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HUMAN RIGHTS AND INTERNATIONAL CRIMINAL JUSTICE IN THE TWENTY FIRST CENTURY
(*Права людини і міжнародна кримінальна юстиція у XXI столітті*)

1. INTRODUCTION

The term "Human Rights", as recognized after World War II, is essentially the product of Western ideas having evolved from the European Age of Enlightenment of the late 17th-Century. It was the Enlightenment that established the philosophical foundations for the nineteenth century liberalism[2] that in turn developed the conceptual framework of the post-WWII International Human Rights Law regime.[3] The ideas produced in what is called the "Age of Reason" reflects the writings of philosophers and intellectuals including Baron de la Brede et de Montesquieu, Francois-Marie Arouet (Voltaire), and Immanuel Kant. Their ideas were derived, in part, from values reflected in Christianity with origins in Judaism (for both the Old Testament and New Testament combined to produce Western Christian values). The values originating from these ideas were incorporated into political doctrines, which in time were identified with the meaning of "democracy" reflected in the Declaration of Independence of 1776, the French Declaration of the Rights of Man and of the Citizen of 1789, and the Universal Declaration of Human Rights ("UDHR") of 1948.

These western concepts of democracy have their genesis in the Greek philosophical concept of natural law. The very word "democracy" in Greek combines the words "people" and "power." The concept of natural law was largely developed by Aristotle, who was heavily influenced by Socrates, Plato, and the Ancient Greek school of Stoicism. The Aristotelian natural law inspired Catholic natural law as postulated by Saint Thomas Aquinas who relied on the philosophical and theological thoughts of Saint Augustine of Hippo. By the 1700s various disciples developed intellectual methods for the teaching of values and ideas. Such intellectual methods shifted the ways in which scholarly and philosophical writings evolved in the ensuing centuries.

Admittedly, it is difficult to trace the evolution of ideas from one civilization or society to another and also more so to compare them to one another while taking into account culture and context. During the six million years of *Homo Sapiens* evolution, there has been a gradual progression of values and ideas originating and evolving in different civilizations — sometimes reflecting totally different customs

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[2] William M. Spellman, A Short History of Western Political Thought 109 (2011).

[3] *See*, *e.g.*, Micheline R. Ishay, The History of Human Rights: From Ancient Times to the Globalization Era 2–14 (2004).

and mores conditioned by geography and the material/contextual conditions in which the society evolved. While some values and ideas remained indigenous to their particular society of origin, others were passed on to other societies. The migration of ideas although difficult to trace, is nevertheless evident. But similar values and ideas have emerged in societies with significant cultural differences, and frequently also, different societies under different circumstances embrace the same values and ideas explained in different ideological ways.

Whether societal values and ideas emerged separately, coincided accidently, or migrated purposely from one society to another, that coalescence of these values and ideas are reflected in contemporary human rights through the positing and application of human rights, which reflects a Western Judeo-Christian background. Yet, regardless of the point of inception or determined historical evolutionary course of an idea or value, there exists both a cumulative accretion that engenders universalism, while at the same time coexisting with cultural relativism and diversity.

One can analogize accretional universalism to a small snowball at the top of a snowy hill that rolls down the snowy hill and reaches the bottom as a larger mass than when it started at the top. This analogy is by no means entirely accurate in reflecting the historical accretion of values and ideas in the course of one thousand years of recorded human history. However, in the end, there is something cumulative that has been inherited in different ways by different civilizations (notwithstanding their diverse origins and multiple interpretations), which are human rights. How future generations will be able to preserve, enhance, and reconcile the universality and relativism of the values and ideas of human rights in different societies, will depend on the political will of states, and actions of non-state actors.[4] The interactions between states, inter-governmental agencies, and non-state actors, will determine the future of the preservation of human rights.[5]

2. THE WESTPHALIAN LEGAL ORDER AND INTERNATIONALLY PROTECTED HUMAN RIGHTS

The values and ideas of western civilization reflected in the Westphalian legal order that emerged from the Treaty of Westphalia of 1648 reflects the values and ideas of Western Christian civilization, which influenced Enlightenment writers and conditioned the emerging international legal order of that time. But it is

[4] Non-state actors include a variety of groups which include: (1) civil society organizations; (2) multinational organizations; (3) global media; (4) groups that pursue ideological purposes by violent means and that are referred to as "terrorists," (5) groups that seek to obtain profit by the use of violence that are referred to as "organized crime" groups (*See* Tom Obokata, Transnational Organized Crime in International Law 14–19 (2010)) and; (6) groups that are parties to conflicts of a purely internal and non-international character (*See* M. Cherif Bassiouni, *Symposium: Redefining International Criminal Law: New interpretations and New Solutions: Criminal Law: The New Wars and the Crisis of Compliance With The Law of Armed Conflict by Non-State Actors*, 98 J. Crim. L. & Criminology 711, 713–714 (2008)).

[5] *See* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. Cal L. Rev. 1155, 1155–1237 (2007) (discussing normative conflict among multiple overlapping legal systems); *See also* Paul Schiff Berman, *A Pluralistic Approach to International Law*, 32 Yale J. Int'l L. 302–329 (2007).

not universal. No more than it can be said that all international human rights law, norms and standards that flow from the UDHR are universal.[6] The Treaty of Westphalia embodies the recognition of statehood as a reflection of the concept of state sovereignty. This concept was originally designed to protect the different religious and political communities of European Christendom after the Hundred Year's War between Catholics and Protestants.

The modern enunciation of internationally protected human rights, which is said to have begun with the UDHR,[7] was an extraordinary breakthrough because until then, individuals were not part of the international legal order. They were the subjects of states, and states could do with individuals as they pleased. No state had the right to tell another state how to deal with its own subjects or to interfere in the affairs of another state — no matter the circumstances.[8] This continues to be reflected in the United Nations Charter's Article 2(4) despite some erosion over the past 60 years.[9] But that, of course, was the surface of international law. Like an iceberg, beneath it existed something much deeper, and it consisted of mainly western imperialism, colonialism, and exceptionalism.[10]

In time, the international legal order evolved, and gradually, the doctrine of humanitarian intervention was grudgingly recognized.[11] In 2005, a summit of heads of states took place at the United Nations General Assembly meeting in New York and adopted the Responsibility to Protect ("R2P") as a principle, which

[6] See also Hirad Abtahi, Reflections on the Ambiguous Universality of Human Rights: Cyrus the Great's Proclamation as a Challenge to the Athenian Democracy's Perceived Monopoly on Human Rights, 36 Denv. J. Int'L. L. & Pol'Y 55–91 (2007).

[7] Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948); The Universal Declaration of Human Rights: The Travaux Preparatoires (William A. Schabas ed., Cambridge Univ. Press 2013).

[8] U.N. Charter art. 2, ¶ 4; Stephen Carley, Limping Toward Elysium: Impediments Created by the Myth of Westphalia on Humanitarian Intervention in the International Legal System, 41 Conn. L. Rev. 1741 (2009).

[9] *Id.*

[10] Charles Murray, American Exceptionalism: An Experiment in History (Values and Capitalism Series) (Am. Enterprise Inst. 2013); Seymour Martin Lipset, American Exceptionalism: A double Edge sword (W. W. Norton & Co., Inc. 1996); Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 Harv. Hum. Rts. J. 89 (2007); 136 CONG. REC. S17486–01 (daily ed. Oct. 27, 1990); Richard A. Falk, The Declining World Order: America's Imperial Geopolitics 3–25 (Taylor & Francis Books, Inc. 2003).

[11] David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. Tol. Rev. 253 (1992); Brian D. Lepard, Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principals in International Law and World Religions 137 (Penn St. Univ. Press 2002); Jon Western & Joshua S. Goldstein, *Humanitarian Intervention Comes of Age: Lessons From Somalia to Libya*, Foreign Affairs, Nov./Dec. 2011, at 48–59, *available at* http://www.foreignaffairs.com/articles/136502/jon-western-and-joshua-s-goldstein/humanitarian-intervention-comes-of-age; Alex J. Bellamy, Global Politics and the Responsibility to Protect: From Words to Deeds 9 (Routledge 2011); Julia Hoffmann & André Nollkaemper, *Introduction*, in Responsibility to Protect: From Principle to Practice 13, 13–16 (Julia Hoffmann & André Nollkaemper eds., Pallas Publications 2012); Gareth Evans, The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All 31 (Brooking Inst. Press 2008); M. Cherif Bassiouni, *Advancing the Responsibility to Protect Through International Criminal Justice*, *in* Responsibility to Protect: The Global Moral Compact for the 21st Century 31–42 (Richard H. Cooper & Juliette Vonnov Kohler eds., Palgrave Macmillan 2009).

allowed states to intervene to protect those in a given state who were the targets of genocide or crimes against humanity.[12] The R2P was later operationalized in 2009.[13] This was a long way from the Westphalian paradigm of world order, based exclusively on state sovereignty, but it was, however, the progeny of that first step — the creating of the UDHR. Nevertheless, there is still a big gap between what is prescribed and what is enforced.[14]

The failure of the fledgling principle of the R2P[15] to become part of an institutionalized process of decision-making leading to consistent practice by the international community is an example of the eroding responsibility of states.[16] The failure of the international community to intervene for the protection of peoples from genocide, crimes against humanity, and war crimes is reflected in the 313 conflicts that have erupted in various national contexts since the end of WWII that resulted in 92 million casualties.[17] State conduct during these conflicts revealed that states intervene mostly when their national interests are at stake and not necessarily when the human rights of peoples are subject to large-scale depredations and risk.

