DRAFT

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Debating the Global Rule of Law a Half Century after Hart/Fuller: Different Transitions, New Perspectives on Morality and Legality

Abstract

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 enforce 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(l) of rule of law? Half a century later, in the midst of a new flux in globalizing politics and economics, a version of the debate over law's relationship to morality and politics has emerged in the context of international law's changing role in globalization. This paper explores the ways contemporary international law jurisprudence is today steeped in an analogous debate about a changing and one might say transitional rule of law and the role of a new and changing judiciary in guiding the emergent global order.

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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.

Within the doctrinal structure of international law scholars have observed the growing convergence of human rights and humanitarian law. 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, 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.[2]

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[1] Ernst C Stiefel Professor of Comparative Law, NYLS, author, TRANSITIONAL JUSTICE (OUP 2000).

[2] See Ruti Teitel, Humanity's Law: Rule of Law in a Global Politics, 35 CORNELL INT'L LAW J. INTRODUCTION 356 (2002).

The emerging legal order is addressed not merely to states and state interests and perhaps not even primarily so. Persons and peoples are now at the core. A non-sovereignty based normativity is manifesting itself, one which has an uneasy and uncertain relationship to the inherited discourse of sovereign equality. In a forthcoming book, I call this new normativity "humanity-law" where I argue that 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.

Half a century after the Hart/Fuller debate,, in the midst of a new flux in globalizing politics and economics, a new, or perhaps revived, controversy over law's relationship to morality is emerging in the context of international law's changing role in contemporary politics.

On the one side—one might call them the "global legalists"—who see the project of international law as rationalizing the reach of legal normativity beyond the bounds of state frontiers and state sovereignty. 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, their legitimacy is at least partially autonomous from the state and, therefore, are thought to abstractly give rise to the rule 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" (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.[3] The cosmopolitan faith in universal law assumes or depends on the truth of the normative substance of that law. One reason for this faith is the putative universalism of human rights law and which also underpins the many constitutional analogies referred to in articulating the normative supremacy of the new international law. Similar beliefs may also be behind the contemporary impetus to normalize and generalize international criminal responsibility of individuals, i.e., a faith in the possibility of international law to reflect and realize foundational social morality. At the same time, there are also elements of a utopian vision of the law as insuring that politics is answerable to universal morality. Thus, for example, Jurgen Habermas has called for "the normative taming of political power through law."[4]

But, to what extent is there a genuine universalism that is emerging? For legal skeptics (or realists) the cosmopolitan perspective is itself situated in a particular context—today this context is more often Europe –where an international law-based vision is often rightly or wrongly

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

[4] JURGEN HABERMAS, THE DIVIDED WEST 116 (Ciaran Cronin ed. trans., Polity Press 2006) (2004).

juxtaposed against the image of American exceptionalism.[5] So it is that, that we can see the ways that what I term the "humanity-law" debates lie at the core of the current reorganization of the international sphere, contributing the parameters for a new version of global bipolarity. As Jurgen 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."[6] Others, such as UK lawyer Philippe Sands, have argued that it is the very stature and centrality of law that is on the line and constitutive of a transatlantic divide.[7] By the same token, in the United States, political analysts and scholars, such as Joseph Nye and others, observe or characterize 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" or "smart power").[8] Nevertheless, what may be more important for us is that, whether or not the United States employs the same vocabulary, these pivotal debates have served to frame both U.S.-Europe relations, as well as conversely framing the 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 seen as somehow isomorphic, and representative of underlying political and social realities—as well as a vindication of the truth of cosmopolitan law's normative substance. Here the mere existence of juridical developments—the expansion, thickening, and deepening of law is seen as evidence in and of itself of political progress. 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 post-national 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, or circular 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 gap is finessed by the recourse to constitutional language. Again, Habermas states: "Following two world wars, the constitutionalization of

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[5] See Bruce Ackerman, Rooted Cosmopolitanism, 104 ETHICS 516, 524 (1994).

[6] See generally HABERMAS, supra note 4.

[7] See PHILIPPE SANDS, LAWLESS WORLD: MAKING AND BREAKING GLOBAL RULES xii (2005) (referring to the Bush Administration's "full scale assault, a war on law").

