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Is International Law Really Law? Theorizing the Multi-Dimensionality of Law

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I. INTRODUCTION

For many people, law is simply law: a set of rules that a given society creates, by whatever process, for itself and its members to live by.[1] It is a tool, an instrument, a set of institutions, a system for achieving social goals.[2] Perhaps because law pervades daily life and structures routine encounters, even those who live and work within a legal system may only rarely consider larger questions regarding the nature of law. It is easy to be satisfied with a view of law as statutes and cases, lawyers and courts, police and prisons. Despite the prevalence of this straightforward view, it is evident that there are deeper complexities, even contradictions, in the law—in its structures, objectives, practices, and participants. These have increasingly been recognized and interrogated by social and legal theorists, most frequently in the context of a single nation-state or government. However, those complexities may be even more prominent, and significant, in the international realm. International law appears to lack many of the familiar institutions of domestic law, and the question is often raised whether international law is really law at all.[3] An understanding of law as more than an instrument or particular system offers more productive means of considering that question.

Drawing upon diverse scholars of law from various disciplines, this article traces three central themes that emerge to theorize law as multi-dimensional: law as violence, law as bureaucracy, and law as governance.[4] Understanding violence as a dimension of law moves

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1. *See* Patricia M. Wald, *Violence Under the Law: A Judge's Perspective, in* LAW'S VIOLENCE 77, 77-104 (Austin Sarat & Thomas R. Kearns eds., 1995).

2. *See* Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 108 AMERICAN ANTHROPOLOGIST 52, 52-65 (2006). *See generally*, MAX WEBER, *Economy and Law (Sociology of Law), in* ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 641, 641-900 (Guenther Roth & Claus Wittich eds., 1978).

3. ANNE ORFORD, READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW 72 (2003).

4. These themes emerge dominantly in the work of Walter Benjamin, Jacques Derrida, Max Weber, and Michel Foucault, respectively. For a discussion of law-making and law-preserving violence, see WALTER BENJAMIN, *Critique of Violence, in* REFLECTIONS 277, 277-300 (Peter Demetz ed., Schocken Books Inc. 1986) (1921); Jacques Derrida, *Force de Loi: Le "Fondement Mystique de L'autorité" [Force of Law: The "Mystical Foundation of Authority"],* 11 CARDOZO L. REV. 919, 919-1045 (1989-1990). For an elaboration of the role of bureaucracy in law, see MAX WEBER, *The Development of Bureaucracy and its Relation to Law, in* MAX WEBER: SELECTIONS IN TRANSLATION 341, 341-54 (W.G. Runciman ed., E. Matthews trans., Cambridge Univ. Press 1978) (1922); Max Weber, *Bureaucracy, in* CLASSICAL SOCIOLOGICAL THEORY 264, 264-73 (Craig Calhoun et al. eds., Blackwell Publishing Ltd. 2d Ed. 2007) (1922); *see also* STEPHEN P. TURNER & REGIS A. FACTOR, MAX WEBER: THE LAWYER AS SOCIAL THINKER (1994). For an examination of the rise of governance in relation to law, see MICHEL FOUCAULT, *Governmentality, in* THE

beyond traditional views of law as an alternative to and bulwark against violence (particularly the violence of individual offenders). Instead, "law as violence" foregrounds the originating and sustaining force that underlies the creation and maintenance of law (and the state) as well as law's deliberate use of violence.[5] Bureaucracy as a dimension of law— "law as bureaucracy"—focuses on the rationalization of law and its processes, and the ways in which it works through the expertise of individuals and institutions.[6] Finally, "law as governance" recognizes the diffusion of law into a wider range of projects of reform and management both within and outside of the formal mechanisms of the law and the state.[7] These are neither necessarily alternative nor exhaustive views of law, but rather reflect significant and often overlapping features of law and legality.

International law well-illustrates this more nuanced understanding of law. This article will consider humanitarian interventions conducted in the name of human rights and the 'rule of law' to illuminate the multi-dimensional nature of law as violence, bureaucracy, and governance. Typically in humanitarian intervention, a group of nations (often under the aegis of an inter-governmental organization such as the United Nations) uses force or the threat of force against another nation in the interest of protecting that nation's citizens based upon a judgment that the nation is either unwilling or unable to do so itself.[8] This is law's violence—serving both to counter and constrain violence considered outside the law as well as to create and maintain a new legal order. Once the international presence has established itself by threat or force, it begins to (re)build the nation through an on-going presence or field mission. This is law's bureaucracy, which imports both a new legal system and a range of experts to administer it. The end goal of such an intervention is to establish a process of governance of the local

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ESSENTIAL FOUCAULT: SELECTIONS FROM ESSENTIAL WORKS OF FOUCAULT, 1954-1984, at 229-45 (Paul Rabinow & Nikolas Rose eds., 1994); ALAN HUNT & GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A NEW SOCIOLOGY OF LAW AS GOVERNANCE 99 (1994).

　　5. For a discussion of law-making and law-preserving violence, see BENJAMIN, *supra* note 4, at 277-300; Derrida, *supra* note 4, at 919-1045.

　　6. For an elaboration of the role of bureaucracy in law, see WEBER, *The Development of Bureaucracy and its Relation to Law*, *in* MAX WEBER: SELECTIONS IN TRANSLATION, *supra* note 4, at 341-354; Weber, *Bureaucracy, in* CLASSICAL SOCIOLOGICAL THEORY, *supra* note 4, at 264-73; *see also* TURNER & FACTOR, *supra* note 4.

　　7. For an examination of the rise of governance in relation to law, see FOUCAULT, *supra* note 4, at 229-245; HUNT & WICKHAM, *supra* note 4.

　　8. *See* PATRICIA MARCHAK, NO EASY FIX: GLOBAL RESPONSES TO INTERNAL WARS AND CRIMES AGAINST HUMANITY 6 (2008); HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 268-70 (2000).

population—law as governance—first by international administrators and increasingly in conjunction with a range of 'civil society' organizations, until the nation has been determined to be capable again of self-governance.

Recent years have seen such interventions in Bosnia, Kosovo, Rwanda, Sierra Leone, East Timor, and elsewhere.[9] In the field, international policymakers and advocates typically adopt an approach that attempts to blend pragmatism with idealism.[10] Law appears in its familiar guise as a tool to be wielded in the interests of the greater good. While this may reflect intentions (if not always reality), it seldom allows for a more critical or nuanced view. Instead, it leads to an understanding of intervention based on human rights or humanitarian grounds as, at best, an attempt to (re)establish the "rule of law" and to (re)build the nation, and at worst, as a well-intentioned choice to avoid the greater evil of "doing nothing" in response to crisis.[11] But there remain more fundamental questions to examine. What is the "rule of law" in such a context? What does it mean to establish law (and human rights) through forceful intervention? How is law deployed in international projects of governance? As this article elaborates a theory of law's multi-dimensional nature, it will engage with these questions in the context of international interventions.

In Part II, this article will explore law's relationship with violence. It will briefly examine conventional views that position law as a restraint upon or selective and judicious dispenser of violence as well as more critical views that explore the enmeshed nature of law and violence. It will then discuss contemporary humanitarian interventions and human rights institutions and practices, and their historical antecedents, to surface international law's violence. In Part III, this article will discuss the ways in which law's force becomes subject to bureaucratic, technical considerations with the increasing rationalization of law. In the context of international interventions, it will elaborate the importation of "rational" international legal regimes and the deployment of "objective" international experts to establish and manage such regimes and to train local participants in these new procedures and practices. Part IV will

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9. HUMAN RIGHTS FIELD OPERATIONS, LAW, THEORY AND PRACTICE (Michael O'Flaherty ed., 2007); MARCHAK, *supra* note 8; SHERENE H. RAZACK, DARK THREATS AND WHITE KNIGHTS: THE SOMALIA AFFAIR, PEACEKEEPING, AND THE NEW IMPERIALISM (2004).

10. *See* DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004); MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

11. RAZACK, *supra* note 9, at 150.

focus on the deployment of law as a technique in projects of governance and the roles of experts in creating, facilitating, and maintaining networks and practices of reform and management. Humanitarian interventions begin as the projects of states and inter-governmental organizations but expand to include larger and more diffuse networks of actors. The article will conclude by returning to the larger questions of international law and contending that understanding the integration of law's violence with projects and institutions of bureaucracy and governance is essential for answering those questions as well as for an appropriately complex appraisal of humanitarian intervention in the contemporary environment.

II. THE FORCE OF LAW: LAW AS VIOLENCE IN HUMANITARIAN INTERVENTION

It may be easiest to imagine the connections between law and violence in the context of criminal law with its fierce debates about the scope and purposes of punishment, including the ultimate measure of the death penalty, or the treatment of prisoners and the conditions of their incarceration.[12] However, the relationship of law and violence is more encompassing, more complex, and more contested. Conventional views position law in opposition to violence, as a restraint upon violence, or, at most, as a deliberate and impartial dispenser of violence. In many circumstances, for many participants in legal processes and institutions, those views are accurate and adequate. Nonetheless, there are important critical voices that challenge these understandings, both to problematize more benevolent views and to articulate the complicated ways in which law and violence are enmeshed. This section will consider both conventional and critical views of law and violence before examining their relationship in the context of international law and humanitarian intervention.

A. *Law as a Civilizer of Violence*

Under the conventional view, law and violence are connected, but law domesticates, channels, and justifies violence. Not all violence is equal; there is a fundamental distinction between violence used for just

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12. *See* ROBERT COVER, *Violence and the Word, in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 203, 203-38 (Martha Minow, Michael Ryan, & Austin Sarat eds., 1992) (using the criminal trial and death penalty as examples); Wald, *supra* note 1, at 77-104 (discussing the criminal trial); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1975) (tracing the origins of punishment and the emergence of prisons).

(or legal) purposes and violence used for unjust (or illegal) purposes. Violence authorized by law is just(ified), and violence outside the law is not.[13] Legal theorist Robert Cover articulates this understanding of law as an alternative to and a means to control violence: "Were the inhibition against violence perfect, law would be unnecessary; were it not capable of being overcome through social signals, law would not be possible."[14] Here, law represents the best intentions: it "is the projection of an imagined future upon reality."[15]

Judges and lawyers, though not its only agents, are often the most visible faces of the law, particularly in this model. The traditional, idealized view of judges (and sometimes lawyers) focuses on esteemed qualities of intelligence and ethics, but also on an objectivity and "ability to step away from the battles of the day and to articulate the principles of a rational and orderly society."[16] They seem to be the antithesis of violence, and yet judges also wield violence through their ability to command the enforcement of the law.[17] If, as former federal court judge Patricia Wald suggests, "a society is defined by its ability to enforce communal decisions—by force, if necessary," then it is left to the judge to "affirmatively sanction yet try to control and channel that violence to attain the law's ends."[18] Cover and Wald both use the criminal trial and the role of the judge to illustrate the conventional view of the relationship of law and violence: the defendant's violence is outside the law and is met with law's tempered violence through the judgment for punishment, even to the extreme case of the death penalty.[19] In this context (and perhaps more broadly) legal interpretations serve to justify violence exercised by the state.[20] These are "organized, social practices of violence" where the interpretation of what ought to be done is

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13. This view of the connection between law and violence is reflected in essays by prominent legal theorist Robert Cover and former federal court judge Patricia Wald. COVER, *supra* note 12, at 203-38; Wald, *supra* note 1, at 77-104.

14. COVER, *supra* note 12, at 219.

15. *Id.* at 207. This is not to suggest that Cover's view lacks nuance; he is mindful of the role of ideology in law and of the unequal power relations at play. *Id.* at 212.

16. Wald, *supra* note 1, at 77.

17. *Id.* at 78. Wald characterizes this as "liv[ing] in paradoxical proximity to violence." *Id.*

18. *Id.*

19. COVER, *supra* note 12, at 224-36; Wald, *supra* note 1, at 78-88. Wald gives other examples in a civil law context, such as domestic violence (where the law's violence can be a resource for victims) or the right to peaceful protest (where law must face the risk of violent responses to the protest). *Id.* at 92-100.