3. PAST THE UDHR PHASE

After the UDHR of 1948, two major international covenants were adopted. In 1963, the International Covenant on Civil and Political Rights ("ICCPR")[18] and the Covenant on Economic, Social and Cultural Rights ("ICESCR")[19] were adopted. The division between the two was the consequence of the Cold War. The Western World supported the former, while the communist bloc and Third World supported the latter. To date, the difference between individual and collective rights remains, and the post-2000 era of globalization has enhanced capitalism over collective social rights. The two covenants, in time spawned a number of specific

[12] 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1, at 138–40 (Sept. 16, 2005); Dan Kuwali, The Responsibility to Protect: Implementation of Article 4(h) Intervention 89 (Martinus Nijhoff Publishers 2011); Bellamy, *supra* note 10, at 83 (2009).

[13] G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009).

[14] Gareth Evans, *Responding to Atrocities: The New Geopolitical of Intervention*, *in* Sipri Yearbook 2012: Armaments, Disarmament, and International Security 15, 23 (Stockholm Int'l Peace Res. Inst. eds. 2012); Elizabeth Wilmshurst, *Conclusions*, *in* International Law and the Classification of Conflicts 478, 479–80 (Elizabeth Wilmshurst ed., Oxford Univ. Press 2012); (The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice, Vols. I-II (M. Cherif Bassiouni ed., 2010).

[15] *See* U.N. GAOR, 60th Sess., 2005 World Summit Outcome, ¶¶ 138-39, U.N. Doc. A/60/L.1 (Sept. 15, 2005); *See generally* Gareth Evans, The Responsibility To Protect: Ending Mass Atrocity Crimes Once and For All 50-54 (2008); *See generally* Alex J. Bellamy, Responsibility to Protect: the global effort to end mass atrocities 1–5 (2009).

[16] For an opposing argument to humanitarian intervention under the R2P, *see* Mohamed S. Helal, *Justifying War and the Limits of Humanitarianism*, 37 Fordham Int'l L.J. 551-642 (2014).

[17] Bassiouni, The Pursuit of International Criminal Justice, *supra* note 13, at 34.

[18] International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR. 21st Sess., Supp. No. 16, at 27, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

[19] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 3, U.N. Doc. A/6316 (1966) [hereinafter Covenant on Economic, Social, and Cultural Rights].

conventions on different subjects. The UDHR[20] and ICCPR and ICESR formed the core of what scholars refer to as the "International Bill of Human Rights."[21] While the Universal Declaration[22] was at first deemed declaratory, it subsequently became part of customary international law.[23] The two covenants originated as binding positive international law, though prescriptive in nature. They prescribed that certain individual rights were protected from state infringement, but they did not provide for enforceable remedies even though, in time, many of these individual rights were recognized as constituting part of customary international law and thus presumably binding upon non-state parties.

This was, for all practical purposes, the second generation of human rights normative protections, which transitioned from the declarative phase to the prescriptive, and thereafter the third stage soon followed — the prescriptive stage — which criminalized some of these violations.[24] Similarly, the large number of human rights conventions, which were adopted in the three decades from the 1960s to the 1990s, started to trickle down to only a few conventions in the subsequent two decades. Other human rights have not been covered during what is commonly referred to as the first and second generation of human rights, and moreover, the heralded third generation of human rights is presently stalled.[25] The first and second generations of human rights were tailored to apply to states where national fora offered the prospects of adjudicating a human rights violation and of obtaining a remedy. The third generation of human rights has proven to be of little effect. The fourth generation of human rights in this transitional phase to a globalized society is not likely to offer better outcomes than its precedent one.

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[20] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[21] John P. Humphrey, The International Bill of Human Rights: Scope and Implementation, 17 Wm. & Mary L. Rev. 527, 528–34 (1976).

[22] Michael Akehurst, *Custom as a Source of International Law*, 47 Brit. Y.B. Int'l L. 1, 45–49 (1975). *See also* Peter Malanczur, Akehurst's Modern Introduction to International Law 39–48 (7th rev. ed. 1997).

[23] Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 42 (1989).

[24] M. Cherif Bassiouni, Introduction to International Criminal Law 48 (2d ed. 2013). These conventions include: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Supp. No. 51 at 85, U.N. Doc. A/39/51 (1984)); Convention on the Suppression and Punishment of the Crime of Apartheid of 1973, which in article 5, criminalized this particular form of racial discrimination, but was never put into effect and for all practical purposes the Apartheid Convention simply fell into *déssitčude* (International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, 28 U.N. GAOR, 28th Sess., Supp. No. 30, at XXVIII, U.N. Doc. A/9030 (1973)) [hereinafter CSPCA]. According to Black's Law Dictionary, *déssičtude* (spelled "Desuetude") is defined as, "Disuse; cessation or discontinuance of use. Applied to obsolete status." Black's Law Dictionary (9th ed. 2009).

[25] *See*, *e.g.*, United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107,165; S. Treaty Doc No. 102-38 (1992); U.N. Doc. A/AC/237/18 (Part II)/ Add.1; 31 I.L.M. 849 (1992); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York, Dec. 18, 1990, *entered into force* July 1, 2003, 2220 U.N.T.S. 93, 30 I.L.M. 1517 (1991).

The declarative and prescriptive stages of International Human Rights Law brought about a large number of multilateral instruments, which in turn had an impact on the contents and terminology of national constitutions, criminal legislation, procedural norms, and evidentiary standards.[26] Thus, while it is impossible to assess whether the adoption of these international legal instruments have enhanced state compliance with what is now commonly referred to as international human rights norms and standards, it is nonetheless possible to assess their impact on national normative developments.[27] Thus, the center of gravity of human rights has, as it should, moved from internationalization to nationalization.

4. THE UNITED NATIONS MILLENNIUM DECLARATION: REAFFIRMING HUMAN RIGHTS PROTECTION

On the occasion of the millennium, it became important to reassert the international community's commitment to this historical evolution of internationally protected human rights. It was also an opportunity for the heads of States and governments to urge a plan of action at the General Assembly of the United Nations on September 6, 2000, through September 8, 2000, which was the Millennium Declaration.[28] The plan of action is premised on the values and principles embodied within the declaration. Part I, of the United Nations Millennium Declaration, titled "Values and principals," reads as follows:

1. We, heads of State and Government, have gathered at United Nations Headquarters in New York from 6 to 8 September 2000, at the dawn of a new millennium, to reaffirm our faith in the Organization and its Charter as indispensable foundations of a more peaceful, prosperous, and just world.

2. We recognize that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world's people, especially the most vulnerable, and in particular, the children of the world, to whom the future belongs.

3. We reaffirm our commitment to the purposes and principles of the Charter of the United Nations, which have proved timeless and universal. Indeed, their relevance and capacity to inspire have increased, as nations and peoples have become increasingly interconnected and interdependent.

4. We are determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter. We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect for their territorial integrity and political independence, resolution of disputes by peaceful means and in conformity with the principles of justice and

[26] M. Cherif Bassiouni, Introduction to International Criminal Law 583–671 (2d ed. 2013).

[27] Comparative Criminal Justice Systems: From Diversity to Rapprochement, 17 Nouvelles Etudes Pénales (1998); The Regionalization of International Criminal Law and the Protection of Human Rights in Criminal Proceedings, 65 Revue Internationale De Droit Pénal 493 (1994); Inquisitorial-Accusatorial: The Collapse of Dogmas in Criminal Procedure, 68 Revue Internationale De Droit Pénal (1997).

[28] United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/55/L.2 (Sept. 8, 2000).

international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion and international cooperation in solving international problems of an economic, social, cultural or humanitarian character.

5. We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world's people. For while globalization offers great opportunities, at present, its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable. These efforts must include policies and measures, at the global level, which correspond to the needs of developing countries and economies in transition and are formulated and implemented with their effective participation.

6. We consider certain fundamental values to be essential to international relations in the twenty-first century. These include:

• **Freedom.** Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. Democratic and participatory governance based on the will of the people best assures these rights.

• **Equality.** No individual and no nation must be denied the opportunity to benefit from development. The equal rights and opportunities of women and men must be assured.

• **Solidarity.** Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.

• **Tolerance.** Human beings must respect one another, in all their diversity of belief, culture and language. Differences within and between societies should be neither feared nor repressed, but cherished as a precious asset of humanity. A culture of peace and dialogue among all civilizations should be actively promoted.

• **Respect for nature.** Prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development. Only in this way can the immeasurable riches provided to us by nature be preserved and passed on to our descendants. The current unsustainable patterns of production and consumption must be changed in the interest of our future welfare and that of our descendants.

• **Shared responsibility.** Responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. As the most universal and most representative organization in the world, the United Nations must play the central role.