[8] 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.

international law has evolved along the lines prefigured by Kant toward cosmopolitan law and has assumed institutional form in international constitutions, organizations and proceedings.[9]

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.[10] Thus, "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."[11] Indeed, for some, this is their main virtue —that in a global system, humanity's law offers standards of evaluating and delimiting the state from above. One might see this as one side of the polarized debate over the potential of the law in today's politics.

Yet, framing the relevant question at stake in terms of a debate about the law—whether for or against—seems 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 non-state—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.

The most vocal and evident critics of the cosmopolitan view today are those whom one might characterize as the "law skeptics," including realist scholars of international relations.

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[9] See HABERMAS, supra note 4, at 115.
[10] Id. at 116.
[11] Id.

Such skeptics downplay the significance of the changes that are highlighted by the cosmopolitans. They see the present post Cold war moment merely in terms of a reassessment and realignment of state interests and interstate power relations.

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, known by some 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 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 democratic 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 rules becomes the essential proxy or vehicle for the democratic legitimization of international legal rules.

Though it comes close to denying any existence for international law autonomous from the will of states, strangely this point of view appears to have garnered 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 reception of international law into domestic law, particularly through adjudication.[14] Therefore, what is at stake here goes to a pressing debate about what are the current sources of legitimacy and the law, and what are the nature of expectations regarding the normative aims of the law.

The positivist view of international law is challenged by changing political realities: namely the "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 is our

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

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

[14] See Robert Dahl, Can International Organizations Be Democratic? A Skeptic's View, in IAN SHAPIRO & CASIANO HACKER-CORDÓN (EDS.), DEMOCRACY'S EDGES 19 (Cambridge University Press, 1999); Jack Goldsmith & Stephen D. Krasner, The Limits of Idealism, DAEDALUS, Winter 2003, at 47.

context: that of greater international interconnection—yet without greater consensus—conditions which accordingly have been shifting 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 legitimating normality that permeates and diffuses itself through interpretation of our complex realities.

Lessons from the Hart/Fuller Debate about Global Legality

The oft given characterization of Hart's position in the Hart/Fuller debate is one of arch positivism i.e., of rule of law in terms of the "command of a sovereign"[15] If this characterization were true then one would expect Hart to be an ally of the skeptical camp in the current post cold war debate about the status of international law in its contribution to rule of law. However, when one turns to Hart's considered view on international law developed later –in his subsequent seminal work, "The Concept of Law," one finds Hart rejecting such a narrow understanding of legality. For here, Hart expressly distances from the view that command is what defines a legal system.[16] And, as is elaborated later in this paper, he proposes a far richer understanding of the materials that make up such a system, an understanding that illuminates the contemporary understanding of global rule of law.

For the polarized law/not law positions cannot account for what law is actually doing here, especially in light of the rise in the sense of insecurity on the global scene. 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, a context often associated with increased disorder and pervasive violence. Generally, the evaluation of foreign affairs tends to be driven by political variables independent of law.[17] (eg there are now neoliberal institutionalist views for example, those of Robert Keohane and Anne Marie Slaughter that aim at a better integration.)[18] Like the cosmopolitans, institutionalism can account for the instant trend towards legalism, ie the rise of processes and institutions reflecting

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15 71 Harv. L Rev at 631

16 THE CONCEPT OF LAW at 212.

17 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 K. Krasner ed., 1983).

18 On the relevance of method and interpretive approaches to international law, see Stephen Ratner & Anne —Marie Slaughter (eds.), 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 in Law's Empire: The Jurisprudence War, 85 AM. J. INT'L L. 117 (1991); Judith Goldstein et al., Introduction: Legalization and World Politics, 54 INT'L ORG. 385, 391 (2000) (discussing realism). 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).

greater legalization of international policymaking,[19] but 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.[20]

This paper aims to move beyond the prevailing perspectives on the present shift to global legality whether from international relations or international law, because these theoretical structures are of limited explanatory value today as they do not adequately comprehend present foreign policymaking, which is itself undergoing change in light of contemporary transformations regarding law and politics. The prevailing mainstream approaches do not adequately register the transformations wrought by what I have termed humanity-law—the evolving merger of international human rights and humanitarian legal regimes, such as the changes in legal personality, judicialization and enforcement all of which affect perceptions of the rule of law.