20. COVER, *supra* note 12, at 203.

separated out from the act of doing the violence.[21] Judges, then, are both linked to and separated from law's violence.[22]

Punishment is, then, a central feature of law as it strives to provide justice; the simple logic of the system states that if you break the law (and if you get caught), you will be punished. Equally important, however, is the sense that law's consequences are punishment rather than vengeance. It is common, particularly among those within the legal system, to view the law as objective, rational, and impartial, rather than emotional, subjective, and biased.[23] Underlying this view of the law is a sense that the move to rationalize punishment represents a sort of forward progress in the law, a channeling of violence into impartial bureaucracies or the hands of various experts to become discipline and punishment.[24] Social theorists have problematized this view.[25] They have suggested instead that the nature and type of legal institutions have

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21. *Id.* at 203, 235. Derrida points out, however, that interpretation itself may be "a juridico-symbolic violence, a performative violence." Derrida, *supra* note 4, at 995.

22. Cover suggests that judges may use their violent power by withholding it: "A judge may or may not be able to change the deeds of official violence, but she may always withhold the justification for this violence." COVER, *supra* note 12, at 228-29 n.48. Although judges are distanced from the outcome of their decisions, Wald contends that judges must work to "retain the humanizing sense of accountability for imposing law's violence on individual defendants." Wald, *supra* note 1, at 83.

23. *See infra* Part III for a discussion of law as bureaucracy.

24. . In *Discipline and Punish: The Birth of the Prison*, Foucault also considers the role of the judge but finds it less ennobling and expansive than either Cover or Wald. In his view, the role of the judge is transformed by the move to disciplinary power. In that framework, the police assume a more dominant role; judges become "the scarcely resisting employees of this apparatus." FOUCAULT, *supra* note 12, at 282. Instead of the courts, the prison, and more broadly the carceral, becomes the "model of justice itself." *Id.* at 302. Foucault suggests that "[t]he carceral 'naturalizes' the legal power to punish, as it 'legalizes' the technical power to discipline." *Id.* at 303. Disciplinary power is "a type of power that the law validates and that justice uses as its favourite weapon." *Id.* at 302. It operates by giving "the power to inflict legal punishment a context in which it appears to be free of all excess and all violence." *Id.* In a sense, this is the separation between interpretation and violence that both Cover and Wald also describe.

25. Durkheim suggests two "laws" that explain quantitative and qualitative variations in punishment over time. EMILE DURKHEIM, *Two Laws of Penal Evolution, in* EMILE DURKHEIM ON INSTITUTIONAL ANALYSIS 153, 153-79 (Mark Traugott ed. & trans., The Univ. of Chicago Press 1978) (1900). Tracing the historical changes in punishment practices from torture and public executions to imprisonment outside of public view, he articulates his first "law": "The intensity of punishment is greater as societies belong to a less advanced type . . . and as centralized power has a more absolute power." *Id.* at 153. This linkage of quantitative variations to macro considerations such as the type of society and the centralization of power follows the traditional view of "progress" in addressing crime in a society. His second "law" folds in micro concerns of duration and intensity of the crime as influenced by increasing societal development: "Punishments consisting in privation of freedom—and freedom alone—for lengths of time varying according to the gravity of the crime, tend more and more to become the normal type of repression." *Id.* at 164.

changed over time as the means of exercising power have also transformed.[26]

Punishment under sovereign reign, centered on public execution, was understood as the vengeance of the sovereign.[27] This common form of punishment was "more than an act of justice; it was a manifestation of force; or rather, it was justice as the physical, material and awesome force of the sovereign deployed there."[28] Over time, however, subsequent penal reform shifted from the idea of vengeance to the idea of defending society.[29] Foucault describes this as the transformation of sovereign power to disciplinary power, and this transformation also reworks the legal system.[30] The police and other non-judicial actors assume a more dominant role in the legal system, and this transformation results in a new form of law—"a mixture of legality and nature, prescriptions and constitution, the norm."[31] The power to punish extends beyond the sovereign to include the wide range of actors that are familiar today: the police, the courts, the lawyers, the probation officers, the social workers, the prison guards, and so forth.

In this new framework, the relations of power multiply, and this is a point that is easy to overlook in conventional views of law. The violence of the law—even of legal interpretation and practices of punishment—does not occur on an equal playing field; law's violence is implicated in relations of power, where "perpetrator and victim of organized violence will undergo achingly disparate significant

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26. Durkheim concludes: "If penal law is milder today than heretofore, it is not because the ancient institutions of criminal justice remained the same, little by little losing their rigor; rather, it is because they have been replaced by different institutions." *Id.* at 179. Here, he accounts for the evolution by investigating "what gave birth to the prison in its original form and then what led to its later transformations." *Id.* at 166. In many respects, Durkheim lays a foundation for Foucault's later investigations in *Discipline and Punish: The Birth of the Prison*. FOUCAULT, *supra* note 12. Foucault's work in this text precedes and foreshadows his later work on governmentality as he traces the exercise of punishment from sovereign society to disciplinary society. *See infra* Part IV.

27. FOUCAULT, *supra* note 12 at 90.

28. *Id.* at 50.

29. *Id.* at 90.

30. Within the legal system, there is increasing use of the "simple instruments" of "hierarchical observation, normalizing judgement and their combination in a procedure that is specific to it, the examination." *Id.* at 170.

31. *Id.* at 304. Foucault suggests:

Beneath the increasing leniency of punishment, then, one may map a displacement of its point of application; and through this displacement, a whole field of recent objects, a whole new system of truth and a mass of roles hitherto unknown in the exercise of criminal justice. A corpus of knowledge, techniques, 'scientific' discourses is formed and becomes entangled with the practice of the power to punish.
Id. at 22-23.

experiences."[32] Even the conventional view recognizes that the ideology of law as a civilizer of violence "is much more significant in justifying an order to those who principally benefit from it and who must defend it than it is in hiding the nature of the order from those who are its victims."[33] Simply put, the judge is more likely to believe that the legal system tempers violence than the defendant and his or her community (and, likely, the crime victims). This recognition, however, is ultimately reconciled in, or obscured by, the belief that law serves to domesticate violence, that those with power in the system can use their power (and the law) for benign purposes, to restrain other, non-authorized forms of violence.[34] This view results in a focus on institutions as dominant—and identifying—features of law, and it also lead to questions about international law's status as law when it appears to lack these features. How can international law be law without the means to enforce, to punish, to meet unauthorized violence with authorized violence? Alternative views of law as violence offer insight on this fundamental question.

B. *Law as Enmeshed with Violence*

Although conventional theories of law as a substitute for or opposition to violence are useful ways of thinking about the nature of law and law's work, there are also more critical views of law's relationship to violence, which see the two as deeply enmeshed.[35] These perspectives shift the focus from law's use of violence to violence as a feature of law. In a foundational essay, "Critique of Violence," Walter Benjamin examines violence through its relationship to law and justice.[36] His focus is on violence itself as a means, without concern for the

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32. COVER, *supra* note 12, at 238.

33. *Id.* at 212. Foucault also identifies this point: "[t]he general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines." FOUCAULT, *supra* note 12, at 222.

34. COVER, *supra* note 12, at 236. In judge-like fashion, Wald prescribes: "The law's violence must be rationed fairly and not denied to some individuals who need its protection." Wald, *supra* note 1, at 103. In his essay on Cover, Austin Sarat problematizes this view. Whereas Cover "reluctantly preferred" law's violence, Sarat asks what "price is paid for law's intimacy with violence." Austin Sarat, *Robert Cover on Law and Violence, in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER, *supra* note 12, at 261. Sarat notes that violence "puts an end to interpretation and meaning construction," and as a result law's violence is "a continuous threat to law's principal involvement in the production and maintenance of meaning in diverse normative communities." *Id.* at 257.

35. BENJAMIN, *supra* note 4, at 277-300; Derrida, *supra* note 4, at 919-1045.

36. BENJAMIN, *supra* note 4, at 277-300.

particular ends towards which it is directed (just or unjust, for example).[37] He identifies two forms of violence as means—law-making violence and law-preserving violence.[38] Law-making violence is an originating violence, the violence that establishes law, and law-preserving violence is a maintaining violence, which sustains law's power (though these distinctions ultimately break down).[39]

Benjamin argues that in the quest to find the original source of legitimacy for law, one must end up with—or rather begin with—violence.[40] In a basic sense, law-making violence is about power as it establishes the new order.[41] Law's oft-noted interest in a holding a monopoly on violence is a law-preserving violence, concerned with maintaining power, because "violence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law."[42] As a result, "all violence as a means . . . is implicated in the problematic nature of law itself."[43] This illuminates an essential role for violence in law. Violence is enmeshed with law; it is present in the foundational moment of law and also serves to preserve law and the legal order. In some sense, Benjamin's idea of law-preserving violence supplements the conventional view as much as it challenges it; it grounds law in violence rather than in opposition to it, and it expands law's use of violence to the preservation of itself.

Other theorists have both critiqued and extended this view of law's intimacy with violence.[44] Jacques Derrida begins his inquiry with a revealing point of language regarding the common expression of "the force of law."[45] He emphasizes that "there is no law without enforceability, and no applicability or enforceability of the law without

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37.   Benjamin sets aside the conventional understandings of natural law and positive law, which both feature in contemporary human rights law and practice, and which evaluate violence either through its connection to just ends or through its use of legal means. *Id.* at 277.

38.   *Id.* at 287.

39.   *Id.*

40.   *Id.* at 295.

41.   *Id.*

42.   BENJAMIN, *supra* note 4, at 281. Like the conventional theorists, Benjamin also draws upon the example of the death penalty. However, Benjamin suggests that "in the exercise of violence over life and death more than in any other legal act, law reaffirms itself." *Id.* at 286.

43.   *Id.* at 287.

44.   Derrida, *supra* note 4, at 919-1045.

45.   Derrida points out that "law is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable." *Id.* at 925. Derrida also engages directly with Benjamin's *Critique of Violence*, noting that violence for Benjamin includes "both violence and legitimate power, justified authority." *Id.* at 927.

force."[46] The relationship of force or violence to law is a complex one, particularly when one considers the emergence of law (and even justice); law itself emerges from violence that is not yet legal or authorized (nor illegal or unauthorized) in the founding moment.[47] However, law and violence are entwined even beyond this originating moment. Law "claims to exercise itself in the name of justice and that justice is required to establish itself in the name of a law that must be 'enforced.'"[48]

Law-preserving violence and law-making violence are in a dialectical relationship.[49] Derrida suggests that founding law and conserving law eventually collapse into one another.[50] This becomes evident—and particularly relevant to the context of international law—in examining the origin of the state. Derrida suggests, "The foundation of all states occurs in a situation that we can thus call revolutionary. It inaugurates a new law; it always does so in violence."[51] Law-making violence is the revolutionary moment, the creation of a new state and a new law; in fact, it is an exceptional moment, even "an instance of non-law" as it exists outside the law. [52] Law-preserving violence seeks to conserve that new state and new law, and this may often be the conventional, and more familiar, violence of law that seeks to punish threats to the existing legal and social order. However, there is always a contradiction in that the founding violence can be repeated and a new law established.[53]

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46. *Id.* at 926-27. Derrida takes an expansive view of force, which may be "direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth." *Id.* at 927.

47. *Id.* at 943. Derrida provides a foundation for connecting it to the international realm by linking it to the origin of the state. *Id.* at 1007.

48. *Id.* at 959, 961. Derrida explains: "Justice, as law, is never exercised without a decision that *cuts*, that divides," and in its violence, law "claims to recognize and defend said humanity as end, in the person of each individual." *Id.* at 963, 1003.

49. BENJAMIN, *supra* note 4, at 300. In fact, Benjamin contends that "[w]hen the consciousness of [the latent pretence of] violence in a legal institution disappears, the institution falls into decay." *Id.* at 288.

50. Derrida contends that law "is both threatening and threatened by itself." Derrida, *supra* note 4, at 1003. Thus, it begins the process of decay identified by Benjamin, "the trajectory of decline, of institutional 'degeneracy.'" *Id.* at 1015.

51. *Id.* at 991.