7. In order to translate these shared values into actions, we have identified key objectives to which we assign special significance.[29]

5. THE EVERLASTING COMPLIANCE GAP

Since WWII, three different international legal regimes have co-existed whose "value-oriented goals" include the protection of human rights.[30] They are: International Humanitarian Law ("IHL"), International Criminal Law ("ICL"), and International Human Rights Law ("IHRL"). These regimes are, at once, complementary and distinct as to, *inter alia*, their respective spheres of application, subjects, contexts, and normative schemes. These differences, which characterize these regimes whose historical origins are also different, necessarily evidence overlap and gaps in the overall protective scheme of human rights. This would have been avoided had all three been part of an integrated legal regime. This is not the case. However, what is significant is that all three international legal regimes recognize: (1) the individual as a subject of internationally established rights and obligations arising directly under international law; (2) these rights and obligations override national law; (3) that they are binding upon states, and; (4) that they require (in different and varying ways) international and domestic enforcement measures, sanctions, and ultimately remedies for victims.[31]

Many declarations and plans of action under the three international legal regimes remain within the sphere of "soft law," a euphemism that allows some to raise that banner in the face of non-implementation. It is another euphemism for non-enforcement. Nevertheless, the normative and "soft law" enunciation of human rights has had a notable impact on national constitutions and, as a result, on national legislation and jurisprudence.[32] They effectively transferred to the national legal systems that which at one time was believed to be exclusively within the province of the international legal system. Having said that, however, national compliance (which is usually subject to control by the state's judicial branch), is thwarted in many states by abuses of power by state executive branches.

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[29] *Id*. at vol. I, pt. 1.

[30] *See* Myres S. McDougal, Harold D. Laswell, & Lung-chu Chen, Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity (1980).

[31] The latter is of more recent vintage. *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law G.A. Res. 60/147, U.N. Doc. A/RES/60/146 (Dec. 16, 2005); M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 Hum. Rts. L. Rev. 203 (2006); Rome Statute of the International Criminal Court art. 68, July 17, 1998, 2187 U.N.T.S. 3; International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, Rule 85 (2000).

[32] Ved P. Nanda, *Impact of International Regional Norms, Including Human Rights Norms on National Criminal Proceedings*, *in* Comparative Criminal Justice Systems: From Diversity to Rapprochement 163, 163–70 (Association Internationale De Droit Penal, 1998); Wolfgang Schomburg, *Aspects from a German/European Perspective*, *in* Comparative Criminal Justice Systems: From Diversity to Rapprochement 163, 171–77 (Association Internationale De Droit Penal 1998).

Moreover, legislation in many states provides for exceptions, such as states of emergency with respect to the ICCPR.[33] Also, it should be noted that the international human rights regime does not, so far, extend to non-state actors an international legal obligation.[34] This creates gaps in the protection of human rights. Generally, these gaps can be attributed to two factors: first, the evolution of international human rights, humanitarian law, and criminal law, has historically been haphazard; and second, the states that control the international legislative process are not keen on eliminating the overlaps, gaps, or ambiguities that exists within these systems.[35] This is because states stand to be more constricted by an efficient system.[36]

To illustrate the overlap, the International Court of Justice ("ICJ" or "the Court") discussed the relationship between IHRL and IHL. The ICJ stated in its Advisory Opinion of 8 July 1996 on the *Legality of the Threat and Use of Nuclear Weapons*, stating:

The protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from, in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities.[37]

A specific example of how IHL and IHRL overlap is evidenced by the ICJ decision in a case involving Israel's treatment of Palestinians and Palestinian occupied territories.[38] In it, the ICJ held that the two regimes are simultaneously

[33] The ICCPR states, "Article 4, 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law, and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." ICCPR, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 27, U.N. Doc. A/6316 (1996) at art IV, ¶ 1; Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, *in* The International Bill of Rights: The Covenant on Civil and Political Rights 74–77 (Louis Henkin ed., Columbia Univ. Press 1981); International Law Association, Report of the Sixty-First Conference (1984) [hereinafter Paris Minimum Standards of Human Rights Norms in a State of Emergency]; Richard B. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. Int'l L. 1072 (1985); Rosalyn Higgins, *Derogations Under Human Rights Treaties in Public Emergencies*, 22 Harv. Int'l L. J. (1981).

[34] Andrew Clapham, Human Rights Obligations of Non-State Actors in Conflict Situations, 88 INT'L REV. RED CROSS, Sept. 2006, at 491–523; M. Cherif Bassiouni, The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors, 98 J. Crim. L. & Criminology 712–810 (2008).

[35] International Criminal Law: Crimes, Vol. 1 at 618 (M. Cherif Bassiouni ed., Transnat'l Publishers 2d ed. 1999).

[36] *Id*.

[37] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 ¶ 25 (July 8).

[38] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶106 (July 9).

applicable, but that IHL, being the *lex specialis*, prevails over IHRL, which is the *lex generalis*, thus there is a gap in the protection of human rights during conflicts of purely internal nature.[39] It was in this Advisory Opinion of 9 July 2004, on the *Legal Consequences of the Wall in the Occupied Palestinian Territory*[40] that the ICJ stated:

Some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely: human rights law and, as *lex specialis*, international humanitarian law.[41]

Thus, regarding the *Wall,* the ICJ further established the relationship between IHRL and IHL, and demonstrated that there are possible situations for overlap.

IHRL and ICL also overlap in that ICL criminalizes some of the conduct prohibited by IHRL, but in different contexts. An example of the overlap between the two regimes is in connection with combatants in conflicts of an international and non-international character who engage in collateral activities proscribed by ICL as "organized crime"[42] activities, "terrorism,"[43] or drug trafficking.[44] It has not yet been established by the ICJ or by experts how to address the overlap between ICL and IHRL.[45] Conflicts can shift from primarily internal to international and during this shift multiple legal regimes are applicable. This overlap will occasionally bring about IHL's supremacy over ICL and *vice-versa*. Still however, the gap between IHL and IHRL persists, as evidenced by the prescriptive nature of the latter, and the proscriptive nature of the former.[46] These gaps and overlaps will continue to exist as long as the states are lacking the political will to eliminate them.[47]

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[39] *Id*. ¶ 105–06.

[40] Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136, 177–78 ¶ 102–05 (July 9).

[41] *See id*. at 178 ¶ 106.

[42] United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/55/383, art. 2(a) (Nov. 15, 2000).

[43] International Terrorism: Multilateral Conventions (1937-2001) at xxv–xxix (M. Cherif Bassiouni ed., 2001); M. Cherif Bassiouni, *"Terrorism": Reflections on Legitimacy and Policy Considerations*, *in* Values and Violence: Intangible Acts of Terrorism 233–35 (Ibrahim A. Karawan, Wayne McCormack & Stephen E. Reynolds eds., 2008).

[44] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3, Dec. 20, 1988, 1582 U.N.T.S. 95; Convention on Psychotropic Substances art. 1, Feb. 21, 1971, 1019 U.N.T.S. 175; Protocol Amending the Single Convention on Narcotic Drugs art. 1, Mar. 25, 1972, 976 U.N.T.S. 3; Single Convention on Narcotic Drugs, 1961, As Amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961 art. 1, Mar. 30, 1961, 520 U.N.T.S. 151.

[45] *See* Antonio Cassesse, International Criminal Law 4–7 (2d ed. 2008); Ilias Bantekas, International Criminal Law 19–20 (Hart Publishing, 4th ed. 2010); Alexander Zahar and Goran Sluiter, International Criminal Law: A Critical Introduction 15–17 (2008).

[46] M. Cherif Bassiouni, Introduction to International Criminal Law 33 n.134–35 (2d ed. 2013).

[47] International Criminal Law: Sources, Subjects, and Contents, Vol. 1 at 516 (M. Cherif Bassiouni ed., 2008).

Nevertheless, powers of the state are limited with the recognition of the individual as a subject of international law protected by legal right. This is the other side of the coin that provides for the individual's international criminal responsibility.[48] This was first embodied in the Charter of the International Military Tribunal ("IMT")[49] and the Statute of the International Military Tribunal for the Far East ("IMTFE"),[50] both of which relied on the customary international law of armed conflicts to carry out individual international criminal responsibility based on what was known as war crimes.[51] The Charter and Statute added to the core "war crimes" charge, those of "crimes against humanity,"[52] "crimes against peace,"[53] and criminalized conduct that violated the right to life and to physical integrity. Shortly after the IMT and IMTFE concluded their proceedings, the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide.[54] Since then, aggression, genocide, crimes against humanity, and war crimes became the four core crimes of ICL.[55] In that, ICL and IHL paved the way for the paradigm shift that was indispensable for the IHRL regime.

6. HUMAN RIGHTS BODIES AND MECHANISMS

The international human rights system has positively impacted national legal systems, but it has largely faded into an international bureaucratic background that does not contribute much to either the international or the national enforcement of internationally established human rights. This is particularly evident in the ineffectiveness of various treaty bodies established by different international conventions whose operations have been mostly bureaucratic and

[48] M. Cherif Bassiouni, *The Discipline of International Criminal Law*, *in* International Criminal Law 3, 21 (M. Cherif Bassiouni ed., 3rd ed. 2008); *see* M. Cherif Bassiouni, Introduction to International Criminal Law 64–71 (2003).

[49] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis art. 1, (Aug. 8, 1945) 59 Stat. 1544, 82 U.N.T.S. 279.

[50] Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (entered into force Apr. 26, 1946).

[51] For the failed post-WWI efforts to establish international criminal responsibility, as was subsequently the case after WWII, *see* M. Cherif Bassiouni, *World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System*, 30 Denv. J. Int'l L. & Pol'y 244 (2002).