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 law debates taken up above seem to only indirectly address this question—namely, how entangled ought the law be in politics?

Here, once again, we can see the relevance of the postwar debates. For Hart and Fuller this question was deliberated over at a time of substantial political flux, though neither one thought the question was peculiar to transitional moments.[21] And, it may well be that what is particular to such moments really goes to the scope of change and hence the conspicuousness of these dilemmas at such moments. Indeed, this contextual dimension seems to have been glossed over in the debates, although it plays a bigger role in Fuller's response. As the debate is characterized as one of law/morals rather than what the transitional phenomena suggest, which is a dramatization of law/politics dilemmas. Ultimately, insofar as it is addressed, this law/politics question seems to have been embedded in Hart/Fuller's differences over where and by what process, ie., legislation versus adjudication, does change legitimately occur?

Another dimension of the transitional parameters associated with the present debate, goes to the evident transnationalism, i.e., that at the same time as the law seems to be increasingly 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

[19] 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).

[20] 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).

[21] See Fuller, 71 Harv at

differences.[22] Here, it is interesting that neither Hart nor Fuller emphasized this aspect of their transatlantic debate. This is really played down by Fuller, whose response refers to their non "minority" status,[23] although, as Nicola Lacey has explored in her illuminating writing on Hart, this may be all too simple.

All that is clear is that the potential bases for legality—democracy, rule of law, and human rights—do not necessarily go hand-in-hand or neatly map on. Nevertheless, in the various contemporary debates about the meaning and status of "law," the array of 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 peace, democracy and human rights appear to go hand in hand, these are all ostensible purposes of the present recombined international rule of law scheme. Thus, understanding the humanity-law regime can help us understand the ways the complexity of the transnational subject and values can result in tensions and, therefore, do not necessarily move in a linear progressive direction.

This contemporary debate harking back to the postwar debate implicates the foundation question of what makes law, law? When Hart addresses this question of law, he elides the strict positivist answer; but instead, goes on to raise the question of where law lacks a centralized command structure, as it does in international law that it nevertheless, can be distinguished from morality, namely, that it is a distinctively juridical system of normative communication with legal sources, arguments and claimsmaking.[24] 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 what I term 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 ie a hierarchic view of the law's relation to politics. As we shall see, this redirection of the current characterization of the question of the normative status and role of law in international affairs today to the status and role of subjects and practices such as adjudication in establishing a sense of rule of law draws upon my

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[22] HABERMAS, supra note 4, at 116 (referring to the United States as engaged in a "moralization of politics").

[23] See 71 Harv. L Rev at 637.

[24] Hart, THE CONCEPT OF LAW at 223.

understanding of what was ultimately at stake in the Hart/Fuller debate, and in particular, the question of where the critical transformative decisions would occur?

So, for example, consider the many debates over the sources of international law today, such as regarding the meaning of the "law of nations," and what it may contribute to the perception of global legality. This term hardly admits of just 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—aimed at conventional law - an adequate basis for the interpretative activity of the proliferating judiciary? Moreover, given the apparently increasing number of such fora, to what extent can normative pluralism and/or conflict be addressed via interpretation? i.e., a challenge often associated with transitional times. Or, in another instance occasioning guiding normative principles, the areas the growth of international law and its interactions with domestic law, particularly where human rights at stake.

The law debates are often waged as if what is at stake is the actual "facticity" of law. Here, despite a range of emphases or attitudes regarding legalism, this seems to be a moment of positivistic tilt on both sides of the debate and the ocean. On the European side, one thinks of the philosopher Jurgen Habermas's excursions into legal theory in Between Facts and Norms,[25] and more recently, arguing for 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.[26] 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 is authentically "law."[27] In the United States, this has produced a stultifying debate, reflecting a form of retrenchment in 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"[28]—its domain and influence more and more diffuse.

Properly understood, the controversy now underway transcends the essentializing antinomies of the Hart/ Fuller debate which have tended to dominate —of law versus morals,-?

[25] JURGEN HABERMAS, BETWEEN FACTS AND NORMS (1998).

[26] See HABERMAS, supra note 4, at 116.

[27] See GOLDSMITH & POSNER, supra note, 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.

