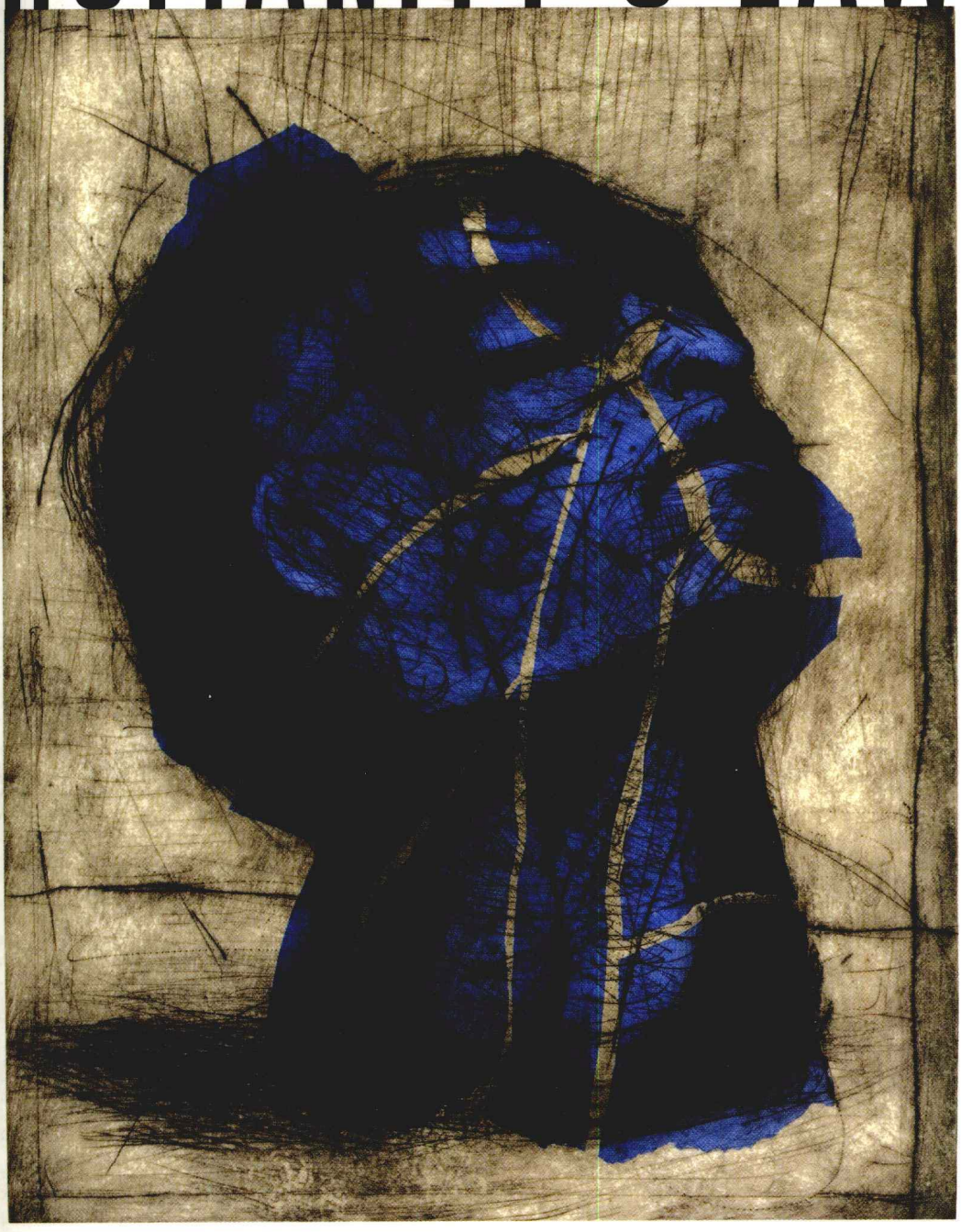
HUMANITY'S LAW



RUTI G. TEITEL

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For Rob

PREFACE

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

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

Another puzzle that arose was that of the role of law, and why legal mechanisms and solutions seemed to proliferate. How could this development best be explained? It was clear that the lens we were using—which viewed situations from a state-centric perspective—lacked sufficient explanatory power. But why might that be? The law's role seemed problematic, given the changes we had witnessed in the nature of the violence. It was necessary to ask: To what extent is the law addressing the real sources of conflict? What sort of law should properly be applied to twenty-first-century conflicts?