[52] M. Cherif Bassiouni, Crimes Against Humanity: Historical Evolution and Contemporary Application 95 (2011).

[53] *See* Whitney Harris, Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg Germany, 1945-1946 (1999). *See also* Yoram Dinstein, *The Distinctions Between War Crimes and Crimes Against Peace*, *in* War Crimes in International Law 1 (Yoram Dinstein & Mala Tabory eds. 1996).

[54] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); *see* William A. Schabas, Genocide in International Law: The Crime of Crimes (2d ed. 2009).

[55] Rome Statute of the International Criminal Court art. 68, July 17, 1998, 2187 U.N.T.S. 3; International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, Rule 85, art. 5–8 (2000).

are of limited impact nationally and internationally.[56] However, some of these bodies have, over the years, produced valuable commentaries.

These bodies include the Human Rights Committee[57] and the Convention Against Torture ("CAT") Committee.[58] CAT remains the most striking example of the proscriptive stage of IHRL through ICL. It criminalizes the commission of torture by any state party to the said convention. Scholars have also concluded that the prohibition of torture as reflected in CAT, the UDHR,[59] the ICCPR, and other regional instruments declaring the prohibition of torture,[60] amounts to customary international law binding upon all states irrespective of whether a given state is a state party to any of these multilateral conventions.[61]

With regards to the protection of vulnerable groups such as civilians threatened by "terrorism,"[62] fifteen multilateral conventions and seven regional conventions address different manifestations of "terrorism."[63] The proscription of certain acts

[56] New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures? (M. Cherif Bassiouni & William A. Schabas eds., Intersentia 2011); U.N. Human Rights Comm., Article 4: Derogations During a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add/11 (Aug. 31, 2001); Office of U.N. High Comm'r for Human Rights, Strengthening the United Nations Human Rights Treaty Body System, Human Rights Comm., U.N. Doc. A/66/860 (June 2012) [hereinafter Pillay Report]; Yuval Shany, The Effectiveness of the Human Rights Committee and the Treaty Body Reform, (Hebrew Univ. of Jerusalem, Research Paper No. 02-13), available at http://papers.ssrn.com/sol3/papers/cfm?abstract_id=2223298.

[57] *See* Office of U.N. High Comm'r for Human Rights, Human Rights Comm., Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008).

[58] *See* Office of U.N. High Comm'r for Human Rights, Comm. Against Torture, U.N. Hum. Rts. Comm., Comm. Against Torture, Compilation of General Comments and General Recommendations Adopted by Human Rights treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008).

[59] Universal Declaration of Human Rights, *supra* note 19.

[60] Arab Charter on Human Rights art. 8, May 22, 2004 (entered into force Mar. 15, 2008), *reprinted in* 12 Int'l Hum. Rts. Reps. 893 (2005); African Charter on Human and Peoples' Rights, art. 5, June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986); American Convention on Human Rights art. 5, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July, 18 1978); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

[61] *See* Sir Nigel Rodley & Matt Pollard, The Treatment of Prisoners under International Law (3rd ed. 2009); J. Herman Burgers & Hans Danelius, The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988).

[62] *See, e.g.*, International Terrorism: Multilateral Conventions (1937-2001) (M. Cherif Bassiouni ed., 2001); M. Cherif Bassiouni, *"Terrorism": Reflections on Legitimacy and Policy Considerations*, *in* Values and Violence: Intangible Acts of Terrorism 233 (Ibrahim A. Karawan, Wayne McCormack & Stephen E. Reynolds eds., 2008); M. Cherif Bassiouni, *Assessing "Terrorism" into the New Millennium*, 12 DePaul Bus. L. J. 1 (2000); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 Harv. Int'l. L. J. 83 (2002).

[63] Multilateral Conventions: 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Sept. 10, 2010 (not yet in force), DCAS Doc No. 22; *see also* 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, *adopted* Sept. 10, 2010 (not yet in force), *DCAS Doc. No. 21;* Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, *adopted* Nov. 1, 2005, LEG/CONF.15/22; Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against

of terror-violence are not only deemed harmful to the state and to international peace and security, but it also constitutes violations of different individual human rights such as the right to life, physical integrity, personal safety and security, and the enjoyment of international means of travel. However, states' efforts at controlling "terrorism" have in turn produced human rights violations when they resulted in the curtailment of certain human rights for those deemed as "terrorists" by states. (This is evident in the commission of torture at the Guantanamo facility (Cuba) established by the United States, the commission of torture in Iraq (notably at Abu Ghraib prison) and Afghanistan (notably at Bagram Air Force Base), and extrajudicial executions and torture in the context

the Safety of Maritime Navigation, *adopted* Oct. 14, 2005, LEG/CONF.15/22 (entered into force July 28, 2010); International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002); Draft Comprehensive Convention on International Terrorism, Working Document Submitted by India, U.N. Doc. A/C.6/55/1 (Aug. 28, 2000); International Convention for the Suppression of Terrorism Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256 (entered into force May 23, 2001); Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 2051 U.N.T.S. 363 (entered into force Jan. 15, 1999); Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 2122 U.N.T.S. 359; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1998, 1678 U.N.T.S. 304; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994); Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 125; International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205 (entered into force June 3, 1983); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167 (entered into force Feb. 20, 1977); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219; Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962).

Regional Conventions: Convention of the Organization of the Islamic Conference on Combating International Terrorism, July 1, 1999, a*vailable at* http://www.unhcr.org/ refworld/publisher,OIC,,,3de5e 6646,0.html (deposited with the General Secretariat of the Organization of the Islamic Conference); OAU Convention on the Prevention and Combating of Terrorism, June 14, 1999, *available at* http://www.unhcr. org/ refworld/docid/3f4b1f714.html (deposited with the Secretary General of the Organization of African Unity); Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999, *available at* http://www.unhcr.org/refworld/docid/47fdfb290.html (deposited with the Executive Committee of the Commonwealth of Independent States); Arab Convention for the Suppression of Terrorism, Apr. 22, 1998, *available at* http://www.unhcr.org/ref world/publishe r,LAS,,,3de5e4984,0.html (deposited with the Secretary-General of the League of Arab States); SAARC Regional Convention on Suppression of Terrorism, Nov. 4, 1987, *available at* http://www.ciaonet.org/cbr/ cbr00/video/cbr_ctd/cbr_ctd_36.html (deposited with the Secretary-General of the South Asian Association for Regional Cooperation); European Convention on the Suppression of Terrorism, Jan. 27, 1977, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/090.htm (deposited with the Secretary General of the Council of Europe); Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, *available at* http://www.oas.org/juridico/ english/treaties/a-49.html (deposited with the General Secretariat of the Organization of American States).

of what the United States has euphemistically referred to as "extraordinary rendition."[64])

In addition to conventions, fact-finding missions have also proven effective. The United Nations system developed international fact-finding missions that have proven effective in monitoring human rights violations in conflict and post-conflict justice situations.[65] They include a number of different mechanisms established by different agencies and bodies of the United Nations; though since 2005, most mechanisms have been established by the Human Rights Council. The establishment of human rights mechanisms is often driven by political considerations, and operationally, they are plagued with bureaucratic, administrative, and methodological problems resulting from their *ad hoc* nature,

[64] See, e.g., Wolfgang Kaleck, From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008, 30 Mich. J. Int'l L. 927, 952–53, 965–66 (2009); Jordan J. Paust, Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Power, 2007 Utah L. Rev. 345, 345–73 (2007); Jordan J. Paust, Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees, 43 Colum. J. Transnat'l L. 811, 824–51 (2005); Jordan J. Paust, Ending the U.S. Program of Torture and Impunity: President Obama's First Steps and the Path Forward, 19 Tul. J. Int'l & Comp. L. 151, 151 n.1 (2010); Jordan J. Paust, Civil Liability of Bush, Cheney, et al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance, 42 Case W. Res. J. Int'l L. 359, 359-61 & n.1 (2009); see Leila Nadya Sadat, Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror, 75 Geo. Wash. L. Rev. 1200 (2007); Michael P. Scharf, Keynote Address: The T-Team, 19 Mich. St. J. Int'l L. 129, 130–31, 134–35 (2010); symposium, Philip Zelikow, Codes of Conduct for a Twilight War, David Cole, The Taint of Torture: The Roles of Law and Policy in Deciding Whether to Torture or Execute a Human Being; Mark Danner, The Twilight of Responsibility: Torture and the Higher Deniability, 49 Hous. L. Rev. (2012); Indefensible: A Reference for Prosecuting Torture and Other Felonies Committed by U.S. Officials Following September 11th, World Org. for Human Rights USA (Am. Univ. Wash. Coll. of Law Int'l Human Rights Law Clinic, Wash., D.C.), Jan. 2012, at 3–19, 38–156; Concluding Observations of the Human Rights Committee, United States of America, U.N. Human Rights Comm., 87th Sess., July 10-28, 2006, ¶¶ 10, 16, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006); Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, United States of America, U.N. Committee Against Torture, 36th Sess., May 1-19, 2006, ¶ 14 (the U.S. "should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction...."), 15 ("provisions of the Convention . . . apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world."), 19 (there exists an "absolute prohibition of torture . . . without any possible derogation."), 24 (the U.S. "should rescind any interrogation technique, including methods involving sexual humiliation, 'water boarding,' 'short shackling' and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention."), U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006); Council of Europe Parliamentary Assembly Res. 1433, Lawfulness of Detentions by the United States in Guantanamo Bay, ¶¶ 7(i)-(vi), 8(i)-(iii) (vii)-(viii) (Apr. 26, 2005); U.N. Comm. on Human Rights, Situation of the Detainees at Guantánamo Bay, 62d Sess., U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) (by Leila Zerrougui et al.) [hereinafter U.N. Experts' Report]; Int'l Comm. of the Red Cross, ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody (Feb. 2007), available at http://pegc.us/archive/ Organizations/ICRC_rpt_hvd_20070214.pdf., quoted in Mark Danner, U.S. Torture: Voices from the Black Sites, 56 The N.Y. Rev. of Books, ch. 1 (Apr. 9, 2009).