52. *Id.* Derrida also contextualizes Benjamin's essay as reflecting "the crisis in the European model of bourgeois, liberal, parliamentary democracy, and so the crisis in the concept of *droit* that is inseparable from it." Interestingly, his own context is 1989-1990 at a different time of upheaval with the collapse of the Soviet Union and the emergence of new nations out of the former Soviet bloc. *Id.* at 979.

53. Derrida calls this the "paradox of iterability." *Id.* at 1007.

This more complicated view of law's violence, particularly in exceptional moments, has been elaborated further in Giorgio Agamben's work.[54] Here, the focus is not on the founding moment of law, but rather on an instance of non-law; he looks to the "state of exception," where the law is suspended, to reveal law's violence.[55] Agamben asks what happens to law when the law is not erased or replaced but is deactivated and inactive.[56] Because the state of exception appears to be both inside and outside the juridical order, it illuminates both the presence of law and the absence of law, the efficacy of law and the force of law.[57] The state of exception essentially separates the force of law (its "formal essence") from the law itself.[58] It is "the opening of a space" where "in order to apply a norm it is ultimately necessary to suspend its application, to produce an exception."[59]

In this context, there are real dangers to the juridical order and beyond.[60] Agamben discusses these risks when a domestic sovereign suspends law in the name of emergency, but something very similar happens in international intervention. Domestic law is suspended or overtaken in response to conflict or crisis; although a new legal framework is ultimately (re)instated, international authority often governs in the interim and in the name of the law but without meaningful legal constraint. Despite the grim possibilities in these exceptional moments, however, there may also be opportunity in the deactivation of the law. To explore the possibilities of the open space of

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54. GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., 2005). Like Derrida, Agamben engages directly with Benjamin's earlier work on violence and law, examining the debate between Benjamin and Carl Schmitt; at issue in their debate "is the relation between violence and law—in the last analysis, the status of violence as a cipher for human action" in the zone of anomie that is the state of exception. *Id.* at 59.

55. The state of exception "is a suspension of the juridical order itself, it defines law's threshold or limit concept." *Id.* at 4.

56. *Id.* at 64. Agamben traces the history of the state of exception in the European and American contexts from World War I forward, illustrating its gradual progression from exception to rule. In many ways, the state of exception is grounded in, but distinct from, the idea of necessity, which has its own complex relationship to law. *Id.* at 24-28. Agamben also notes that the state of exception appears related to dictatorship although he cautions that it is "not a dictatorship . . . but a space devoid of law." *Id.* at 50.

57. *Id.* at 37.

58. *Id.* at 38.

59. *Id.* at 40. Agamben also characterizes it as "an emptiness and standstill of the law." *Id.* at 48.

60. This is particularly the case when the state of exception results in power and authority combined in one person: "The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that—while ignoring international law externally and producing a permanent state of exception internally—nevertheless still claims to be applying the law." AGAMBEN, *supra* note 54, at 87.

the state of exception requires severing the connection between law and violence and beginning to re-imagine the possible uses of law disconnected from violence.[61] Or, more simply, it may just require beginning to ask what "price is paid for law's intimacy with violence."[62] This foundational question is one that critical theorists have engaged with and begun to explore through a deeper examination of the ways in which law and violence are enmeshed. Although international intervention aspires to restore law disconnected from violence, it seldom asks the more important questions about how law and violence are enmeshed and what costs that may exact.

C. *Law and Violence in Humanitarian Intervention*

Although domestic examples of criminal law, as well as more exceptional moments of revolution and emergency, are typically used by theorists to illuminate law's violence and the collapse of law-making and law-preserving violence into one another, humanitarian intervention provides an equally compelling example of law's violence in the international realm. However, the analysis and critique of humanitarian intervention, human rights, and human rights law has typically focused on its bureaucratic and governmentalizing tendencies.[63] The role of violence has seldom been discussed, usually for one of two primary reasons. The first is grounded in international law's crisis of identity—is it really law at all?[64] As suggested by conventional views of law and violence, the most frequent reason that is given to undermine international law's status as law is that, simplistically put, there is no international judiciary, police force or even military to enforce it; international law is fundamentally a consent-based regime.[65] Particularly in the area of human rights, advocates are left to rely on

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61. *Id.* at 88.

62. Sarat, *supra* note 34, at 261.

63. *See infra* Parts III and IV.

64. *See* ORFORD, *supra* note 3, at 72. *But see* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (setting forth a rational choice theory of international law).

65. Although private international law, in areas such as business and trade, can find analogies to contract and other domestic private law as a basis for efficacy and look to the "market" for enforcement, public international law struggles in the absence of an international sovereign or government. *See* ORFORD, *supra* note 3, at 72-73; GOLDSMITH & POSNER, *supra* note 64, at 3. *See also* Thomas C. Heller & Abraham D. Sofaer, *Sovereignty, The Practitioners' Perspective*, *in* PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES 31-33 (Stephen D. Krasner ed., 2001) (describing these international commitments as the exercise of sovereignty, rather than limitations upon sovereignty); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645-46 (1997) (discussing the theory that internalized compliance and obedience increase comportment with international law).

strategies of persuasion and shame to ensure compliance.[66] Because international law is often viewed as lacking in enforceability—necessary force—the absence of force or violence has typically been bemoaned and brushed aside.[67]

Nonetheless, at present, a massive international institutional structure—in the United Nations and its subsidiary agencies and regional counter-parts, including many international tribunals (such as the International Criminal Court, the ad hoc war crimes tribunals, the International Court of Justice, and so on)—exists that focuses on implementation, if not enforcement, of international law. Moreover, although there is not a single, unified international police or military, there are numerous alliances and instances of cooperative policing and use of force (Interpol, NATO, and the various military coalitions "authorized" to act by the United Nations Security Council) aimed at similar ends. Therefore, the second and somewhat contradictory reason that law's violence has not been commonly examined in international law is that the force that initiates and supports humanitarian intervention is viewed in isolation and justified as well-intentioned and necessary to avoid a greater violence.[68] The question of violence then sidestepped or compartmentalized, the analysis turns to the work of capacity- or nation-building and the establishment of the "rule of law." This somewhat contradictory status of international law serves as both incentive and justification for ignoring the role of violence or force in human rights law and practice. It may be largely overlooked, of course, but that does not mean it is absent.

Drawing upon the conventional and critical theories of law and violence discussed above, the force that supports international intervention can be problematized at both the micro level of the legal (and other) institutions at work during and after intervention and at the macro level of the geo-political dynamics of the intervention itself. The conventional view of law as a civilizer of or restraint upon violence is one that would likely be embraced by many human rights practitioners and advocates of humanitarian intervention.[69] At the micro level, this

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66. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004). Goodman and Jinks discuss mechanisms of coercion, persuasion, and acculturation.

67. *Id.* at 633-38 (discussing coercion and persuasion).

68. *See* MARCHAK, *supra* note 8; RAZACK, *supra* note 9; KENNEDY, *supra* note 10.

69. *See* HUMAN RIGHTS FIELD OPERATIONS, LAW, THEORY AND PRACTICE, *supra* note 9; CHARLESWORTH & CHINKIN, *supra* note 8, at 268-69; Sally Engle Merry, *Introduction to Part One: States of Violence, in* THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND LOCAL 41, 41-48 (Mark Goodale & Sally Engle Merry eds., 2007).

view underpins the many international or quasi-international institutions that are modeled on domestic institutions, such as the numerous international tribunals that adjudicate individual responsibility for international crimes or monitor human rights treaty compliance.[70] The domestic criminal trial has its counterpart in the war crimes cases before the International Criminal Court and the other ad hoc international war crimes tribunals, and domestic civil examples find their counterparts in more quotidian cases of human rights violations heard by treaty-monitoring tribunals.[71] Although there may be some recognition of the power disparities in these processes, they are reconciled with law's role as domesticator of violence. This view simultaneously acknowledges the violence of law and yet also justifies it; law's violence, if not exactly benign, operates for the greater good.[72]

The conventional view of law as domesticator of violence, in fact as both civilizer and evidence of civilization, is also relevant at the macro level. Historically, it has served as a rationale in support of the extensive and aggressive interventions of colonialism.[73] Early colonial endeavors were often justified by a perceived absence of law and a

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70. *See, e.g.*, Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 Ariz. J. Int'l & Comp. L. 347 (2006) (assessing advantages and disadvantages of hybrid criminal tribunals and contrasting them to ad hoc tribunals such as the ICTY and ICTR); Patricia M. Wald, *International Criminal Tribunals in the 21st Century: Iraq, Cambodia, and International Justice*, 21 Am. U. Int'l L. Rev. 541 (2006) (discussing war crimes tribunals in Iraq and Cambodia); Laura A. Dickinson, *Transitional Justice in Afghanistan: The Promise of Mixed Tribunals*, 31 Denv. J. Int'l L. & Pol'y 23 (2002) (discussing tribunals in Kosovo and East Timor); Michael Lieberman, *Salvaging the Remains: The Khmer Rouge Tribunal on Trial*, 186 Mil. L. Rev. 164 (2005) (discussing proposed tribunal for Cambodia).

71. Interestingly, law's reach is often more extensive in those contexts, where the responsibility of the state (or its subsidiary organs) is at issue, rather than the responsibility of an individual defendant. *See* Elizabeth M. Bruch, *Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens*, 28 B.U. Int'l L.J. 1 (2010); Timothy Cornell & Lance Salisbury, *The Importance of Civil Law in the Transition to Peace: Lessons from the Human Rights Chamber for Bosnia and Herzegovina*, 35 Cornell Int'l L.J. 389 (2002); Wald, *supra* note 1, at 88-103 (describing law's violence in the civil context of domestic law). In fact, Patricia Wald offers a good illustration of the reach of the conventional view beyond the domestic level and into the international level, given her status as first a U.S. federal judge and then later as a judge on the International Criminal Tribunal for Former Yugoslavia.

72. *See supra* Part II.A.

73. Gil Gott uses historical analysis of colonial regimes in an effort at a "critical historicization of the modern human rights project." Gil Gott, *Imperial Humanitarianism: History of an Arrested Dialectic, in* Moral Imperialism: A Critical Anthology 19, 19 (Berta Esperanza Hernández-Truyol ed., 2002). He shows that "humanitarian discourse did more than provide cover for the raw power ambitions of the imperial states . . . [it] formed a kind of partially arrested dialectic, whereby the transnational humanitarian identity became an important articulation point of imperialism." *Id.* at 30. He suggests that a critical human rights project must recognize and "break with received forms of humanitarianism." *Id.* at 35.

prevalence of (uncivilized, barbaric) violence among the colonized.[74] Law was brought to the uncivilized through the overt violence of forceful occupation as well as through the indirect violence of the importation of a new legal framework. Far from being a relic of the past, however, this "discourse of 'the West and the Rest' is alive and well in the modern world" as it echoes through current humanitarian interventions.[75] At times, such as in Rwanda or Haiti, the imperial legacy that supports the contemporary intervention is direct and obvious; in other situations, such as Bosnia and Kosovo, it may be a more indirect legacy of form and structure.[76] As in earlier imperial endeavors, a central theme that underlies the rationale for such intervention is the "absence of law, including international law, and a lack of sustained engagement by international organizations" in areas of crisis.[77] In this context, law's violence reemerges as the texts of international law—the UN Charter, human rights treaties, Security Council Resolutions— "authorize particular violent acts as legitimate" when supported by humanitarian rationales.[78]

Although such humanitarian endeavors linked with force are not new, they are increasingly common (and controversial) at the international level.

Even in the contemporary era, debates about humanitarian intervention reflect both conventional and critical views of law in relation to violence. For example, the idea of a "responsibility to protect" has increasingly gained prominence at the international level.[79] This doctrine suggests that "where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the

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74. Stuart Hall explains that early European explorers "were immediately struck by what they interpreted as the absence of government and civil society—the basis of all 'civilization'—among peoples of the New World." Stuart Hall, *The West and the Rest: Discourse and Power, in* FORMATIONS OF MODERNITY 275, 303 (Stuart Hall & Bram Gieben eds., 1992). Later imperial efforts reflected the same views, influenced in part by early sociological thinkers. *Id.* at 314-15.