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

realism versus idealist/cosmopolitan, positivism versus natural law.[29] Instead, "The real issue (as Fuller observed): How should we state the problem? What is the nature of the dilemma in which we are caught?"[30] Consider to what extent are there political dimensions of this debate, with influence upon the site of normative shift?

From the Postwar to Post Cold War Debates: Humanity Law as Global Rule of Law

Therefore, we can see that the debate guides us away from the realism/cosmopolitan debate, to a different set of questions about interpretation under conditions of sometimes compromised or diffused authority.

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-centered norms themselves), humanity-law opens a space for dealing with regimes sufficient to manage the recombinant humanity-law regime.[31] 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."

In this way, what I term "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 UN Committee on Civil and Political Rights, and other domestic, regional, and international courts. For example, their application in the world court has been subject of some scholarly writing.[32] Yet, human rights law jurisprudence in the deepest sense is still in many ways in its infancy. This is seen in that, while international law itself lacks a theory of interpretation, this gap has been made more vivid and urgent 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.

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

[29] This history has already been told. See generally KOSKENNIEMI, supra note 20.

[30] See 71 Harv L Rev at 656.

[31] 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 Warnke, JUSTICE AND INTERPRETATION (MIT Press, 1993) (1992).

[32] See Joseph Weiler, Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century, New York University School of Law, Institute for International Law and Justice, International Legal Theory Colloquium (Feb. 14, 2008) (draft article), available at http://www.iilj.org/courses/2008IILJColloqium.asp.

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.[33]

The present realist/cosmopolitan positivism/constructivist debate harks back to the postwar law/morals debate above. As 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."[34] Yet, evidently, this extreme representation is also flawed as the new role of law in global politics transcends any one particular debate and any one geographical space.

The Interpretive Turn

Let us reconsider the debates regarding the meaning of global legalism in light of the paradigm shift I have proposed above and the salient elements of the proposed humanity-law scheme. This reconsideration is illuminated by the postwar debate reframing that takes us beyond the issue of the facticity of the law, instead, to its meaning, i.e., what is the significance of the fidelity to law? Indeed, on this point, both Hart and Fuller agree. "One of the chief issues is how we can best define and sense the idea of fidelity to law."[35] These, as will be seen, can best be understood to enable an interpretive space and normative direction which may help to defuse several areas of conflict.

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 and conventions, 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.[36]

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[33] See generally Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, Legalized Dispute Resolution: Interstate and Transnational, 54 Int'l Orgs. 457 (2000).

[34] See Habermas, supra note 4, at 116.

[35] "It is a cardinal virtue of Professor Hart's argument that it brings into dispute the issue of fidelity to Law." Id

[36] See generally Cass Sunstein, One Case at a Time (1999); Cass Sunstein, Legal Reasoning and Political Conflict (1996).

Thinking of contemporary global order and, in particular, the regime 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 legal regimes that are decentralized (that is, not ordered hierarchically), the exercise of adjudication 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 now reinforced by transnational parameters is governed by interpretive principles, as the norms are often downstream from any "original" national origins. Or, they may pose a conflict between regimes, spurring the demand for "confirmatory principles."[37] As has been seen in constitutional adjudication drawing upon sources beyond the national jurisdiction. Particularly, since humanity-law involves transnational interests and norms, the relevant pursuit demands interpretation and pluralist perspectives may often be at issue in resolving relevant rights and duties. 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 that can afford basis for conflict resolution. Humanity-law, as an interpretative lens, navigates the narrow strait between the Scylla of difference and the Charabydis of the notion that these are known common values. But, since interpretive practices arise in real cases of individual rights, this ensures that the enterprise 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 nothing less than the perception of the meaning, force, and authority of international law-in apparent transition to a globalizing order- today, and how to respond to the demand for a guiding "rule of recognition"—a principle which sets, at the basis for the sources and bases for law's authority and significance, some means of managing or resolving normative conflict.[38] 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

[37] See Lawrence v. Texas, 539 U.S. 558, 574-77 (2003).
[38] See H.L.A. HART, THE CONCEPT OF LAW 228-31 (1961).

that informs the global rule of law. Below, the paper further explores the phenomena of "humanity-law" and its related adjudicative fora which may well help point the way.