[65] Siracusa Guidelines for International, Regional, and National Fact-finding Bodies (M. Cherif Bassiouni & Christina Abraham eds., Intersentia 2013).

as well as from the manner in which they are administered within the United Nations system.

For all practical purposes, each human rights mechanism is different from the others, and the lack of uniformity between them hinders the ability to effectively assess the performance of their missions and their missions' respective outcomes. It also means that comparisons between fact-finding missions are not easily made. Nevertheless, this is an important feature whose future use is unlikely to continue if for no other reasons than cost factors as well as qualitative outcomes. This valuable tool is not only important for the enforcement of human rights, but also to support the pursuit of the ICJ, and as such, it should be strengthened.

Regional human rights conventions and enforcement mechanisms are another significant progeny of IHRL development. Regional institutions have been established in Europe,[66] the Americas,[67] and Africa.[68] These regional institutions are, respectively, the European Court of Human Rights,[69] the Inter-American

[66] The Convention on the Protection of Human Rights and Fundamental Freedoms (more commonly known as the European Convention on Human Rights [ECHR]) was established on Sept. 3, 1953. The 28 member countries of the European Union are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and United Kingdom. In addition to these 28 countries, the member states of the Council of Europe further include Albania, Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Georgia, Iceland, Liechtenstein, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Russian Federation, San Marino, Serbia, Switzerland, the Former Yugoslov Republic of Macedonia, Turkey, and Ukraine. The Council of Europe's observer States are Canada, Holy See, Israel, Japan, Mexico, and the United States. *See* Member States, Council of Europe, http://www.coe.int/en/web/portal/country-profiles (last visited Jan. 22, 2014); *see also* Member Countries of the European Union, Eur. Union., http://europa.eu/about-eu/countries/member-countries/index_en.htm (last visited Jan. 22, 2014).

[67] The Inter-American Commission on Human Rights was established in 1959. The American Convention on Human Rights, otherwise known as the Pact of San Jose, became effective on July 18, 1978. The 35 Member States of the Organization of American States include Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname, The Bahamas, Trinidad and Tobago, United States of America, Uruguay and Venezuela. *See* Member States, Org. Am. States, http://www.aos.org/en/member_states/default.asp (last visited Jan. 22, 2014).

[68] The Organization of African United was established on May 25, 1963, but was disbanded on July 9, 2002. It was disbanded to be replaced by the African Union, which was established on May 26, 2001 and was launched on the day that the Organization of African Unity was disbanded. The Member States of the African Union are Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote D'Ivorie, Democratic Republic of the Congo, Djibouti, Egypt, Republic of Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Republic Arab Saharawi Democratic, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Swaziland, United Republic of Tanzania, Tago, Tunisia, Uganda, Zambia and Zimbabwe. *See* Country Profiles, AFRICAN UNION, http://www.au.int/en/member_states/countryprofiles (last visited Han. 22, 2014).

[69] The ECHR established the European Human Rights Court (ECtHR), initially established in 1959 and permanently established in 1998.

Commission and Court of Human Rights,[70] and the African Commission on Human and Peoples' Rights.[71] There is no doubt that the European convention has had an enormous impact on national systems within the European system and that it served as the model for other regional systems.

The Inter-American system lacks the obligatory jurisdiction over its state bodies and has proven less effective than its European counterpart, but it has engendered harmony among constitutions and national laws among its state parties. Moreover, the Inter-American decisions are highly regarded and respected by the state parties. More importantly, support for the Inter-American convention and the decision of its commission and court, have penetrated the base of almost every South American society, leading to a genuine, popularly — based support for the enforcement of human rights, and the strengthening of the rule of law.

The African system was established in 2004, and is still in its infancy. The system has yet to establish itself both regionally, and within the national legal systems. Within the Arab world, the League of Arab States ("the League") has adopted one instrument, which is the Arab Charter on Human Rights.[72] In 2012, the Kingdom of Bahrain submitted a proposal to the League for the establishment of an Arab Court of Human Rights.[73]

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[70] *Supra*, note 66. Further, the Inter-American Court on Human Rights became effective on May 22, 1979.

[71] *Supra*, note 67. Further, the African Court of Human Rights became effective on May 22, 1979.

[72] League of Arab States, Arab Charter on Human Rights, adopted Sept. 15, 1994 [hereinafter ACHR]. A first version of the Charter was adopted in 1994, but was criticized widely for its deficiencies by other international and regional organizations, NGOs, academics, and experts. In 2002 and 2003, the Council of the League of Arab States adopted resolutions to modernize the Charter, allocating the task to the Arab Standing Committee on Human Rights. The Committee consulted Member States, independent experts, and NGOs, including the International Institute of Higher Studies in Criminal Sciences, in its drafting process. During the 16th Ordinary Session of the Arab Summit in Tunis in May 2004, the modern version of the Charter was adopted. Although the Charter was adopted in 2004, it was not in force until 2008 when it finally acquired the requisite number of ratifications (seven) pursuant to Article 49 of the Charter. Currently, 12 of the 22 Member States of the League of Arab States have ratified the Charter: Algeria, Bahrain, Iraq, Jordon, Libya, Palestine, Qatar, Saudi Arabia, Syria, United Arab Emirates, Yemen, and Kuwait. The Charter offers no enforcement mechanism. Rather, in 2009, the Arab Human Rights Committee was established to receive reports from State Parties. Under the Charter, State Parties are to submit reports on their progress in implementing human rights protections to the Secretary-General of the League. To date, only four State Parties have done so: Algeria, Barhain, Jordan, and Qatar. However, there are no provisions in place for enforcement or for allowing individuals or other State Parties to file a claim against another State Party. *See* Arab Charter on Human Rights 2004, 24 B.Y. Int'l L. J. 147, 147–48 (2006) (translated by Mohammed Amin Al-Midani & Mathilde Cabanettes); World Health Organization, *Health and Human Rights: Arab Charter on Human Rights*, World Health Organization, http://www.who.int/hhr/Arab%20Charter.pdf (last visited Jan. 22, 2014); Mohamed Y. Mattar, *Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards*, 26 Harv. Hum. Rts. J. 93–94 (2013); ACHR, *supra* note 71, at art. 48.

[73] Although the proposal was well-received, and a committee was approved to explore the proposal, no outcome has yet been produced, though a test was submitted in the fall of 2012 to the Committee of Minsters of Foreign Affairs. *See* Mattar, *supra* note 71, at 145.

7. GLOBALIZATION AND HUMAN RIGHTS

Globalization has created new spatial and political opportunities for human rights to develop including speed and access to information and social media, which increases the individual's ability to galvanize one another and generate massive popular movements. New horizons are likely to include individual and political rights as well as collective social, economic, and cultural rights. New agents of change have, however, emerged in this transitional phase, which has the capability of enhancing future human rights prospects. These agents include international and national civil society and a sensitized private sector economy, which can impact human rights outcomes more directly than any other segment of the globalized society. In the categories of the periods of evolution or development of IHRL, the new horizons of human rights in this globalized era are the fourth generation of human rights.[74] But this new generation of human rights will be based on a number of paradigm shifts whose outcomes cannot be predicted.[75]

First, human rights claims by individuals and collectivities are no longer going to be directed only towards states, for they too will be impacted by the processes of globalization and the uncertainty about what will make state structures and powers is uncertain. Moreover, as the powers of states are diluted in the era of globalization, there exists no specific globalized counterpart or authoritative process to replace the state. Power and decision-making are likely to be more diffused in a globalized society than in a Westphalian state based system.[76] At the same time, states have lost a substantial part of their capacity to govern. Thus, a tectonic shift is taking place with respect to states' decision-making powers and effectiveness that will impact the states' capacity to carry out their obligations under the traditional terms of a "social contract."[77] Whether the shift towards globalized systems and processes is likely to replace that which is being eroded is at least speculative.[78]

Globalization of the world's economy and financial systems and methods of communication have also resulted in new ways to infringe on individual human rights. This includes predatory economic and financial practices by multinational corporations, control of the right of access to information, intrusions on privacy, and threats to the environment. The transition phase of globalization is witnessing the erosion of states' powers, in fact, because of the shift in decision-making power to new globalized institutions and processes, and in part, because of the increased un-governability of contemporary societies. The reduced capabilities of governments to protect, preserve, and enforce human rights, in the absence of

[74] *See* Micheline R. Ishay, The History of Human Rights: From Ancient Times to the Globalization Era 245–313 (2004).