75. *Id.* at 318. *See* Gott, *supra* note 73, at 19-38; RAZACK, *supra* note 9.

76. In each of these examples, however, the "international community" takes on the imperial role, forcefully intervening for the sake of establishing the rule of law; this rule of law replaces, domesticates and redeploys violence for its own ends. Orford characterizes collective humanitarian intervention as a "willingness to use force in the name of humanitarian values." ORFORD, *supra* note 3, at 2. *See* RAZACK, *supra* note 9, at 165; Bruch, *supra* note 71.

77. ORFORD, *supra* note 3, at 15.

78. *Id.* at 50.

79. *See* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001); MARCHAK, *supra* note 8. *See also* SPENCER ZIFCAK, UNITED NATIONS REFORM: HEADING NORTH OR SOUTH? (2009).

principle of non-intervention yields to the international responsibility to protect."[80]   In many ways, it reflects the influence of the discourse of "the West and the Rest" and its dialectical impulses towards violence and governance.[81]   It is based on a belief in a disinterested, Western humanitarian impulse to establish the "rule of law" with little recognition of Western self-interest in intervention (or even complicity in the situations of conflict or transition that serve to justify intervention).[82]   Moreover, there is the "paradox of humanitarian goals accomplished by force," which is often legitimated by the language of human rights.[83]   The narratives of these interventions reveal "deeply internalized myths about our civilizing mission" in the West (or, now, the Global North).[84]   Law, in this context, serves to distract from the violence of the intervention and restore a sense of innocence in both intention and action.[85]   In fact, originating violence becomes justified through "the narrative of choice"—where nations (again, usually of the West or Global North) must either stand by as atrocities occur or intervene militarily to establish a new legal order.[86]   It is a new revolutionary or exceptional moment.   Framed as choice, "[v]iolence

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80. *See* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 79; MARCHAK, *supra* note 8, at 6.

81. *See* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 79; MARCHAK, *supra* note 8. Marchak takes a generally supportive view of humanitarian intervention, broadly defined to include both military and non-military interventions. Through case studies of interventions in the "broken societies" of Cambodia, Rwanda, and Bosnia, Marchak illustrates the complexities of humanitarian (or other) engagement in real contexts. *Id.* at 97. However, the focus is on practical failures of these endeavors, rather than broader theoretical concerns about their connections to earlier colonial enterprises and Cold War interventions or problematizing notions such as the emerging doctrine of a "responsibility to protect." *Id.* at 37. Marchak concludes that "success for humanitarian interventionist strategies is dependent on knowing who the combatants are, knowing why they are in conflict, and having an articulated and publicly understood yet disinterested objective." *Id.* at 287. Without these conditions, "interventions under present world circumstances should be avoided unless both or all combatants request it." *Id.*

82. *But see* MARCHAK, *supra* note 8, at 290-91. Marchak states, "While external powers attempt to influence broken societies by introducing Western legal systems and courts, the one thing still missing is their acknowledgement of their own culpability for some of these happenings."

83. RAZACK, *supra* note 9, at 40, 44. Razack focuses on legal proceedings that followed incidents of violence by Canadian peacekeepers against Somali civilians, noting that "[l]aw has an important role to play . . . for it is in the courtroom and at hearings that a public truth is proclaimed about who we are as a people and as a nation." *Id.* at 8.

84. *Id.*

85. *Id.* at 149. Although Razack's focus is on Somalia, she also considers peacekeeping and peace enforcement missions in Bosnia, Haiti, and elsewhere; she concludes that "[n]o peacekeeping mission involving Western peacekeepers seems to have been without violence directed at the local population." *Id.* at 53.

86. *Id.* at 150.

helps establish who is, in fact, in control."[87] However, it remains a self-denying violence that justifies and thereby renders invisible the force exercised in the name of humanity.

Humanitarian intervention and the international law that is deployed in its support, thus, operate with law's violence along similar paths as the domestic law considered by both conventional and critical theorists. From the early history of colonialism to contemporary projects of international intervention, it is possible to trace that violence. Like revolution, humanitarian intervention establishes a new law and, often, a new state out of violence. It is a forceful violence that intervenes militarily to establish and to preserve a new legal order. It enforces the rule of law at both the national and the international level. Although the originating violence in this context is typically cloaked in legality (or, at least, justice), it is a contested rather than a stable legality. It is an interpretive violence that recognizes only certain forms of law as law and that remakes existing regimes in its image. This interpretive violence supports both the decision to intervene and the subsequent practices of the institutions that operate the new legal regime. It also legitimates itself in the new law—international human rights law or, more broadly, the "rule of law"—that it establishes. Yet, the new legal order remains vulnerable, perhaps more obviously so than more established states; there is always the threat of a new revolutionary moment that will destroy the existing legal order and install yet another new order. This threat exists for both the new national legal order and the international legal order.   This, then, justifies continuing international involvement, even force, to (re)establish the rule of law. International law, like domestic law, is co-implicated with violence.

III. THE RULE(S) OF LAW: BUREAUCRACY AND EXPERTISE IN PROJECTS OF HUMAN RIGHTS

In contrast to violence, the connections between law and bureaucracy are more readily apparent as fundamental features of the state and domestic legal system as well as the international legal domain. Law's quest for objectivity and rationality underscore the importance of bureaucracy, from the massive administrative apparatus of the "justice" system to the extensive and wide-ranging codification of legal doctrine. These features are evident not just in the practices of law, but also in the work of individuals and institutions, the various experts in law and

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87. *Id.* at 156. However, seeing the choice "as starkly as a choice between going and not going is again to remain within the moral universe of imperialism." *Id.* at 164-65.

otherwise, that participate in its processes. This section will elaborate the development and proliferation of law's bureaucracies and will consider the role of expertise in that context. It will then examine the ways in which this bureaucratic dimension of law manifests itself in humanitarian interventions and the human rights legal regimes they establish.

A. Bureaucracy and Law

Social theorists have long considered the links between law and bureaucracy. Early sociologist (and trained lawyer) Max Weber shows how bureaucracy operates in the administration of justice, through the development of "rational" legal procedures and formalized legal concepts.[88] Like the theorists of violence and law, Weber was interested in the origination of law and its subsequent legitimacy.[89] In his view, a simple norm or rule became law if it was enforced by "psychological or physical coercion by a staff of people."[90] Thus, a sense of force underlies his understanding of law, and both force and bureaucracy are present in his definition of the state. For Weber, the state is a "compulsory political organization with continuous operations . . . insofar as its administrative staff successfully upholds the claim to the monopoly of the legitimate use of force."[91] While force may be foundational, however, law's process itself is rational and bureaucratic.

In fact, in Weber's view, the modern state is "completely dependent on bureaucracy," and the longer the process of bureaucratization goes

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88. WEBER, *The Development of Bureaucracy and its Relation to Law, in* MAX WEBER: SELECTIONS IN TRANSLATION, *supra* note 4, at 352.

89. *See* TURNER & FACTOR, *supra* note 4. Weber considered systems of law and convention as "orders" included within "uniformities of action." *Id.* at 82. Legitimacy and beliefs about legitimacy, in contrast to questions of validity, are essential in this context. *Id.* at 101. Weber distinguishes between convention and law by the consequences that result from deviation. If deviation results in disapproval by the social group, it is a convention; if it results in "psychological or physical coercion by a staff of people," it is law. *Id.* at 102.

90. *Id.* Law's origins, however, are not in violence nor in rationality, but rather in something outside of both. This is because of an "inherent limitation" in rationalization, which is that the end goals themselves cannot be rationalized. *Id.* at 176. Although "Weber understood the process of 'positivization' of the law as an adjunct to the historical process of rationalization, or rather as a form of this process," he nonetheless concluded that "[w]hat positivism inadvertently produces is a concept of the law that can be grounded only in a kind of 'faith.'" *Id.* at 172-73.

91. *Id.* at 104. However, as Turner and Factor note, "Weber argues that legitimacy and the state evolve separately . . . legitimacy does not evolve . . . out of force." *Id.* at 108. Instead, Weber concluded that law emerged by revelation, and that legal formalism reflects "in some sense a residue of the magical element in primitive law." *Id.* at 109.

on, the further it extends.[92] This increasing bureaucratization is caused by the intensification of demands on administration as societies become increasingly complex.[93] This complexity encompasses increased social responsibilities, modern forms of interaction and communication, and political sophistication.[94] In terms of political factors, the most significant is the social demand for stability, order, and protection.[95] Thus, bureaucracy is an instrument and feature of law and order; it offers its unique attributes of "[p]recision, dispatch, clarity, familiarity with the documents, continuity, discretion, uniformity" and reduced material and personal costs.[96] However, there are other costs to a bureaucratic system—such systems are inflexible, rigidly hierarchical, almost mechanized.[97] The administrators and officials are dehumanized, in a sense, as the professional and objective office is separated from private life and subjective sensibilities.[98] At the same time, other participants are also dehumanized as bureaucratic practice focuses on general rules and disregards individual, particular situations.[99]

Along with the rise of the legal bureaucracy comes the increasing rationalization of the law and legal system.[100] In both civil and common law systems, "[t]ypification, one-sided selectivity, idealization (especially in the context of instruction), rationalization, and codification" become central to processes of developing and applying the law.[101] These same practices remain central to the law in contemporary settings. In fact, this leads to a common conception of the law as "scientific" or "objective."[102] Law and science both appear to

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92. WEBER, *The Development of Bureaucracy and its Relation to Law, in* MAX WEBER: SELECTIONS IN TRANSLATION, *supra* note 4, at 347. He continues: "the bureaucratisation is all the more complete the bigger the state is, and above all, the more it is or becomes a great power." *Id.*

93. *Id.* at 348.

94. *Id.* at 349.

95. Weber characterizes this as "the increasing need felt by a society grown accustomed to stable and absolute peace for order and protection ('police') in all areas." *Id.*

96. *Id.* at 350.

97.   *Id.* at 344-45.

98. WEBER, *The Development of Bureaucracy and its Relation to Law, in* MAX WEBER: SELECTIONS IN TRANSLATION, *supra* note 4, at 344-45.

99. *Id.* at 351.

100. Weber's work on law, perhaps reflecting his training and practice as a lawyer before he turned to sociology, also emphasizes the rationalization of law. In *Max Weber: The Lawyer as Social Thinker*, Stephen Turner and Regis Factor trace Weber's personal transformation and his theoretical transformation of legal science into his sociology. TURNER & FACTOR, *supra* note 4.

101. *Id.* at 140.

102. Bruno Latour, *Scientific Objects and Legal Objectivity, in* LAW, ANTHROPOLOGY AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS 73, 73-114 (Alain Pottage & Martha Mundy eds., 2004).

"emphasise the virtues of a disinterested and unprejudiced approach, based on distance and precision."[103]   Nonetheless, there remain important distinctions as well; law's quest for "objectivity" centers on the sort of indifference and distance characteristic of bureaucracy.[104] Again, the role of the judge provides illustration. Judges hold an important place in the legal hierarchy and exercise their power through interpretation and judgment.[105] Under their guidance, the system "appears to partake both of the positive logic of science and the normative logic of morality and thus to be capable of compelling universal acceptance through an inevitability which is simultaneously logical and ethical."[106] The rationalization of the legal process provides judicial decision-making with its effectiveness by "granting the status of *judgment* to a legal decision which no doubt owes more to the ethical dispositions of the actors than to the pure norms of the law."[107] Law

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103. *Id.* at 73. Latour continues: "in both domains participants speak esoteric languages and reason in carefully cultivated styles." *Id.* Both involve "a kind of proof or ordeal," as well as "speech, facts, judgments, authorities, writing, inscriptions, all manner of recordings and archives, reference works, colleagues, and disputes." *Id.* at 77, 82. However, Latour proceeds to destabilize these easy comparisons. Although "judges appropriate the scientist's white coat in order to represent their role" and "scientists borrow the judge's robes of purple and ermine in order to establish their authority," in fact there are important differences. *Id.* at 106.