Tribunalization and the Emergence of Global Legality

As became clear in the postwar debate, once the problem at stake is reconceptualized in terms of "fidelity to law" discussed above "it becomes a matter of capital importance what position is assigned to the judiciary in the general frame of government."[39] In this regard, one might observe that among the most remarked trends internationally is the increase in the number of courts and tribunals, international, regional, hybrid and the greater uses of such bodies not only to interpret and enforce international law, but to guide and resolve disputes between states and other actors in the international system. While supporters of international law have long had to deal with the perception that international law is not really law, or at least not an effective legal system, because it lacks the routine adjudicative mechanisms characteristic of domestic systems, this skeptical viewpoint may exaggerate or distort the extent to which adjudication relative to other institutions -- political, social and economic -- is responsible for the effective realization of domestic legal norms, or, more generally, their impact on behavior broadly understood, it has, nevertheless, dogged those who would make the case for international law as an important and influential form of legal ordering. Yet, these differences were assayed by Hart in his writing following the debate in*The Concept of Law*,[40] where conceding that this form of law lacked the usual state-centric bases, there were other bases for legitimacy including judicial decision making in the mix.

Of course, the mere increase in the numbers of tribunals and the frequency of their use, while it is what seems most to impress casual observers, would not itself make international law seem more like a domestic legal system, as Hart observed in his later work, in the*Concept of Law,*[41] but for qualitative changes as well-- changes which have been uneven across different areas and even within specific regimes but which point to shifts in "dispute settlement" along a court like direction.

A common narrative of tribunalization is that it signifies a shift from a power- to a rules-based international system. Seen this way, tribunalization is often said to mean depoliticization. This view goes hand in hand with the perception or assumption of the qualitative change above. Yuval Shany has written of a "greater commitment to the rule of law in international relations, at

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39 71 Harv at 634.

40 Id.

41 See THE CONCEPT OF LAW at 212-213.

the expense of power oriented diplomacy."[42] Yet, evaluation of how tribunalization has occurred in the different regimes, and, particularly, its relationship to shifts in the normative substance of the law, are such that the depoliticization hypothesis is much too simplistic. Indeed, posed this way this threatens to morph into another iteration of the "law-morals" debate. In fact, the dynamic relationship between tribunalization and shifts in normative substance has led to moments where tribunals rather than operating in isolation from or above the politics on the ground have become deeply entangled with it, in a number of post-Cold War conflicts, in some ways leading to the emergence of what one might see as a new politics of international order, itself shaped by tribunalization, where tribunals have become the most evident sites of the new global politics of contestation between multiple actors, NGOs, individuals, corporations, communities and not just states.

Just as the optimistic hypothesis of tribunalization as a full shift from power-based to law-based international order is likely too simplistic and misleading, so too, is the countervailing anxiety that the proliferation of international tribunals in an uncoordinated and decentralized global legal order will only exacerbate "fragmentation," actually undermining the integrity and coherence (and implicitly the legitimacy) of international legal order, i.e., in normatively speaking- dis-order.

Instead, the perspective here, informed by the core issue posed by the postwar debates, one would need to inquire further to see how tribunalization is operating today and above all, the possibility of sustained attention to the interpretative sensibilities and practices of these regimes.

Here, one regime that lends itself to such study is that which appears to be playing a more significant role within transitional contexts, namely, international criminal justice, i.e., one of the strands feeding what I term humanity-law. In this regard, it is worth observing that similar fora associated with the postwar transitions were widely perceived to afford rule of law values such as generality and continuity of the law, e.g., Nuremberg. Here, looking to practices, we might see some commonality in the conventions, ie the concern for law enforcement respecting political leadership, etc.

Nevertheless, there are also perceptible differences in the conditions at present, concerning the multiplicity or proliferation of adjudicative fora drawing attention to their interpretative practices. Could it be that now paradoxically the very density is thought to undercut the rule of law? Hence, an obvious and dramatic flashpoint for the "fragmentation" anxiety concerning tribunalization was the pronouncement of the post Cold war International Criminal Tribunal for the former Yugoslavia ("ICTY") Appeals Chamber in the Tadic case, where the Court rejected the prevailing World Court's ICJ's interpretation of certain of the rules of state

[42] Yuval Shany, The Competing Jurisdiction of International Courts and Tribunals (Oxford: Oxford University Press, 2003), pp. 3-4.

responsibility: "International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided)."[43]

Of course, the current tribunalization did not create what the anxious have labeled "fragmentation." But, the decentralized and specialized work of diverse functionally-oriented international legal regimes, run by very different technical and bureaucratic elites with their own cultures, need not have given rise to great anxiety about fragmentation as a specific shortfall of international legal order: rather such a phenomenon might well be seen as a parallel to the increasing specialization and differentiation of governance functions within post-industrial capitalist democracies, for instance, a tendency frequently observed in social theory.