[75] M. Cherif Bassiouni, *The Future of Human Rights in the Age of Globalization*, 40 Denv. J. Int'l L. & Pol'Y 115 (2012).

[76] *See* Thomas Alfred Walker, A History of the Law of Nations 147–48 (1899); *see generally* Leo Gross, *The Peace of Westphalia*, 42 Am. J. of Int'l L. 20 (1948).

[77] *See generally* Jean-Jacques Rousseau, The Social Contract (Dover Publications 2003) (1762).

[78] M. Cherif Bassiouni, *The Future of Human Rights in the Age of Globalization*, 40 Denv. J. Int'l L. & Pol'Y 115–116 (2012).

collective exercise of parallel power by the international community in the present context of international relations and the international law systems, have not been substituted by anything new that globalization may eventually offer.[79]

Although globalization mainly encompasses the multiplicity of international processes and collective decision-making bodies consisting mostly of states, the private sector has also developed informal processes that are capable of producing outcomes that are similar to those of structured state control decision-making bodies. The impact of these and other phenomena of globalization have not been the same everywhere in the world or similar with respect to different categories of rights. Thus, the expansion of a globalized free market economy that seems to have had the most impact throughout the world, has not necessarily witnessed a concomitant rise of labor rights though it has no doubt energized the discourse on labor rights as human rights throughout the world. The globalization of a free market economy, which requires the free flow of goods and movement of materials across national boundaries without hindrances, has extended to the free movement of people across state boundaries, but not necessarily to the freedom of people to immigrate without discretionary restrictions imposed by host countries, save for certain minimal rights of asylum.[80]

Another unexplained perverse consequence is the regression of the rights of immigrant labor forces and the hardship suffered by refugees fleeing wars, repressive regimes, economic exploitation, and poverty. Western societies, which are economically among the worlds most advanced, have been more resistant to these and other human rights claims derived from globalization based on their interpretations of cultural relativism and claims of nationalistic cultural rights. Cultural differences continue to stand in the way of the universality of human rights. Last but not least, globalization has not impacted the bottom billion people of the world who live in poverty.[81]

[79] M. Cherif Bassiouni, *The Future of Human Rights in the Age of Globalization*, 40 Denv. J. Int'l L. & Pol'Y 116 (2012).

[80] *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967); *see generally* James C. Hathaway, Rights of Refugees Under International Law 16-24 (2005); M. Cherif Bassiouni, *The Future of Human Rights in the Age of Globalization*, 40 Denv. J. Int'l L. & Pol'Y 116 (2012).

[81] *See* The World Bank, The World Development Report 2011: Conflict, Security and Development 100 (2011), *available at* http://wdr2011.worldbank.org /sites/default/files/pdfs/WDR2011_Full_Text.pdf (discussing the correlation between human rights and economic development. According to the 2011 World Development Report, 1.5 billion people live in countries suffering from continual political and criminal violence. This can only be overcome through strengthening of "legitimate national institutions and governance" which provide the foundation for security, justice, employment, and the risk of violent conflict accordingly. In particular, more than 90 percent of civil wars since 2000 occurred in places where previous civil wars took place in the last three decades. This sort of endemic violence seriously impacts the capacity of states to develop and escape poverty. It is noteworthy that not a single "low-income fragile or conflict affected[ed]" state has achieved one of the UN's Millennium Development Goals. Poverty is, on average, 20 percent higher in those countries than in their conflict free neighbors. One of the clear lessons is the need to build strong and effective governments with a rule of law, as countries without the requisite governmental institutions are 30-45 percent more likely to see a civil war than those with such institutions. In sum, unemployment, corruption, injustice, exclusion and the systemic violation of human rights remain the strongest causes and predictors of violence); *see generally* Paul Collier, The Bottom

In September 2014, the International Institute for Higher Studies in Criminal Sciences, under the auspices of the President of the Italian Republic, held a High Level Meeting of Experts titled, "The Global Issues and their Impact on the Future of Human Rights and International Criminal Justice" in Siracusa, Italy. The following is an excerpt from the conference's "Pre-Conference Summary of Issues for Discussion," titled "Perspectives on Global Issues and their Impact on the Future of Human Rights and International Justice"[82] It is used in its totality because of its relevance to this section, and to this article.

1. Globalization is not a new phenomenon; it has been ongoing during the all years that it took for the human species to evolve into the organized societies of our times. During this historic process, human characteristics and human needs shaped social organizations leading to the coalescence of social values and to their transformation into human values that transcend purely utilitarian considerations. In time, these social and human values have been embodied in principles, norms and standards of individual and collective behavior that were adopted by states and the international community as it evolved. These principles, norms and standards had value-oriented goals that included considerations pertaining to the common good, which included, *inter alia*, collective security, the promotion and protection of human rights and international criminal justice (ICJ). These value-oriented goals also reflected the commonly shared values of the international community and were deemed to some extent to supersede the power and wealth interests of states and individuals. This historical process in question was at times slow and sluggish, while at other times, it was rapid and even exponential in its growth — as has been the case in the expansionist era of globalization that developed since the 1960's. Concomitantly, however, this historical process also revealed how uneven the applications of these principles, norms and standards have been enforced, particularly with respect to states that enjoy positions of power and wealth that places them in a category of exceptions.

2. The social, economic, political, and legal challenges that have emerged over the last few years, including the inability of states and international organizations to carry out their institutional functions, have tested a number of assumptions about the future of human rights and ICJ in light of the present phase of globalization. These challenges have also tested the ability of the emerging global system to effectively respond to a number of collective challenges, which impact our global community.

3. The present state of globalization is led and dominated by science and technology which have by now, shrunk the spatial process and temporal

Billion: Why the Poorest Countries are Failing & What Can Be Done about it (2007) (discussing the correlation between economic development and globalization); M. Cherif Bassiouni, *The Future of Human Rights in the Age of Globalization*, 40 Denv. J. Int'l L. & Pol'Y 117 (2012).

[82] M. Cherif Bassiouni, Pre-Discussion Summary of Issues for Discussion: Perspectives on Global Issues and their Impact on Future Human Rights and International Criminal Justice, 1–15 (2014).

boundaries of our world. Other factors include: means of communication, human mobility, a worldwide economy, a worldwide financial system, worldwide market expansions, and other factors which have increased human interdependence and interconnectedness with paradoxical positive and negative effects and outcomes. Science and technology, however, enhances the power and wealth of those states that have these resources and capabilities — leading the powerful and wealthy to enhance their positions, all too often to the detriment of others.

4. The present expansionist rate of globalization, its depth and breadth, as well as its effects and outcomes, reveals, as it always has, that those states which excel in scientific and technological capabilities develop greater power and wealth than others. This in turn, brings about the domination and exploitation of those societies that have not reached the same levels of scientific and technological development. But, the positions of power and wealth that certain societies attain are not constant, as is evidenced in the rise and fall of empires throughout history. More significant, however, is the direct correlation between scientific and technological advances and the positions of power and wealth enjoyed by certain states, so frequently at the expense of others. What has ensued from these power-disparities are wars and human depredations of all types by those with power over those without it. But, after many tragedies, human societies have also sought to curb these harmful effects and outcomes by establishing limitations on the rule of force and implementing stricter boundaries for the protection of human rights. In turn, the human rights thrust of post-WWII brought about ICJ. But these gains cannot be taken for granted and are not necessarily durable in light of new global factors and their challenging effects and outcomes.

5. The legal and political orders of the Westphalian paradigm (1648) that all states are co-equal sovereigns and that all states have the right to pursue their own interests with only such limitations as they choose to accept, have been overtaken by the ascension of human rights to the principled and normative levels of the international legal order, with even some proclaimed inderogable principles and specific rights. The globalization of the world economy and its financial system allows states, multinational corporations (MNC), and non-state actors (NSA) with power and wealth to use these interconnected global systems in order to exploit weaker economies — often greatly impacting the human rights of the peoples of developing and less- developed countries. Additionally, the asymmetrical power-relations between states allows developing countries to negatively impact the world's environment, which in turn, impacts the economies and human condition of the planet, but with greater harmful impact on developing and less-developed countries and their respective populations.

6. The contemporary world order includes a number of legal regimes whose value-oriented goal is the protection of certain human rights principles and specific rights. They include: (a) International Human Rights Law (IHRL) and

its various implementation mechanisms at the international and national levels, which are, notwithstanding their ever-more expanding subjects, forever in the nature of enunciations of individual and collective rights; (b) International Humanitarian Law (IHL) and its sub-regimes curtailing the use of force in some but not all types of conflicts, and criminalizing some of the prohibited conduct; (c) International Criminal Law (ICL), which criminalizes only some human rights violations; and (d) ICJ, which involves international and national mechanisms designed to enforce violations of some IHL and ICL norms, reflecting the same human and social values contained in IHRL. But the very multiplicity of these regimes with their gaps and overlaps reveals the cynical approach of the international community to the enforceability of these principles, norms and standards. These gaps and overlaps have become one of the legal escape hatches from accountability; the results include: reducing deterrence, prevention, control, and punishment of perpetrators of the most egregious violations of internationally protected human rights. A number of global factors contribute to this outcome, the least of which is not the exceptionalism of certain states and MNCs.