104. Latour suggests that in science the object itself is judge. *Id.* at 106-07. In contrast, legal objectivity "depends entirely on a quality of speech, deportment, dress, and on a form of enunciation." *Id.* at 107. Ultimately, lawyers and scientists have different tasks, and Latour argues that "science should not be asked to judge, and . . . law should not be asked to pronounce truth." *Id.* at 113.

105. In this context, judicial power "demonstrates the special point of view, transcending individual perspectives—the sovereign vision of the State." Pierre Bourdiew, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 Hastings L.J. 805, 838 (1987). Bourdiew also scrutinizes issues of power, judgment and violence in the work of legal professionals. Power within the juridical field is tied to power more broadly, and Bourdiew, echoing the classic definition of the state, notes the "permanent conflict between competing claims to the monopoly on the legitimate exercise of juridical power." *Id.* at 824.

106. *Id.* at 818. There is also a division of labor within the juridical field that "constitutes the true basis of a system of norms and practices which appears as if it were founded a priori in the equity of its principles, in the coherence of its formulations, and in the rigor of its application." *Id.* However, interpretation is not solely a judicial act, and it is also implicated within power relations. Bourdiew explains, "The practical content of the law which emerges in the judgment is the product of a symbolic struggle between professionals possessing unequal technical skills and social influence," and the real meaning of a rule "can be discovered in the specific power relation between professionals." *Id.* at 827.

107. *Id.* at 828 (emphasis in original). This process is not simply a rhetorical mask; it is "the expression of the whole operation of the juridical field and, in particular, of the work of rationalization to which the system of juridical norms is continually subordinated." *Id.* at 820.

decides, and it does so through processes constructed as rational and objective, removed from the individuals involved.[108]

Once established, the bureaucracy of law has spread and flourished, facilitated through processes of institutional isomorphism that lead to a similarity of structures across society (and across societies).[109] DiMaggio and Powell identify three mechanisms of isomorphic change—coercive, mimetic, and normative isomorphism—which operate primarily in the intertwined realms of the state, law, and education.[110] Coercive isomorphism occurs when change is mandated by authority and, where necessary, enforced. The state and the law are central in processes of coercive isomorphism;[111] this is the force, the violence, of law. In addition to coercive isomorphism, however, law is also relevant in mimetic processes of isomorphism, where an institution mimics or copies the conduct of other institutions for reasons other than coercion.[112] Because of the general power of the state, there is social pressure to follow the practices of institutions that are successful within the system; the practices of those institutions are, in turn, shaped by the legal regime at work. Finally, the third mechanism of institutional isomorphism, normative pressure, is also evident in both the law and the working of the state system.[113] Normative pressure is the sense of "should" or "ought" that underlies the choice for a particular system or process.[114] Law is also at work in normative processes when legal education is standardized (in part, through law), and lawyers are ubiquitous in government bureaucracies and legislatures.[115]

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108. Bourdiew explains that there is a process of rationalization at work in the juridical field that results in a "social division between lay people and professionals" and that "constantly increase[es] the separation between judgments based upon the law and naïve intuitions of fairness." *Id.* at 817. Deploying his concept of *habitus*, he suggests that "[t]he predictability and calculability that Weber imputed to "rational law" doubtless arise more than anything else from the consistency and homogeneity of the legal habitus." *Id.* at 833.

109. Institutional isomorphism is the process that results in homogeneity of structures across society due to social constraints. Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields, in* CONTEMPORARY SOCIOLOGICAL THEORY 146, 146-61 (Craig Calhoun et al. eds., Blackwell Publishers 2d ed. 2007) (1983). *See also* Goodman & Jinks, *supra* note 66, at 650 (discussing processes of isomorphism in human rights).

110. DiMaggio & Powell, *supra* note 109, at 149.

111. *Id.* at 150.

112. *Id.* at 151.

113. *Id.* at 152.

114. Education plays an essential role here, as well as systems of professionalization and socialization. *Id.* at 153-54.

115. Turner and Factor note that "[t]he courtroom is an artificial setting, like the laboratory, and, as with the laboratory, special training is required to understand fully what is going on within

Processes of isomorphism help explain the increasing rationalization of law and its systems and the proliferation of particular types of systems, domestically as well as transnationally and internationally. Mimetic and normative processes are manifest in the prevalence of "model laws," uniform documents and processes, standardized education, and "best practices." Yet law's bureaucracy is not distinct from law's violence.[116] Coercion and force do not disappear; rather, they become techniques, subject to bureaucratic, technical considerations.[117]

B. *The Role of the Expert*

The role of the "objective" expert is essential as law does its work through the bureaucratic practices of the individuals and institutions who wield its power. Weber has traced the emergence of expertise in his history of the rise of legal rationality.[118] Although his focus is on the development of law and procedure, the role of the expert is threaded throughout:

> From a theoretical point of view, the general development of law and procedure may be viewed as passing through the following stages: first, charismatic legal revelation through "law prophets"; second, empirical creation and finding of law through legal *honoratiores*, i.e., law creation through cautelary jurisprudence and adherence to precedent; third, imposition of law by secular or theocratic powers; fourth and finally, systematic elaboration of law and professionalized administration of justice by persons who have received their legal training in a learned and formally logical manner.[119]

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it." TURNER & FACTOR, *supra* note 4, at 18. As a part of their training, lawyers learn to exclude "non-legal" elements of reality from consideration within the legal system. *Id.* at 132.

116. Zygmunt Bauman also presents an analysis that explicates the links between bureaucracy and violence in *Modernity and the Holocaust*. ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST (1989). It was a failure of civilization—and of law—because "all those intricate networks of checks and balances, barriers and hurdles which the civilizing process has erected and which, as we hope and trust, would defend us from violence and constrain all over ambitious and unscrupulous powers, have been proven ineffective." *Id.* at 87. Bauman contends that the Holocaust was enabled by "the ability of modern bureaucracy to co-ordinate the action of great number[s] of moral individuals in the pursuit of any, also immoral, ends." *Id.* at 18. This was accomplished through "*routine bureaucratic procedures*: means-ends calculus, budget balancing, universal rule application." *Id.* at 17 (emphasis in original).

117. *Id.* Bourdiew also reminds us that "the State alone holds the monopoly of legitimized symbolic violence." Bourdiew, *supra* note 105, at 838.

118. WEBER, *supra* note 2, at 641-900.

119. *Id.* at 882.

In fact, Weber contrasts the role of the legal expert in the rationalized legal system with the exceptional case of the jury, where laypersons can adjudicate according to "irrational" standards.[120] Trained jurists are distinguished by "that special capacity which results from specialized professional training, viz., the capacity to state clearly and unambiguously the legal issue involved in a complicated situation."[121]

These university-trained jurists and advocates—due to their expertise—become an important aspect of the development of the rational state as well as the rationalized legal system.[122] In this context, a decisive quality is judgment: "the ability to maintain one's inner composure and calm while being receptive to realities, in other words *distance* from things and people."[123] This same sense of a trained, impersonal, and "objective" specialist appears in the role of the bureaucratic official generally.[124] As bureaucracy rationalizes and dehumanizes itself, it increasingly relies upon the expert "who is all the more indifferent in human terms, and so all the more completely "objective" the more complex and specialised the culture becomes."[125]

As with law's violence, this understanding of law's bureaucracy raises questions of power. The increasing rationalization of the legal system and the rise of expertise reflect a political transformation and a new type of power relations.[126] Judicial power, which has been central,

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120. *Id.* at 892-95.

121. *Id.* at 853.

122. Weber elaborates the role of the expert, particularly the legal expert, in his broader discussion of politics and politicians (where lawyers often play a significant role). MAX WEBER, *The Profession and Vocation of Politics, in* WEBER: POLITICAL WRITINGS 309, 328-29 (Peter Lassman & Ronald Speirs eds., Cambridge Univ. Press 1994) (1919). He traces the rise of "professional officialdom," first as a counter-force to autocratic rule and then as a counterpart to political officials. *Id.* at 322-25.

123. *Id.* at 353 (emphasis in original). Weber continues: "A 'lack of distance', in and of itself, is one of the deadly sins for any politician and it is one of those qualities which will condemn our future intellectuals to political incompetence if they cultivate it." *Id.* at 353.

124. *See* WEBER, *The Development of Bureaucracy and its Relation to Law, in* MAX WEBER: SELECTIONS IN TRANSLATION, *supra* note 4, at 341-54.

125. *Id.* at 351.

126. Foucault also traces the origin of the legal system with attention to increased rationalization and the rise of a system of "inquiry." 3 MICHEL FOUCAULT, *Truth and Juridical Forms, in* POWER: ESSENTIAL WORKS OF FOUCAULT, 1954-1984 1, 48 (James D. Faubion ed., Robert Hurley et al. trans., The New Press 1994) (1974). He begins with an archaic form of the "rule-governed dispute, the challenge between the two warriors" that determines who is right rather than who speaks the truth. *Id.* at 33. In such a procedure, there was "no judge, judgment, inquiry, or testimony to determine who spoke the truth." *Id.* However, over time, this process gives way to the elaboration of more rational forms of proof and demonstration through processes of inquiry and the juridical discovery of truth. *Id.* at 33-34. This new mode of proceeding broadens the dispute to include not just the interests of the parties in conflict, but also the interests of the sovereign (or

now operates in conjunction with a "whole network of nonjudicial power," particularly the experts who become so prevalent in the bureaucratized state.[127]   These experts include the administrators, officials, staff, and consultants that are responsible for so much of the day to day work of the legal system. They purport to offer certainty, clarity, distance, objectivity, and rationality to non-experts as they seek to navigate the complexities of the law, the legal system, or even the everyday world.

C.   The Bureaucratization of Human Rights and the Emergence of the International Expert

Law's bureaucracy—and the rationalization of law and the significance of expertise—also manifests in international law and the international legal system.   These features are evident in the international human rights institutional and legal framework that is often partnered with humanitarian intervention.   Although social scientists have only begun to examine human rights and human rights law relatively recently, in their analyses, bureaucracy and instrumentalism have emerged as common themes.[128]   Annelise Riles suggests that "an

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state). The settlement of disputes is "imposed from above," and both the judge and prosecutor appear "as manifestations of the sovereign's interest in the dispute." *Id.* at 42-43. When the sovereign's interest is asserted, the criminal is redefined as "the social enemy." *Id.* at 54.

127. *Id.* at 57. The hierarchies embedded in relationships of "distant" and "objective" expertise have increasingly been interrogated and critiqued in recent decades in legal and social theory. For example, feminist scholar Dorothy Smith critiques the pursuit of "objectivity" in expertise. DOROTHY E. SMITH, THE EVERYDAY WORLD AS PROBLEMATIC: A FEMINIST SOCIOLOGY 105-45 (1989). Smith is primarily concerned with the expertise of the sociologist, but her analysis has broader relevance. As an alternative to traditional views, Smith suggests a fundamental shift in the relationship of expert and non-expert that would discard "the detached scientific consciousness" that is so important to the idea of expertise, especially bureaucratic and legal expertise. *Id.* at 111. If non-expert laypeople are recognized as having their own form of expertise grounded in experience (like the expert), the expert loses some of the "distance" that underlies expertise. *Id.* at 107, 110. The idea of the expert as exclusive holder and purveyor of objective knowledge is destabilized, and there is recognition that distance and detachment are socially constructed because the expert is never really "outside" the relations being observed, analyzed or interpreted. *Id.* at 94.