Other changes, too, are under way, leading us to ask: Exactly who is the current subject in foreign affairs today? And, in a concededly globalizing politics, what exactly might be the role of actors beyond the state? Large numbers of civilians were being affected by conflict, and accordingly, it was vital to examine the role of a human-centered (not state-centered) politics and law in the search for legitimacy. Compounded vulnerabilities speak to other identities, which in turn illuminated the extraordinary rise in ethnic conflict. These persistent questions gave rise to the exploration here into the conditions for, the status of, and the changing role for law. They have led me to postulate that we are witnessing at least a partial change of legal regime, departing from the preexisting interstate regime and moving toward a regime I term "humanity law"—that is, the law of persons and peoples.

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

Portions of chapter 4, on justice and war, were presented at my alma mater, Cornell Law School, at its Conference on Global Justice, in remarks responding to "Just War and the Noncombatant Defense" (April 2006), which were published as "Wages of Just War," in the Cornell Law School symposium issue (*Cornell International Law Journal* 39 [2006]). In the fall of 2006, I was grateful for the support of the University of Connecticut's Human Rights Institute, where I was given a visiting Gladstein Chair for Human Rights, as a result of which I gave three university-wide talks. These began with an overarching view of the project, "For Humanity: The Emerging Shift in the Rule of Law in Global Politics," and ended with a presentation on the evolution of the law toward a humanity law regime at the University of Connecticut Faculty Workshop (November 2006).

Over the next year, various chapters of this book benefited from workshops at American University, Washington College of Law; Georgetown Law School's Constitutional Law Colloquium; Harvard Law School's International Law Colloquium workshop series; and the Columbia Law School Associates Series, where I presented at its international law seminar. Chapter 3 benefited from discussions at Columbia University's Associates-in-Law Workshop Series (February 2007); and a Fall Speaker series where I presented "Humanity's Law: Regulating a World of Conflict" hosted by Columbia Law School's Center for Global Legal Problems (October 2007).

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

My home institution, New York Law School, has been very supportive, through its summer grant research assistance program and the Ernst C. Stiefel Chair, which for some years now has supported my research. Having had a chance to get to know the late Ernst Stiefel and his dynamic view of international law, I believe that he would have liked this book. I am very grateful to the New York Law School law library staff, and particularly to Ms. Camille Broussard and Margaret Butler. I also owe an enormous

debt to my terrific research assistants at New York Law School, without whom this book would not have been possible—most recently Luna Droubi, who somehow balanced this with her editorial role on the Law Review, Aman Shareef, as well as my former research assistants over the last three years: Sandra Dubow, Diane Bradshaw, Eric Grossmann, Theresa Loken, and William Vidal. I would also like to convey my gratitude and admiration to Human Rights Watch for their excellent research reports. In this project, as always, my assistant Stan Schwartz has been invaluable in word processing and other assistance.

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

CONTENTS

Humanity's Law

CHAPTER 1

Introduction

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

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

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

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

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

Kofi A. Annan, *"Two Concepts of Sovereignty" (1999)*

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

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

The end of the Cold War gave rise to hopes for a new peace, to be cemented by multilateral institutions and inspired by universal law. But, in short order, the collapse of communism released a wave of political violence. There followed a range of interventions and engagements undertaken in the name of "humanity"—from Kosovo to Darfur, to Afghanistan and Iraq. We have been confronted with new kinds of conflicts. The obsolescence or inadequacy of long-standing devices and doctrines—such as nuclear deterrence, spheres of influence, and "contain-

ment" approaches—to effectively manage conflict has become increasingly apparent. From the Balkans to Africa to the Middle East, we see a rising number of weak and failed states and increasing political fragmentation, civil strife, displacement, and migration, and we witness the plight of peoples whose very survival is under threat. Terrorism and religious extremism add to the pervasive sense of volatility and existential insecurity.

This history has created the context for a transformation in the relationship of law to violence in global politics. The normative foundations of the international legal order have shifted from an emphasis on state security—that is, security as defined by borders, statehood, territory, and so on—to a focus on human security: the security of persons and peoples.[1] In an unstable and insecure world, the law of humanity—a framework that spans the law of war, international human rights law, and international criminal justice—reshapes the discourse of international relations.