7. International law practices concerning the protection of human rights and the enforcement of ICJ have, admittedly, never been consistent. Some state actors have benefitted from exceptionalism and other forms of evasion of the international law prohibitions, irrespective of the effects and outcomes of the volatile conduct. International practice has always evidenced disparities. States that enjoy greater power and wealth than others fall into a category of exceptionalism wherein their conduct, no matter how harmful it is to others and to the common environment, evades international responsibility. Exceptionalism is, in fact, about what few powerful states can do and get away with. Globalization has enhanced this behavior among major world powers and certain MNCs, putting them beyond the reach of international law.

8. Globalization has also extended the status of exceptionalism to certain MNCs, because of their wealth, worldwide activities, and their economic and political power and influence on national and international institutions. They are effectively beyond the reach of the law (regardless of whether it is national or international). It is in this way that these MNCs are in a position to significantly impact the lives and the well being of individuals and the world's environment. The macro-diffused ways of their activities and products prevent the accountability of their decision-makers — no matter how harmful their policies and practices are to the common good of the planet or to the safety and well being of people in various parts of the world.

9. MNCs are not the only NSAs that are beyond the reach of the law. Some NSAs are in that same category because they are either too small to be registered on the radar screen of our present world order, or because their ability to cause significant harm requires collective security measures that the international system is reluctant or unwilling to commit. The first category is comprised of

a variety of NSAs engaging in trans-boundary and transnational criminality, and the second category includes those engaging in national and transnational violence associated with failed and failing states, and ethnic conflicts. The first group of NSAs benefit from the openness of world markets and the unification of the world's financial system. The second benefits from the failure of a collective security system that does not include the "Responsibility to Protect" (R2P). In the end, these NSAs and their principals benefit from impunity while their harmful conduct and its consequences negatively impact the human rights of the most vulnerable segments of the world's population.

10. Our "Spaceship Earth" has a finite inhabitable territory with limited resources that can sustain a finite population. Global factors, such as population growth and the inability to produce or distribute food to meet the needs of areas with an increasing population, directly impacts the human rights of many, particularly those at the poverty and famine levels. Furthermore, the effects of global warming and the numerous harmful consequences of environmental damage caused by human factors leaves the world's most vulnerable populations even more at risk than others. Nevertheless, no international obligation currently exists to provide humanitarian assistance to countries affected by famine, drought, environmental disasters, and other substantial natural or human-made tragedies. As a result, affected societies are forced to make the choice as to those persons who receive humanitarian and medical assistance, thereby deciding the fate of others. The absence of an international system to regulate these needs for human survivability will necessarily mean that the human rights of some will be sacrificed.

11. Failed and failing states, whose numbers have consistently risen in the last two decades, are likely to continue increasing — particularly when the world population in 2050 reaches 9.3 billion with an estimated 1.4 billion below the hunger level. Such affected local populations are likely to descend into chaos — with the strongest of them preying upon the weakest, thus further affecting the human rights of many. Moreover, these failed and failing states often generate groups of people, who in addition to preying upon their own co-nationals will export violence to other states, thereby also depriving other individuals of their human rights.

12. As domestic, transnational and international violence escalates due to global factors, it will enhance ethnic and religious violence — in addition to the oppressive, repressive, and exploitative regimes that violate human rights with impunity as the international system fails to provide collective security, "R2P", humanitarian assistance, and ICJ. This is already visible in certain parts of sub-Saharan Africa, Asia and in some Arab states with cascading effects in neighboring countries, as well as in countries and regions wherein outside geopolitical actors have conflicting interests. The combination of these factors has negative consequences for human rights, yet nothing that the international

system presently offers can mitigate these consequences — only the occasional goodwill of some states mitigates such harmful effects and outcomes.

13. Globalized factors and their effects and outcomes are also increasing states' governability challenges. In some cases, governability has risen to a crisis level, particularly where there are internal conflicts and/or high levels of poverty. But, even in developed states, governability on the basis of the historic "social contract" carried out under the auspices of governmental democracy is showing significant flaws, particularly as to governmental effectiveness. These factors impact human rights in so many ways, among which are the inequality gaps between members of these societies, poverty and access to health services. This phenomenon is also replicated at the international level with respect to the economic disparities between states. Governmental choices as to the allocation of resources will continue to affect the human rights of the weak, much as the allocation of resources to populations affected by environmental harm and by poverty will result in a political choice, by those in power, as to those who will receive and those who will not receive survival necessities.

14. The interdependence of the world and its peoples is undeniable, much as the environmental consequences of our societies' policies and practices impact upon the entire planet. It is a truism that the world's environment is integral, and the cumulative effects and outcomes of our actions today affect us now, and will continue to affect generations to come. Harmful environmental effects are beyond the singular control of states, and in the absence of effective international collective measures, these harmful consequences will impact the entire planet. But those who are likely to suffer most are the more vulnerable societies and the most vulnerable individuals. The negative human rights outcomes are self-evident.

15. International criminal justice as we have come to know it since the 1990s is likely to feel the impact of all of the above, and consequently, go into a foreseeable historic downturn, much as what happened after the end of World War II, during the Cold War. The ICJ paradigm of post-World War II, however, was essentially a victor's justice system. Those who were prosecuted at Nuremburg and Tokyo and in the subsequent proceedings were either nationals of the defeated Axis Powers, or those who collaborated with them in the states that the Axis Powers occupied. It is often overlooked that there were no prosecutions of those from the victorious Allied powers, regardless of the crimes committed or the evidence available. This was, in fact, a form of exceptionalism, much as we see it apply to military interventions and occupations by major world powers in the 20th and 21st century. One cannot, however, claim that those who were prosecuted on the defeated side did not deserve to be prosecuted, they did. In the aftermath of World War II, the movement for international criminal justice, which was to apply equally to all violators of international criminal law *largo sensu* (including IHL), was blocked by political considerations arising out of

the Cold War and in the aftermath of World War II. It was not until 1992 that ICJ was re-awakened, and that in 1994 two ad hoc Security Council tribunals were established (for the former Yugoslavia and Rwanda), and five mixed- model tribunals were established in cooperation with the United Nations (Kosovo, East Timor, Cambodia, Lebanon, and Sierra Leone). In spite of this, all of the above-mentioned tribunals are winding down with some of them, like East Timor and Kosovo, already closed. The only remaining ICJ institution is the International Criminal Court, whose early stage difficulties have so far prevented its full realization.

16. As the experience with the last two decades of ICJ institutions has now reached a level of assessing its cost-benefit outcomes, the financial costs are clearly high. These costs, as well as the bureaucracies that they require, may well make their retention in the future questionable. More important is the question of whether ICJ will maintain its present priority level among the many other priorities that states and the international community have — particularly in the face of a number of global factors mentioned above. The latter will necessarily change the ranking of state priorities, and as a consequence, the present priority ranking of ICJ is likely to be reduced in the future.

17. On balance, all of the aforementioned global factors directly and indirectly impact human rights with respect to life, health, well-being, human dignity, and justice. The ability of existing international human rights mechanisms to prevent or mitigate these harmful consequences is limited. No international studies exist that assess this situation, and maybe that is more than coincidental — as international organizations consist of states that are unlikely to make human rights monitoring more effective, or enhance ICJ. A countervailing force, however, exists in international civil society and certain concerned states. Without them, the negative consequences, in part described above, could be significantly worse.[83]

8. CONCLUSION

There is a growing concern that in twenty-first century, especially when it comes to globalization and security concerns, that neither domestic nor international laws protect human rights. For instance, post-9/11, the United States set aside its Constitution, laws, and treaty obligations.[84] This occurred by having extraordinary renditions, and in the opening of a prison in Guantanamo outside U.S. jurisdiction to detain persons deemed "enemy combatants" without any form of legal process.[85] Over the years, many of these prisoners were tortured

[83] *Id.* at 2–12.

[84] *See*, *e.g.*, M. Cherif Bassiouni, The Institutionalization of Torture by the Bush Administration: Is Anyone Responsible? (Intersentia 2010); The Torture Debate in America (Karen J. Greenberg ed., Cambridge Univ. Press 2006); The Torture Papers: The Road to Abu Gharib (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

[85] *Id.*

and denied basic rights guaranteed under the U.S. Constitution as well as international treaties.[86] As depicted, the veneer of legal civilization is thin; as is the primacy of human rights over other social interests, particularly that of security, which is admittedly perceived differently by respective sovereignties. Since WWII, human rights norms and standards have developed at the international, regional, and national levels, though with varying degree of effectiveness. Human rights instruments have influenced national constitutions and permeated the legal systems of most states. International criminal justice has also made inroads at the national level, increasingly reaching heads of states that have committed human rights violations. But even though the principle of accountability has been widely recognized, its application is at least symbolic.[87]

9. ADDITIONAL CONCLUSIONS[88]

1. There are no international institutions with the capacity and effectiveness to exercise control over the negative effects and outcomes of globalized factors on the planet, states and individuals.

2. As the cumulative impact of global factors on individuals and societies becomes more pervasive and less controllable, new challenges have risen, making it increasingly more difficult for states and international institutions to effectively address their negative consequences — particularly as to the environment, population growth, food production, poverty, famine, and the increase in failed and failing states with resulting violence and disruption of world order.

3. International and national processes are increasingly unable to cope with the emerging needs and demands of an ever more dependent international community, and national boundaries notwithstanding, are bound and impacted by global factors.