128. Tola Olu Pearce, *Human Rights and Sociology: Some Observations from Africa*, 48 SOCIAL PROBLEMS 48, 48-56 (2001); Riles, *supra* note 2, at 52-65; Malcolm Waters, *Globalisation and the Social Construction of Human Rights*, 31 J. SOCIOLOGY 29, 29-36 (1995). Malcolm Waters explores the institutionalization of human rights from "a social constructionist point of view, a view that human rights is an institution that is specific to cultural and historical context just like any other, and that its very universality is itself a human construction." *Id.* at 32. He traces the rise of current human rights discourse, its strategic use by global superpowers and the (intended and unintended) consequences for state sovereignty, and he concludes that human rights institutionalization is "the outcome of instrumental action by power groups seeking to realize their interests." *Id.* at 35. Waters calls for investigation of the processes that have led to

instrumentalist conception of law is the agreed theoretical and political basis of modern U.S. law," and this in turn has greatly influenced the development of international law, including human rights law.[129] In familiar language, she contends that the "understanding of law as a tool or instrument also provides the concrete, day-to-day form of legal knowledge practice—that of thinking in terms of relations of means to ends."[130] This bureaucratic, "technocratic" approach in everyday practice has resulted in a view of human rights as "a set of problem-solving institutions and of legal techniques deployed and managed by international bureaucrats."[131] These institutions and the international experts who manage them appear mostly obviously in the bureaucracies of the United Nations and its subsidiary agencies and institutions (and the regional inter-governmental organizations that are their counterparts). However, similar institutions and models of expertise are also found in the international field presences established in humanitarian interventions.

After an initial intervention, the international community typically establishes a formal bureaucracy and begins a process of governance of the local population, using 'objective' experts to accomplish its work. The human rights bureaucracies created in field missions under the auspices of inter-governmental and multi-state interventions aspire to and, at times, reflect familiar characteristics of objectivity, efficiency, rationality, and distance. Often, they import with them a new and "rational" legal system, typically modeled on international law or

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institutionalization in human rights, and Pearce makes a related call for a closer look at the role of bureaucracy in human rights. *Id.*; PEARCE, *supra*, at 53.

129. RILES, *supra* note 2, at 59.

130. *Id.*

131. *Id.* Despite its bureaucratic instrumentalism, the human rights apparatus is increasingly looked to as a potential source of power both within and outside the state. Bryan Turner has noted the progression of rights discourse from a natural to a global discourse; he has also noted that scholars have focused attention on the political utility of rights as an articulation of "an international standard of justice." Bryan S. Turner, *Introduction: Rights and Communities: Prolegomenon to a Sociology of Rights*, 31 J. SOCIOLOGY 1, 7 (1995). R.W. Connell elaborates on this view. R.W. Connell, *Sociology and Human Rights*, 31 J. SOCIOLOGY 25, 25-29 (1995). Connell departs from the common sociological critique of rights as either "a form of individualist ideology that conceals real social relations" or "a legal discourse that constructs a subjectivity inevitably subordinated to juridical state power." *Id.* at 25. Instead, Connell explains that it is important to recognize "the diversity of situations in which rights talk is deployed, and grasp the different historical consequences of its deployment." *Id.* at 27. Rights claims are an assertion of power, yet they also go beyond existing relations of power to "describe[] a state of practice that does not exist." *Id.* at 28. Echoing Cover's earlier remarks about law as an "imagined future," Connell suggests that claims of rights similarly reflect a "project," "a vision of a world coming into existence." *Id.*; COVER, *supra* note 12, at 207.

standards.[132]   The processes of isomorphism that proliferate within bureaucratic systems (and lead to the reproduction of such systems themselves) are at work as these new, internationally approved frameworks are adopted or imposed in the name of (re)establishing the "rule of law."[133]

Historically, the idea of the rule of law has been linked to a democratic framework and self-governance, and in field missions, the development of such a framework has generally been the goal. However, in practice, it has been an approach of "externally imposing a rights framework outside the political process of debate and consensus-building" in the affected nation.[134]   This is typically seen as unproblematic given the "universal" and "progressive" nature of human rights.[135]   Nonetheless, this approach creates a "rule of law paradox,"

132.   Law's force becomes subject to bureaucratic, technical considerations as international interventions make this shift to the establishment of a field mission focused on rebuilding the nation. See *supra* Part II.B, regarding the violence that accompanies this process of "bringing the law" to a nation in conflict or transition, as well as the echoes of the imperial past in such endeavors. PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 101 (1992). Fitzpatrick also suggests that in the imperial context, "law was pre-eminent amongst the 'gifts' of an expansive civilization, on which could extend in its abounding generosity to the entire globe." PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW 178 (2001). *See* ALBERT MEMMI, THE COLONIZER AND THE COLONIZED (1991) (discussing colonial relationships). *See also* RAZACK, *supra* note 9, at 9-10 (noting a shared feature of both nineteenth century and contemporary projects of empire is "a deeply held belief in the need to and the right to dominate others *for their own good*, others who are expected to be grateful") (emphasis in original).

133.   Goodman & Jinks, *supra* note 66, at 650-51. Goodman and Jinks discuss the ways in which human rights norms are spread based upon ideas dominant in the international arena rather than through internal development in affected states. They suggest that "when states copy an internationally legitimated model that does not fit their local needs, one should expect a continued disjuncture between structural isomorphism (across states) and technical demands and results (within states)." *Id.* at 651.

134.   David Chandler, *The Bureaucratic Gaze of International Human Rights Law, in* THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW 128, 128-29 (Saladin Meckled-García and Başak Çali eds., 2006). Chandler notes that "[t]he 'rule of law' did not mean merely that there was a set of rules and regulations or laws, but that this framework was predicated on consent, the equality of rights and the autonomy of individuals." *Id.* at 129. It distinguishes itself from "the rule of bureaucratic regulation or authoritarian repression" and from "the 'divine right' of kings or the 'civilizing' mission of a colonial administration." *Id.*

135.   *See* Cornell & Salisbury, *supra* note 71 (analyzing this power of the international community as a positive force in support of the rule of law). *But see* PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 117-18 (1992) (noting how the "rule of law" has become a new "universal measure of appropriate behaviour" and as a marker of civilization in contrast to barbarism); FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW 181 (2001) (pointing out that "the colonist claimed to bring law from the outside, a civilized law of universal valency free from polluting involvement with the particularity of the local scene"). In the context of humanitarian intervention, this can, of course, be counter-productive in numerous ways: it appears (and may be) undemocratic, it may consequently lack validity and legitimacy, and it ignores the valid critiques

where the importation of a rationalized legal regime to protect human rights and the rule of law may actually undermine both—at least in process, and potentially, in effect.[136]

The imposition of the new legal framework, and often its initial work, is managed by international administrators, bureaucrats, and experts. In fact, the idea of expertise takes on particular significance in the context of the "field," where location itself becomes partially constitutive of expertise. The expert becomes the "international expert." Early social theorist Georg Simmel first connected this question of "location" with the "distant" standpoint that is often embedded in notions of objectivity in expertise. Simmel's essay "The Stranger" explores the relationship of the stranger and the group and unearths an expertise in the standpoint of the stranger: "[The stranger] is the freer man, practically and theoretically; he examines conditions with less prejudice; he assesses them against standards that are more general and more objective; and his actions are not confined to custom, piety, or precedent."[137] In part, expertise arises from the mobility and freedom of the stranger, which leads to different types of experiences and perspectives than those of the group.

However, the stranger's expertise is also grounded in a sort of objectivity, but this objectivity is not based solely on distance (as Weber's "objectivity" may suggest), but rather upon a tension between distance from and embeddedness within the group.[138] The stranger is involved with the group, and thus, may have a unique access to the facts as an outsider within the group.[139] Yet the stranger also remains detached, with an objectivity that is not simply non-participation but reflects the lack of ties to the group that may "prejudice his perception,

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that have emerged about existing human rights law. *See, e.g.*, Abdullahi Ahmed An-Na'im, *Problems of Universal Cultural Legitimacy for Human Rights, in* HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES 331, 348-53 (Abdullahi Ahmed An-Na'im & Francis M. Deng eds., 1990) (discussing the exclusion of non-western participants and perspectives in the early development of the international human rights regime); CHARLESWORTH & CHINKIN, *supra* note 8, at 36-37 (identifying a "Southern" critique of the "Western origins, orientation and cultural bias" of the international legal order).

136. Chandler, *supra* note 134, at 121.

137. Georg Simmel, *The Stranger, in* CLASSICAL SOCIOLOGICAL THEORY, *supra* note 4, at 297.

138. The stranger's objective attitude "does not signify mere detachment and nonparticipation, but is a distinct structure composed of remoteness and nearness, indifference and involvement." *Id.* at 296.

139. Simmel suggests that the stranger often has access to "revelations and confidences" from members of the group that are generally kept hidden. *Id.*

his understanding, and his assessment of data."[140]   There are risks, however, to the expert who operates both within and outside the group—risks to the stranger and his or her ideas if they are identified as foreign or coming from outside.[141]

This tension in expertise as a stranger, or outsider, doing transnational or international work, especially in the "field" has been further elaborated by contemporary theorists.   Critical geographer, Jennifer Hyndman, explains:

> Just as there is tension between discourses of universality and particularity—the shared language and entitlements of human rights versus distinguishing cultural practices—a discursive distance between "here" and "there," "us" and "them," confounds any singular understanding of culture. "The field" is a diffuse and problematic term for . . . [those] who travel in a privileged way across cultures. For some, "the field" is a place impossibly outside the power relations that organize "home."[142]

In fact, the relationships that develop or are constructed across those boundaries of home and field in transnational work often evolve into relations of "sub-citizens" and "supra-citizens."[143]   This sense of citizenship reflects the hierarchy and status distinctions in international work, including consequences to mobility and authority within and across national borders.   The mobility and freedom of the "supra-citizen," like the mobility of the stranger, leads to different types of experiences and perspectives than those of the "sub-citizens."   However, it also translates into broader—where you are comes to define who you are, as much as who you are defines where you are—in the asymmetrical relationships of "international" experts and "local" non-experts in the field.[144]

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140. *Id.* at 297. In fact, Simmel uses a type of legal expert to exemplify this objective standpoint—judges recruited from "outside" the community because they have no family or other entanglements. *Id.* at 296. For these experts, their "objective" expertise arises, in part, quite literally from distance.

141. *Id.* at 297 (Simmel calls these "dangerous possibilities").

142. JENNIFER HYNDMAN, MANAGING DISPLACEMENT: REFUGEES AND THE POLITICS OF HUMANITARIANISM 88-89 (Borderlines Ser. Vol. 16, 2000).

143. *Id.* at 110-11.

144. *See* ORFORD, *supra* note 3, at 119-20 (pointing out that "'the international' . . . becomes that which major powers wish to claim or own—peace, democracy, security, liberty—while "the local" becomes that for which major powers do not wish to take responsibility"); Alison Mountz, *Embodying the Nation-State: Canada's Response to Human Smuggling*, 23 POL. GEOGRAPHY 323, 336 (2004). *See also* Chandler, *supra* note 134, at 128; Upendra Baxi, *Politics of Reading Human Rights, in* THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW, *supra* note 134, at 182-200.

Human rights work, particularly in the context of humanitarian intervention, raises similar and related questions of expertise, objectivity, and relationship. In some sense, the whole idea of a field mission—and humanitarian intervention more generally—rests on the supposed objectivity of outside observers, strangers, and experts. The international expert, like the stranger, is supposed to observe with less prejudice, with few ties to custom, using general and objective (in fact, universal) standards. Yet experience suggests that such "international" experts are as grounded in their own locations, perspectives, interests, and customs as "local" others.[145] As with law's violence, closer interrogation of law's bureaucracy and objective expertise complicates traditional understandings in ways that have significance for evaluating contemporary bureaucratic practices, including the everyday practices of international experts in humanitarian interventions. They raise important questions of what the "rule of law" or the "international expert" offers in situations of conflict or transition and whether it is possible to imagine a more balanced engagement that reflects and appreciates both the embeddedness of the "objective" outsider and the expertise of the "subjects" of international interventions.