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

All this engages the sources, content, institutions, and agents of international law. The law of war has traditionally included both *jus in bello*—which addresses the manner in which war is waged—and *jus ad bellum*, which sets the legal rules that determine whether going to war is permissible in the first place. *Jus ad bellum* has mostly been codified in the UN Charter, which bans the use of force by states against other states, except in self-defense or with the authorization of the Security Council.[2] *Jus in bello* is codified to a significant extent in the postwar Geneva Conventions and Additional Protocol, substantial parts of which are now regarded as customary international law, binding on the entire community of states.

Among the most important norms set out in Common Article 3 of the 1949 Geneva Conventions are the prohibitions on murder, torture, and cruel treatment. The targeting of civilians is prohibited; the principle of

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

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

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

Finally, also informing the humanity law framework is the law of international criminal justice, which is closely associated with international humanitarian law, as it has evolved since the end of the last world war. Under the law of international criminal justice, enforcement focuses on individuals. This approach may be seen as beginning with the landmark International Military Tribunal at Nuremberg, and drawing from the law of war. It is central to the Torture Convention, and to the charters of the ad hoc international criminal tribunals that were constituted after genocides in Europe and Africa. This approach also characterizes the proceedings of the permanent International Criminal Court (ICC), and encompasses the concept of "universal jurisdiction," as well as widespread norms that universally prohibit the most egregious of offenses, such as torture and slavery ("jus cogens"). Such norms allow—and, indeed, may even require—the prosecution of offenders by any state that is able to do so.

This book maps the rise of humanity law, and considers how that body of law is shaped by, and is reshaping, each of the three international legal regimes just discussed. While the book does not espouse a formal fusion of rules or doctrines, I argue that humanity law provides a framework that both legal and political actors employ in today's world, as they confront the challenges of conflict and of insecurity. This framework is most evidently at work in the jurisprudence of the tribunals—international, regional, and domestic—that are charged with applying a diverse range of legal materials to particular disputes, disputes that often span issues of internal and international conflict and security. Thus, throughout this book, I will discuss and analyze this jurisprudence. Most international legal scholarship focuses on individual regimes or tribunals, as if they operated in a relatively self-contained way. But under that approach, it is easy to miss the evolution of a jurisprudence that is being generated by a normative and interpretive framework that operates across these divides, and connects the mandates and decisions of diverse tribunals and institutions.

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

Today, when violent conflict is conspicuous and pervasive in parts of the world, the law of war is expanding alongside the parameters of contemporary transnational conflict.[3] Heightened violence, particularly across state borders, coincides with the ascendance of a humanity-driven discourse in politics.[4] I will elucidate the tension between the ascendant rule of law and the management of the use of force, by exploring the changed law of humanity and its impact on the traditional law of war and human rights law.

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

Moreover, as we will see, this framework informs our analysis of globalization and the current economic crisis—raising the vital question "What do we

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

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

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

These developments have gone hand in hand with the rise of nonstate actors in international law as bearers of both rights and duties, and the interconnected tendency toward judicialization. Here, one thinks of the emergence of international criminal law processes and institutions, as well as the prevailing regional courts, and how they are being shaped by individ-

uals' involvement in adjudication, and also of the appellate jurisprudence of the World Trade Organization—a legal system that formally remains within the classic interstate model yet is unable in its lawmaking to resist the shift to non-state-centric subjectivity, as seen by its judge-made decisions entertaining amicus submissions from nonstate actors and in its decision to open hearings to the public.[7]

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

THE PARADIGM SHIFT

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

The UN Charter did recognize one exception: the "inherent" right of self-defense. For, Article 51 provides that, "nothing... shall impair the inherent right of individual or collective self-defence if an armed attack occurs." At least until the Security Council had been able to act, the right to self-defense may be exercised *unilaterally* or through other collective institutions (such as NATO, etc.). Of course, as conceded by the 1990s-era UN Secretary-General Kofi Annan, in reality, this "old orthodoxy" was never absolute. The UN Charter, after all, was issued in the name of "the peoples," not the governments, of the United Nations. As Annan has commented,