It is that, in the case of adjudication, once there is a commitment to legality itself as discussed in—the Hart/Fuller debate—but here shall just reveal for now a preference for one side of it – this entails a requirement to fidelity to certain values, ie, that the commitment is not just to order for its own sake as Fuller puts it "unless it is good for something,"[44] i.e., a concept of justice (or grundnorm, in Kelsenian terms) that cross-cuts the differentiated functions of specialized regimes, each committed to their own form of instrumental reasoning. In domestic legal systems, these cross-cutting values might be thought of as positivized or entrenched in the rules of the constitution-written and or-unwritten-and confided to the high or highest court for guardianship, assuring as it were of a coherent legal order. In international law, by analogy one might have imagined that the equivalent would be structural norms concerning responsibility, personality, sovereignty, territory, jurisdiction etc., as reflected in custom, the "codification" work of the ILC in the UN Charter; and here one might imagine--the World Court as the guardian of this "constitution," analogous to the domestic high or constitutional court. It was precisely in shattering this last element of the analogy that clarifies why the *Tadic* Appeals Chamber ruling which constituted the foundational first jurisdictional challenge represents such a flashpoint for the anxiety of fragmentation: as even structural rules such as those concerning state responsibility take on their authoritative meaning within each self-contained system, and the meaning assigned to them by what many might have imagined or fantasized as the prevailing international law's high court, the ICJ, has no special, must less predominant, normative force.

Another reading of *Tadic* here is possible, namely, that there is a shift in the grundnorm, or ultimate value of international legality, from sovereign state equality, where states are not

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43 Prosecutor v. Tadic (Jurisdiction), (1996) 35 ILM 32, 39.

44 Fuller, 71 Harv L Rev at 657.

subject to any higher authority, whether natural or divine law), than to humanity and its protection.[45] Here, one might say that the postwar World Court or ICJ, insofar as it avoided humanity in its understanding of the structural rules and privileging the older state centric grundnorm (for a late example see the Arrest Warrants case), appeared to concede the Marbury v. Madison moment of the new "humanity law" order to more contemporary post Cold War tribunals such as the ICTY where responsibility is conspicuously personal, hence connecting up the procedural to substantive dimensions of the law's scope. Although in the older World court, one sees, albeit, dim or belated recognition of what one might consider the new grundnorm in decisions such as Le Grand, Bosnia v. Serbia, and the Security Fence advisory opinion (see also Nuclear Weapons Advisory op), as well as in other regional decisions which are shaped (admittedly, often in a timid and subterranean way) by what I term the law of humanity or "humanity-law."

While, of course, there is the obvious pessimistic hypothesis, on the other hand, that the expansion of the rule of law through tribunals will simply continue to intensify incoherence and tension in the international legal system, undermining the "majesty of the law" and playing into the hands of those who are international law critics or skeptics—who may see the only clear and concrete order at the global level as the actual relationships between "states," determined by the hard or harder, laws of power and interest. These critics can say: the more so-called international law there is, the more lawyers and justices there are, even less clear and certain does this purported law become.

In this regard, the view expressed here is neither straightforwardly optimistic nor pessimistic. Firstly, because this paper questions- as did Hart in an earlier transition- whether the actuality and significance of international law as "law" should be determined by comparison against a benchmark drawn from a stereotype of a "domestic legal system"—one based on a historically contingent project, that of building the modern state with its monopoly on legitimate coercion, a project which itself is challenged by the apparent rise of normativity of international law, among other tendencies in emergent global orderings. In this regard, the perspective here is praxis driven, as it views interpretation as central to the construction and evolution of legal order, whether domestic or international. Interpretation responds and normalizes in a sense 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, whether domestic or international, by virtue of the juridical normative system are inherently in

[45] This shift and its implications are set out in Teitel, *Humanity's Law*, forthcoming, Oxford University Press.

