.

To conclude, this rearticulation of the role of comparativism in areas of humanity law offers new justification in the prevailing debates about such methods and the perception of the expansion of judicial power worldwide: first, because it arises in limited areas involving humanity rights which have always, going back historically, been areas of shared law reflecting issues of common humankind; and second, because insofar as these increasingly involve areas of diminished democratic consent, these demonstrate that this area of law has long been justified on other rights-based grounds.

CONCLUSION

This essay has traced a number of contemporary debates over the ongoing meaning of international law and has demonstrated the connections between these debates. It did so looking at a variety of adjudicative contexts where the question raised is what counts as the ultimate sources of

140. See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 218–19 (2003) (demonstrating that transnational adjudication can contribute to a “global community of courts”).

141. For example, consider reliance on cosmopolitan law, defined as “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.” David Held et al., *Rethinking Globalization*, in DAVID HELD & ANTHONY MCGREW, *THE GLOBAL TRANSFORMATION READER* 70 (2003). The cosmopolitan project attempts to specify the principles and institutions for making sites and forms of power, which presently lie beyond the scope of state democratic processes. See generally Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751 (1992). For a related claim that proposes judicial review modeling democratic self-determination, see Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 74–77 (1986).

the authority of international law. Are the sources democratic consent and theoretical conceptions of justice; or rather international and constitutional law cases considering the newfound relevance of notionally foreign law in domestic courts wherever human rights are at stake? These instances reflect the growing nexus between transformation in jurisdiction and the underlying substantive values. The relevant trends reflect the usages of humanity law as a dynamic basis for evolving interpretation across state lines and as a source of normative values and concerns for a global system in flux. Therefore, the claim here is that humanity law plays a pivotal role in laying the bases for law's legality and legitimacy. It is redefining rule of law both at home and on the global stage.