IV. TECHNIQUES OF LAW AND LAW AS TECHNIQUE: HUMAN RIGHTS AS GOVERNANCE

Although law's originating and maintaining violence and law's bureaucratic rationality are significant dimensions of its nature and work, in both domestic and international arenas, law's reach extends beyond the confines of any particular legal system(s) or set of legal processes. This section considers law as governance, as law expands its scope and transforms itself to discipline, shape, produce, and govern the members of society—local, national, or global—in countless ways. This section will first discuss the contention that governance or "governmentality" has displaced more traditional forms of power in society and the consequences of that move for law. It will then examine the practices and institutions of governance, including the recurring role

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145. *See* CHANDLER, *supra* note 134, at 128. Chandler identifies some of the inequities in the context of Bosnia: "Internationals involved in the drawing up of laws are too often more focused on 'high salaries, low expenses and a "per-diem rich environment"' resulting in bad laws." *Id.* (citing the Democratization Policy Institute). *See also* BAXI, *supra* note 144. Baxi notes that "[h]uman rights career bureaucrats/technocrats define their roles in ways that intermingle their positional advantage while pursuing the proliferation of human rights norms and standards." *Id.* at 194. *See also* RAZACK, *supra* note 9, at 45 (discussing the prevalence of such attitudes in the Canadian peace-keeping mission in Somalia, but also in other humanitarian interventions around the globe).

of expertise. Human rights and humanitarian intervention will be used to provide illustration that law as governance is not limited to the domestic context but also appears in international law.

A.   The Rise of Governmentality

In his important and foundational essay "Governmentality," Michel Foucault addresses the "problematic of government" and elaborates the idea of governmentality as a configuration of power.[146] The rise of government occurs in the wake of the decline (or reconfiguration) of sovereignty, as historically understood. Traditionally, sovereignty or sovereign power relied upon the law (backed by force) to achieve its aims—"law and sovereignty were absolutely inseparable."[147] With the emergence of government as a form of power, the relationship with law is transformed: "[W]ith government it is a question not of imposing law on men but of disposing of things: that is, of employing tactics rather than laws, and even of using laws themselves as tactics—to arrange things in such a way that, through a certain number of means, such-and-such ends may be achieved."[148] Law is no longer a simple manifestation of sovereign will, but rather one tool among many for the exercise of power.

The idea of "governmentality" captures the sense that power achieves its objectives as it becomes internalized in practices of self-government, within individuals or, more broadly, within societies. In a general sense, "governmentality simply refers to any manner in which people think about, and put into practice, calculated plans for governing

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146.   FOUCAULT, *supra* note 4, at 229.

147.   *Id.* at 237.

148.   *Id.* In *Foucault and Law: Towards a Sociology of Law as Governance*, Alan Hunt and Gary Wickham explain that Foucault often displaced the role of law in order to focus on other forms of power, and as a result, he did not directly engage with law itself at great length. HUNT & WICKHAM, *supra* note 4. In many ways, he limited the role of law by linking it to sovereign power and negative, "juridico-discursive" conceptions of power. *Id.* at 40-43. Nonetheless, they suggest that although "[l]aw is never one of his explicit objects of inquiry . . . he has a considerable amount to say about law." *Id.* at 39. Hunt and Wickham find links to law in his major themes of power, discipline, and governmentality, among other areas. In tracking the movement from sovereignty to disciplinary society, Foucault sets aside law to focus on the processes of discipline, and he presents law and discipline as "dual but opposing processes." *Id.* at 46. Hunt and Wickham suggest that he also identifies the "interaction and interdependence of disciplinary practices and their legal framework." *Id.* at 47. In this context, law is both constitutive of and a "mask of real power." *Id.* at 48. Foucault's displacement of law to focus on other forms of power (especially micro-power) also appears in his work on governmentality, where "he stresses the essentially non-legal character of his expanded conception of government." *Id.* at 52.

themselves."[149] More specifically, it is "a particular mode of deploying and reflecting upon power."[150] Neither sovereignty nor disciplinary practices are necessarily replaced by government, but rather a new dimension is added. Foucault offers a triangular view of power as "sovereignty-discipline-government, which has as its primary target the population and as its essential mechanism the apparatuses of security."[151]

While Weber considered the modern state dependent on bureaucracy, Foucault offers that it functions based upon the "dispositional and technocratic logic of governmentality."[152] With the "governmentalization" of the state, the sovereign authority, and even the law itself, has less and less significance.[153] Instead, power is largely directed at the population through schemes of reform, pedagogy, and governance. This results in "the formation of a whole series of specific governmental apparatuses, and . . . in the development of a whole complex of knowledges."[154] These governmental apparatuses and bodies of knowledge include the legal system and the law but also extend beyond the law to include projects of education, social work, and other efforts to manage or reform the population. Law then becomes integrated into governance strategies to manage social problems and concerns.[155]

Other theorists have questioned the idea that the move to governmentality necessarily results in a lesser significance or role for law in society.[156] For example, Hunt and Wickham contend that law retains a prominent status even as power relations shift: "[L]aw has been a primary agent of the advance of new modalities of power, [and]

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149. BEN GOLDER & PETER FITZPATRICK, FOUCAULT'S LAW 31 (2009). Golder and Fitzpatrick join other scholars in interrogating the relationship of law to Foucault's theories of power. They "locate Foucault's law between a subordinated law and a surpassing law, between a law which is confined by the emerging modalities of disciplinary power and bio-power and one which is illimitable and always going beyond itself and those who would seek to instrumentalize it." *Id.* at 39.

150. *Id.* at 31.

151. FOUCAULT, *supra* note 4, at 243.

152. GOLDER & FITZPATRICK, *supra* note 149, at 32.

153. FOUCAULT, *supra* note 4, at 244. Foucault controversially asserts that the state "is no more than a composite reality and a mythicized abstraction, whose importance is a lot more limited than many of us think." *Id.*

154. *Id.*

155. GOLDER & FITZPATRICK, *supra* note 149, at 33.

156. In their critique of Foucault's work, Hunt and Wickham note that Foucault tends to focus on a narrow conception of law that centers on criminal law and ignores the multiple other sources and forms of law (which appears to be a common feature of sociological inquiries into law). HUNT & WICKHAM, *supra* note 4, at 60.

law constitutes distinctive features of their mode of operation."[157] They suggest that Foucault's theories of governmentality must be framed in dialogue with the work of Weber, among others; from that perspective, "all operations of law are instances of governance."[158] Governmentality and the rise of governance are, at least in part, "about the growth of modern government and the growth of modern bureaucracies."[159] In fact, these familiar bureaucratic institutions are where governmental power is exercised through a wide range of regulatory practices. Public law, while not synonymous with governmentality, is always involved in either exercising control over or exempting from control the different projects of governance.[160]

Although scholars may disagree about the extent to which law is displaced by the rise of governmentality, it is clear that its role changes as forms of power shift. In a sense, the triangular model of power offered by Foucault of sovereignty-discipline-government is reflected in law's multi-dimensional nature as violence-bureaucracy-governance and in the ways power is exercised through the courts, administrators, and civil society.[161] Violence remains an important component of law—connected to its origins, its preservation, and its enforcement—and bureaucracy retains its significance in the formal institutions and processes of the legal system itself. Law as governmentality, however, captures another dimension. In the modern state, law is pervasive; it extends its reach outside of the formal legal system to the encompassing and overlapping array of efforts to manage society. In turn, those projects of governance also shape the content and scope of the law, domestically, and increasingly in the international realm as well.

B.   Doing the Work of Governance

Government, like bureaucracy, is accomplished through the activities and practices of a wide range of specialized experts. However, the power of government arises not from a static, all-powerful sovereign or state, but rather from "an assemblage of forces" organized into "mobile and loosely affiliated networks" that include both state officials

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157.   *Id.* at 65.
158.   *Id.* at 99.
159.   *Id.* at 76.
160.   *Id.* at 66.
161.   For example, Sarat suggests a Foucauldian understanding of "rival centers of power" in law where violence is tempered "within law's complex chain of command." Sarat, *supra* note 34, at 263.

and numerous other practitioners in the public and private spheres.[162] Governance occurs through the "assorted attempts at the calculated administration of diverse aspects of conduct through countless, often competing, local tactics of education, persuasion, inducement, management, incitement, motivation and encouragement."[163] In this more indirect manifestation of power, it is the various "experts" who provide the links between political authorities and individuals; they ensure that "self-regulatory techniques can be installed in citizens that will align their personal choices with the ends of government."[164]

The task of expertise in governance is not one of "weaving an all-pervasive web of 'social control,'" but a more diffuse (though equally powerful) management of individuals as members of society.[165] Law works in conjunction with expertise; it "translates aspects of a governmental programme into mechanisms that establish, constrain or empower certain agents or entities and set some of the key terms of their deliberations."[166] In a sense, law is meaningful in conferring expertise and shaping the confines of expert authority, both within and outside the legal system. Law may be a specific tactic of government, but it also operates more broadly to contour the range of possibilities available to individuals, to experts, and even to the state. This is evident in the familiar practices of the extended systems of justice, social work, public health, and so forth—that include networks of actors, legal and other experts, and official and unofficial participants.

In a more exceptional but equally relevant context, law's multi-dimensionality—governance working together with violence and bureaucracy—appears in recent practices of detention, notably indefinite detention, in the "War on Terror."[167] Drawing upon Foucault and Agamben, Judith Butler elaborates the reemergence of sovereign power "within the field of governmentality."[168] In the environment of indefinite detention, law is used instrumentally as a tactic of

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162. PETER MILLER & NIKOLAS ROSE, *Political Power Beyond the State: Problematics of Government, in* GOVERNING THE PRESENT: ADMINISTERING ECONOMIC, SOCIAL AND PERSONAL LIFE 53, 64 (2008).

163. *Id.* at 55. Rose extends Foucault's theory of governmentality and elaborates its connections to law. He discusses the shifting nature of power in modern forms of government and the centrality of knowledge to governmental activities, first in the welfare state and then in the neo-liberal state. *Id.*

164. *Id.* at 69.

165. *Id.* at 55.

166. *Id.* at 70.

167. JUDITH BUTLER, *Indefinite Detention, in* PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE 50, 50-100 (2004).

168. *Id.* at 53. *See* AGAMBEN, *supra* note 54.

governmentality.[169] Law is nominally suspended, both national law and international law, and a new exercise of sovereignty takes place outside the law through administrative bureaucracies.[170] This sovereignty is linked to both governance and bureaucracy—"[p]etty sovereigns abound," and these bureaucrats become "part of the apparatus of governmentality."[171]

Once again, the exceptional moment of the suspension of law reveals the convergence of different forms of power and the shifting role of law.[172] Law is redefined; it is no longer "that to which the state is subject nor that which distinguishes between lawful state action and unlawful, but is now expressly understood as an instrument, an instrumentality of power, one that can be applied and suspended at will."[173] From the routine administrative tasks of the social welfare system to the exceptional circumstances of indefinite detention, theorists have begun to trace the essential dimensions of law as violence, bureaucracy, and governance. A multi-dimensional perspective that accounts for this complexity enables a fuller understanding of the nature and operations of law in diverse settings—from the familiar to the extraordinary, and beyond the state to the international realm of humanitarian intervention.

C. Projects of Governance in International Interventions

Humanitarian interventions begin as the projects of states and inter-governmental organizations but, like other projects of governance, expand to include a larger and more diffuse network of actors. Because there is no global sovereign, international law has long struggled with

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169. BUTLER, *supra* note 167, at 54.

170. *Id.* at 51.

171. *Id.* at 56, 59.

172. Butler contends that

[t]he suspension of the rule of law allows for the convergence of governmentality and sovereignty; sovereignty is exercised in the act of suspension, but also in the self-allocation of legal prerogative; governmentality denotes an operation of administrative power that is extra-legal, even as it can and does return to law as a field of tactical operations.

Id. at 55. Butler notes that "contemporary forms of sovereignty exist in a *structurally inverse relation* to the rule of law, emerging precisely at that moment when the rule of law is suspended and withdrawn." *Id.* at 60 (emphasis in original).