4. The cumulative effects and outcomes of global factors will increasingly change international and national priorities in the years to come. As these priorities change, they are likely to displace other priorities whose value-oriented goals are the enforcement of human rights and the pursuit of ICJ.

5. In a curious, not to say perverse, way — our globalized world is becoming more interdependent and interconnected at the same time that it is becoming less committed to the identification and enforcement of the common good.

86 *Id*.

87 M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 Va. J. Int'l L. 284 (2010).

88 Theollowing conclusions have been excerpted from the conclusions of M. Cherif Bassiouni, Pre-Discussion Summary of Issues for Discussion: Perspectives on Global Issues and their Impact on Future Human Rights and International Criminal Justice, 12–15 (2014).

6. In the next few decades, all of this may lead to a reconfiguration of the international community, which could resemble what existed in the middle- ages in Europe and in other parts of the world: the rich and powerful (whether they are organized as states or groupings of states) will be in the fortresses on top of the hills which are surrounded by walls and moats to keep them safe on the inside, while on the outside will be those living in a sea of poverty and chaos.

7. The presently perceived countervailing force is international civil society and some concerned states. However, regarding what they may be capable of achieving in the face of the changing landscape, the foreseeable world order is difficult to assess. But, that is what remains to counteract and mitigate the cascade of negative effects and outcomes of the impact of unbridled globalization on our planet.

8. In the last three to four centuries, globalization in all its forms and manifestations expanded much more than during the previous periods of history. One need only recall in 1961 when Neil Armstrong landed on the moon and referred to it as "one small step for man, one giant leap for mankind". Since then, scientific and technological advances have been nothing less than extraordinary. Yet, no matter how much progress we have made, the relative distance between what we know and what we do not know seems to remain constant. Indeed, technology has shrunk distance and time in a way that parallels Einstein's theory of relativity, which describes the laws of physics concerning time and space in relation to the universe. However, so much more still remains to be done.[89]

АННОТАЦИЯ

В двадцать первом веке, особенно когда речь идет о глобализации и безопасности, ощущается растущая обеспокоенность тем, что ни внутреннее, ни международное законодательство не защищают надлежащим образом права человека. Например, после 11 сентября 2001 г. США во многом пренебрегли положениями своей Конституцией, законами и своими международными договорными обязательствами. Это проявилось посредством череды чрезвычайных выдач лиц, подозреваемых в совершении преступлений, а также открытием тюрьмы в Гуантанамо за пределами юрисдикции США для содержания в ней лиц, считающихся «воевавшими на стороне противника», без соблюдения какой-либо правовой процедуры помещения их в эту тюрьму. Отсюда следует, что современная оболочка правовой цивилизации тонка, и внутри ее более уязвимой выглядит, по сравнению с другими социальными интересами, в частности, безопасностью, правовая охрана прав человека.

В связи с этим в статье предпринимается попытка обосновать ряд важных положений:

1. Сегодня не существует международных институций, обладающих необходимой мощью и эффективностью для осуществления контроля над теми негативными последствиями, которые оказывают многочисленные события и факторы на планету, государства и частных лиц.

2. Как только кумулятивное влияние глобальных событий и факторов на индивидуумов и общества усиливается, и они становятся менее управляемым, возникают новые проблемы, которые препятствуют государствам и международным организациями эффективно

[89] *Id.*

справляться с их негативными последствиями, в частности, связанными с экологией, бедностью, голодом, а далее — ростом слабых и ослабевающих государств, и в результате — насилием и подрывом мирового порядка.

3. Кумулятивный эффект и результаты глобальных факторов будут все больше менять международные и национальные приоритеты в предстоящие годы. По мере изменения этих приоритетов они, вероятно, будут вытеснять другие приоритеты, ценностно-ориентированным задачами которых являются обеспечение соблюдения прав человека и стремление к объективному международному уголовному правосудию.

4. В последующие десятилетия это все может привести к реконфигурации международного сообщества, которое может походить на то, что существовало, например, в Европе и в других частях мира в средние века: богатые и сильные (будь то государства или групп государств) будут находиться на вершине холмов внутри крепостей, окруженных стенами и рвами, в безопасности, в то время как за пределами этих стен будут царить бедность и хаос.

5. В связи с этим, в настоящее время необходимо в качестве уравновешивающей силы считать международное гражданское общество в целом, а также некоторые обеспокоенные государства. Однако, учитывая их достаточно ограниченные возможности в достижении положительных результатов в условиях меняющегося мира, сложно предусмотреть, каким будет мировой порядок. Но анализировать это следует с целью противодействия и смягчения каскада негативных последствий воздействия так называемой «необузданной» глобализации на нашей планете.

6. В целом, следует учитывать, что за последние 3-4 века глобализация во всех ее формах и проявлениях распространилась намного шире, чем в течение всех предыдущих исторических периодов. Стоит вспомнить, как в 1961 г. Нил Армстронг при высадке на Луне сказал: «Один маленький шаг для человек, но один гигантский прыжок для человечества». С того времени наука и технологии достигли невероятных высот. Тем не менее, несмотря на стремительный прогресс постоянной сохраняется дистанция между тем, что мы знаем, и тем, чего мы не знаем. В самом деле, технологии сжали расстояние и время параллельно Эйнштейновской теории относительности, которая описывает законы физика о времени и пространстве относительно Вселенной. Тем не менее, многое еще предстоит сделать, во всяком случае, в социальном понимании происходящих процессов и с точки зрения адекватного международного реагирования на них.

Ключевые слова: права человека, международное право, международное уголовное право, международное уголовное правосудие, международные договоры, договорные обязательства государств.

АНОТАЦІЯ

У двадцять першому столітті, особливо коли мова йде про глобалізацію і безпеку, відчувається зростаюча стурбованість тим, що ані внутрішнє, ані міжнародне законодавство не захищають належним чином права людини. Наприклад, після 11 вересня 2001 р. США багато в чому знехтували положеннями своєї Конституції, законами і своїми міжнародними договірними зобов'язаннями. Це проявилося через низку надзвичайних видач осіб, підозрюваних у скоєнні злочинів, а також відкриттям в'язниці в Гуантанамо за межами юрисдикції США для утримання в ній осіб, які вважались такими, що «воювали на стороні супротивника», без дотримання будь-якої правової процедури поміщення їх у цю в'язницю. Звідси випливає, що сучасна оболонка правової цивілізації тонка, і всередині її більш вразливою виглядає, в порівнянні з іншими соціальними інтересами, зокрема, безпекою, правова охорона прав людини.

У зв'язку з цим в статті робиться спроба обгрунтувати ряд важливих положень:

1. Сьогодні не існує міжнародних інституцій, які мають необхідну міцність та ефективність для здійснення організованого контролю над негативними наслідками численних подій і чинників на планету, держави і приватних осіб.

2. Як тільки кумулятивний вплив глобальних подій і факторів на індивідуумів і суспільства посилюється, і вони стають менш керованими, виникають нові проблеми,

які перешкоджають державам і міжнародним організаціями ефективно справлятися з їх негативними наслідками, зокрема, пов'язаними з екологією, бідністю, голодом, а далі - ростом слабких і таких, що втрачають силу, держав, і внаслідок — насильством і підривом світового порядку.

3. Кумулятивний ефект і результати глобальних чинників будуть все більше змінювати міжнародні і національні пріоритети в наступні роки. У міру зміни цих пріоритетів вони, ймовірно, будуть витісняти інші пріоритети, ценностно-орієнтовані завданнями яких є забезпечення дотримання прав людини і прагнення до об'єктивного міжнародного кримінального правосуддя.

4. У наступні десятиліття це все може призвести до реконфігурації міжнародної спільноти, яка може походити на те, що існувало, наприклад, в Європі і в інших частинах світу в середні століття: багаті і сильні (будь то держави чи групи держав) будуть знаходитися на вершині пагорбів всередині фортець, оточених стінами і ровами, в безпеці, в той час як за межами цих стін пануватимуть бідність і хаос.

5. В зв'язку з цим, в даний час в якості врівноважуваної сили треба вважати міжнародне цивільне суспільство в цілому, а також деякі стурбовані держави. Однак, враховуючи їх досить обмежені можливості в досягненні позитивних результатів в умовах мінливого світу, складно передбачити, яким буде світовій порядок. Але аналізувати це слід з метою протидії і пом'якшення каскада негативних наслідків впливу так званої «неприборканої» глобалізації на нашій планеті.

6. В цілому слід враховувати, що за останні 3-4 століття глобалізація в усіх її формах і проявах поширилася набагато ширше, ніж протягом всіх попередніх історичних періодів. Варто згадати, як в 1961 р. Ніл Армстронг при висадці на Місяці сказав: «Один маленький крок для людей, але один гігантський стрибок для людства». З того часу наука і технології досягли неймовірних висот. Проте, незважаючи на стримкий прогрес постійною зберігається дистанція між тим, що ми знаємо, і тим, чого ми не знаємо. Справді, технології стиснули відстань і час паралельно Ейнштейнівської теорії відносності, яка описує закони фізика про час і простор щодо Всесвіту. Проте, багато що ще належить зробити, в усякому разі, в соціальному розумінні процесів, що відбуваються, і з точки зору адекватного міжнародного реагування на них.

Ключові слова: права людини, міжнародне право, міжнародне кримінальне право, міжнародне кримінальне правосуддя, міжнародні договори, договірні зобов'язання держав.