dialogue with other courts, institutions and actors that also play interpretive roles, and their decisions in individual cases can give meaning to law without purporting necessarily to give "closure" to normative controversy whether in politics or morals. The humanity norm is realized through the interpretation of diverse positive legal rules in multivariate contexts, and is inevitably entangled in politics. This understanding is more fully developed beyond this paper in recent work reflecting changes implied by an increasing amalgamation of the law of war, human rights and humanitarian law.[46]

Tribunalization has sometimes been accompanied by an expectation of reinforcement of law as a self-contained system, protected from an "outside"—whether politics or other laws or cultures technocratic power that challenge the purity of the particular legal order. But, tribunals have found themselves always reaching to and entangled with the "outside," resisting collapse into or subordination to the outside, but always maintaining a dynamic engagement through interpretation. This becomes evident from inquiry into their praxis in present globalizing politics. Looking to tribunalization's unfolding in relation to the evolution of the regimes themselves, within a context of rapidly shifting political, social, and economic realities, we see in each case, little evidence of "self-containment," only a sense of non-subordination or assimilation other normative orders or institutional actors that matches the non-hierarchical reality. Again, through interpretation, tribunals are always engaging with the supposed "outside," the relevant "other" and address it, but without engaging in a struggle for dominance or supremacy. Interpretation implies normative communication not unconstrained conflict, or clinical isolation. This does not imply stable agreement or harmonization on the one hand nor delegitimating incoherence—nihilistic or radical indeterminacy on the other.

Conclusion

In the wake of the transition from fascism following World War II, the debate between H.L.A Hart and Lon Fuller depicted as one pitting positivism against/ idealism with argument conceived as one claiming the strict separation of law and morals. Yet, when we turn to the post-cold war debate about the status of international law as a legal system, one might assume that Hart would be an ally of the skeptics, who often impugn the status of international law based on the absence of centralized application and enforcement of the law. However, on a second glance, in the original Hart/Fuller debate, Hart was not really arguing for the strict separation of law and morals, but rather more of a political theory with an institutional claim that legislatures rather than judges ought to be the appropriate institutional actors for aligning morality and positive law.

[46] R. Teitel, *Humanity's Law: Rule of Law for a Global Politics*, 35 Cornell Intl L J.355(2002). Forthcoming, Humanity's Law (OUP 2009).

So, understandably, when we turn to Hart's later seminal work,*The Concept of Law*, we find that he in fact asserts that international law has the character of a genuine legal system: Hart distances himself from the view that the sine qua non of a legal system is commands backed by threats and coercive sanctions. And, this leads him to consider again what distinguishes law and morality: The answer is one that provides a window into crucial contemporary debates about the nature of contemporary global rule of law: namely, what distinguishes legal from moral controversy in international relations, is that disagreement and discourse in international law is distinguished by certain particular sources of a legal nature-precedents, treaty texts, etc. as well as certain conventions, i.e., a judicial system.

This turns out to be a crucial insight at this pivotal juncture where, in this moment of world transition, the turn has been largely away from constitutionalism to international law as a guiding form of legality. Thus, illuminated by the postwar philosophical debate, we can see that a system characterized by diffused and decentralized interpretation, nevertheless, can be considered to have the requisite coherence and integrity of a legal system, because there is a common idiom, one recognizable by lawyers as legal and therefore distinguishable from other modes of normative discourse-religion, morality, etc. –a feature of significance in the present political context. This paper has explored this insight by addressing a key anxiety in contemporary international legal scholarship and practice-that of fragmentation-the notion that the multiplicity or multiplication of tribunals, or more generally sites of interpretation and application of international law, threatens its integrity and legitimacy as legal system. Here, one might further observe that the role of interpretation in law's normative evolution- despite the plethora of regimes and adjudicative fora and the evident absence of hierarchy, may well at some level address the anxieties surrounding the law/morality debate associated with the earlier postwar transitions. Given multiple actors engaging in normative conversation while there may well be no clear line between the *is* and the *ought*, the interpretive project is nevertheless bounded by the parameters of the adjudicative enterprise, ie, the need to resolve conflicts, the associated aims of the preservation of the state, together with that of other actors as well as the absence of normative hegemony in the global order.