173. *Id.* at 83. In turn, sovereignty becomes "the variable application, contortion, and suspension of the law; it is, in its current form, a relation to law: exploitative, instrumental, disdainful, preemptory, arbitrary." *Id.*

questions of power.[174] In this milieu, a Foucauldian understanding of power is especially useful, where power is "employed and exercised in relations between people, rather than existing as a commodity that can be monopolized by a single entity," such as the state or even an inter-governmental organization like the United Nations.[175]   Instead, a defining feature of humanitarian intervention is that an "assemblage of actors" come together—nation-states, inter-governmental bodies, non-governmental organizations, and individuals—to urge forceful intervention in the name of human rights and to manage the aftermath of that intervention. International law is not just forceful or violent; it does not simply represent a return to the rational and objective rule of law. It also serves as a form of pedagogy, a discipline, and a project of reform.[176]   Human rights, in particular, are often "pedagogically induced" through efforts to promote rights protection and (re)train the population.[177]

In humanitarian intervention, the international community—broadly defined—"constitutes itself in these texts of intervention and reconstruction as a designer of new worlds, a solver of problems, and a saviour of suffering peoples."[178] Humanitarian interventions have come to underpin the self-image of both the international community and (international) law "as a guarantor of peace, human rights and democracy."[179]   From one perspective, it is possible to view humanitarian intervention and the importation of a human rights legal framework as a means to reform the nation (and its population) into an idealized, modern, even rationalized form of society.[180] But if "human rights are a means to engage the social discourse in providing a shape

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174. These include the enduring questions of "how to orient international law to power, or how best to deal with the realities of the operation of power in the international sphere." ORFORD, *supra* note 3, at 73.

175. *Id.* at 75.

176.   *Id.* at 54.

177. PHENG CHEAH, INHUMAN CONDITIONS: ON COSMOPOLITANISM AND HUMAN RIGHTS 232 (2006).

178. ORFORD, *supra* note 3, at 142. Bauman uses a powerful metaphor of the "gardening" state, which "view[s] the society it rules as an object of designing, cultivating and weed-poisoning." Although his focus is elsewhere, this is evocative of the rise of practices of discipline and governmentality in the modern state. This suggests, once again, the linkages among the different facets of law. BAUMAN, *supra* note 116, at 13.

179. ORFORD, *supra* note 3, at 19. Along similar lines, Marchak suggests that the flaws of humanitarian intervention might be overcome by shifting involvement to a "disinterested" institution, such as an organization of experts. MARCHAK, *supra* note 4, at 287.

180. LEONARD M. HAMMER, A FOUCAULDIAN APPROACH TO INTERNATIONAL LAW: DESCRIPTIVE THOUGHTS FOR NORMATIVE ISSUES 72 (2007). This also reflects the colonial history discussed earlier.

and context to society," then the relationships of power and the actors multiply.[181]   Because of this diffusion of power, another perspective contends that human rights may also be used as a counter-hegemonic tool of social struggle.[182]   The role of law in such projects of governance is, thus, more ambivalent.

For many advocates and activists, and many scholars, human rights work turns away from the (violent and bureaucratic) law and becomes a project and vision of 'global civil society.'[183]   Hammer notes a trend in international law to reshape the human rights regime to a broadly defined human security regime, which more closely tracks Foucault's notion of governmentality.   With a focus on human security, "the relationship with the sovereign state [alters] from one of function to that of transaction."[184]   In this framework, "the area in which the human dwells is the focus, with the task falling on the government, international organizations, non-governmental organizations and the populace at large to become active producers within the overall political system."[185] Others have suggested that the turn away from law shifts the focus to broader notions of justice.[186]   For example, Kurasawa contends that the dominant legal framework of human rights is inadequate and obscures actual, emancipatory practices of justice.[187]   Instead, "struggle represents the core" of the enactment of human rights and global justice in the

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181.   *Id.* at 95. The "dichotomous relationship between the sovereign state and the individual" that is foundational in human rights is displaced. *Id.* at 90.

182.   *Id.* at 93.

183.   For many, 'global civil society' is embodied in the activists (and activism) "beyond borders" examined by Keck and Sikkink. *See* KECK & SIKKINK, *supra* note 10. *See also* THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL, *supra* note 183   (including a range of examples of human rights practices by both international and local activists and NGOs).

184.   HAMMER, *supra* note 180, at 110.

185.   *Id.* at 111.

186.   For example, Nancy Fraser argues for an expanded notion of justice in the face of globalization and the changing nature and role of the nation state. Nancy Fraser, *Reframing Justice in a Globalizing World*, NEW LEFT REVIEW 36, 1-19 (2005). Justice in the globalizing world requires not only a redefinition of what constitutes justice, but also of who can make justice claims—"it is not only the substance of justice, but also the frame, which is in dispute." *Id.* at 4. Fraser suggests a new frame drawing upon the "all-affected principle." *Id.* at 13. Under such a frame, "all those affected by a given social structure or institution have moral standing as subjects of justice in relation to it." *Id.* She suggests that justice must now include "the political dimension of *representation*" so that justice is "parity of participation." *Id.* at 5 (emphasis in original). The inclusion of a political dimension to justice raises questions of law—state jurisdiction and decision-making rules, membership and procedure. *Id.* at 6-7.

187.   FUYUKI KURASAWA, THE WORK OF GLOBAL JUSTICE: HUMAN RIGHTS AS PRACTICES 4 (2007).

practices of global civil society, primarily outside traditional legal institutions.[188]

Others are more skeptical about the increasing role of civil society and the emancipatory potential this transformation may represent.[189] When governmental and disciplinary technologies are increasingly deployed by a shifting combination of government and non-governmental actors, the interests of civil society and the state may become more and more aligned.[190] Civil society, then, becomes one more "domain for the articulation and formation of the people's interests through governmental technologies."[191] This same process is at work at the international level. Whether they are the benign force some imagine or more problematic, the organizations and networks of global civil society are significant in both the development and the implementation of international law, and especially human rights law.[192]   In

188. *Id.* at 15. Kurasawa identifies these human rights practices as bearing witness, forgiveness, foresight, aid, and solidarity. He acknowledges that some human rights practices do become institutionalized, such as the formal methods of bearing witness and forgiveness through international tribunals and truth and reconciliation commissions. *Id.* at 27, 56. In addition, law may play a role in structuring the range and modes of practice available, but it is a limited one; law may determine criminal responsibility for injustice, but it has less to do with moral responsibility and political responsibility which are important aspects of global justice. *Id.* at 76. *See also* Elizabeth M. Bruch, *Book Review: The Work of Global Justice: Human Rights as Practices (Fuyuki Kurasawa)*, 34 CAN. J. SOCIOLOGY, Winter 2009, at 207-09.

189. . Foucault demonstrated some ambivalence in this regard. In his statement, *Confronting Governments: Human Rights*, Foucault seems to envision and even embrace an increasing role for "the community of the governed," which obliges members to "show mutual solidarity." FOUCAULT, *Confronting Governments: Human Rights, in* THE ESSENTIAL FOUCAULT: SELECTIONS FROM ESSENTIAL WORKS OF FOUCAULT, 1954-1984, *supra* note 4, at 64. However, in *Truth and Juridical Forms*, he also expresses some skepticism, at least historically, of the role of civil society actors as enforcers of disciplinary society. FOUCAULT, *supra* note 126, at 60.

190. CHEAH, *supra* note 177, at 254.

191. *Id.* at 256.

192. HAMMER, *supra* note 180, at 121. For example, it is common to distinguish within international law between "hard" law—binding forms of law such as treaties and custom—and "soft" law—non-binding authorities such as declarations, statements of principle, and guidelines. Jiri Toman, *Quasi-Legal Standards and Guidelines for Protecting Human Rights, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 217, 217-43 (Hurst Hannum ed., 4th ed. 2004). Soft law is particularly prevalent in international human rights law, where advocates seek to develop it in hopes that it will ultimately achieve status as hard law. In the interim, soft law serves as an expression of policy and ideals, recommendations and guidance for domestic governments. In an interesting twist, law and the legal system have been the subjects of such guidance. One of the first and most enduring examples of soft law is the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations in 1957. *Id.* at 217. These guidelines "reflect the modern approach of reform-minded penologists who emphasize rehabilitation and restraint of a prisoner rather than retribution and deterrence." *Id.* at 221. They also bear a striking resemblance in tone and content to the universal maxims cited by Foucault in *Discipline and Punish: The Birth of the Prison.* FOUCAULT, *supra* note 12, at 269-70. The international community has also adopted basic

humanitarian intervention, non-governmental organizations and other actors of global civil society work in partnership with governmental and inter-governmental authorities to monitor human rights violations, build local capacity, and transform the legal and regulatory landscape. As such, they reflect "emerging forms of governmentality" that wield power through knowledge, information, advocacy, and expertise.[193]

Whether in a framework of human rights or human security or justice, an approach centered on governance moves away from the state-centric and law-centric approach that is traditional in international law and incorporates other actors, such as non-governmental organizations and the other actors of global civil society. In humanitarian intervention, in the space created and maintained by violence, the international community also creates government as the "matrix within which are articulated all those dreams, schemes, strategies and manoeuvres of authorities that seek to shape the beliefs and conduct of others in desired directions by acting upon their will, their circumstances or their environment."[194] Through the activities of experts—in humanitarian intervention, that is "international" experts—it administers the local population "through countless, often competing, local tactics of education, persuasion, inducement, management, incitement, motivation and encouragement."[195]

These tactics or techniques of governance include law, and often it is a dominant feature. However, international efforts to establish "the rule of law" and protect human rights are also projects of reform and (re)education.[196] Formal governmental, inter-governmental, and quasi-governmental institutions manage and direct these projects, but they do not do so alone. They work in cooperation or partnership with a vast network of civil society organizations that operate at all scalar levels, from the local to the global. Not just the nation, but also the population, become subject to a project of reform and management in the name of human rights and the rule of law.

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guidelines delineating the appropriate roles for the judiciary, lawyers, and prosecutors and also for the treatment of victims. Toman, *supra*, at 217-43.

193. CHEAH, *supra* note 177, at 126. *See also* BAXI, *supra* note 144, at 191. Baxi contends that despite the involvement of activists and civil society organizations, "national, regional, and global political, bureaucratic, and institutional actors . . . harness the prose of human rights to a whole variety of ends of governance." *Id.*

194. MILLER & ROSE, *supra* note 162, at 54.

195. *Id.* at 55.

196. CHEAH, *supra* note 177, at 230-67; ORFORD, *supra* note 3.

V. CONCLUSION

Law has a particular set of meanings to those who are trained in it or who work directly with it. However, because it extends its reach throughout the social world, there is much to be learned from other theorists who have investigated law. In some ways, law is everywhere in everyday life; it touches quotidian interactions at home, in school, and at work. At the same time, or perhaps as a result, law appears directly tied to particular communities—often local, at most national. Its pervasiveness and embeddedness can render it opaque, if not invisible. Sometimes a direct encounter with the law—a criminal trial, a broken contract, a contested divorce—provides a rare opportunity to experience how law works. Other times it is a challenge—That's not the law! Is that the law?—that prompts closer examination. Such is the case with international law. Fundamental questions, such as whether international law is really law at all, encourage deeper inquiry into what it means to be law.

Theorists from a range of disciplines have engaged in a searching examination of what law is and how it works. Drawing upon these contributions, a multi-dimensional view of law—including international law—emerges.   Law is enmeshed with violence and force, with bureaucracy and rationality, and with governance and reform. If that is law's nature, then international law is indeed law. However, even as law's multi-dimensionality responds to one major question, it raises new, and perhaps more difficult, questions. If law exists in relationship with violence, what are the consequences of that relationship?   In particular, what are the consequences for international human rights law? What opportunities would law disconnected from violence offer (or foreclose)? But violence is not the only aspect of law; law is also rational and bureaucratic. Questions arise here as well. What are the broader implications and human costs of this form of organization and the increasing rationalization of law? What lessons can be drawn from (and for) the growing bureaucracy of the United Nations and the human rights framework? How do we evaluate expertise as an instrument of authority? Finally, law is increasingly entwined with governance. How are law and governmentality implicated in one another? Is law displaced by governance or has it extended its reach beyond the formal institutions of the legal system? What are the consequences of the increasing power of civil society, especially at the global level?

These are important questions, questions that are not easy to answer but that provide a map for future inquiries. Humanitarian intervention offers a powerful and revealing current example of law-making and law-

preserving violence as well as the processes of bureaucratization in post-conflict areas. Related human rights endeavors, especially in post-conflict nation-building contexts, illustrate the pervasiveness of governmentality and the ways in which it affects power relations at the global level. With on-going international interventions occurring around the globe, it is important to seriously consider these larger questions. Closer examination of law's multi-dimensional nature provides a means for doing so.