

Denver Journal of International Law & Policy

Volume 40
Number 1 *40th Anniversary Edition*

Article 6

January 2011

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M. Cherif Bassiouni

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Recommended Citation

M. Cherif Bassiouni, *The Future of Human Rights in the Age of Globalization*, 40 *Denv. J. Int'l L. & Pol'y* 22 (2011).

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The Future of Human Rights in the Age of Globalization

Keywords

Age, Globalization, Human Rights Law, Criminal Law, International Criminal Court, International Criminal Law, Administration of Justice, States

THE FUTURE OF HUMAN RIGHTS IN THE AGE OF GLOBALIZATION

M. CHERIF BASSIOUNI*

Professor Nanda is far too well known in academic circles for me to add anything new or different about his scholarship and contributions to legal education and to international law and human rights. What I can add, however, is my personal tribute to him as a person of integrity and moral character. We have been friends since 1965, and over the years, we have worked together on a number of academic projects, including the first two volumes on international criminal law ever published in the United States in 1973. Subsequently, we also co-edited another volume on specific crimes arising under international criminal law. During these years, we remained bound by an abiding friendship arising out of mutual respect and affection, and it is my privilege to contribute this manuscript to a volume of the Denver Journal of International Law and Policy, which he founded and which is dedicated to him. The thoughts that follow are in keeping with his concerns about human rights.

THE EMERGENCE OF HUMAN RIGHTS AS WE HAVE COME TO KNOW IT

The aftermath of World War II brought about a paradigm shift in positive international law with respect to the individual's relationship to the state. The latter ceased to be considered as an object of international law and became a subject thereof. This meant that the individual could not only be the recipient of certain rights but also their rightful claimant from states.

Experts have debated the moral, philosophical, ideological, and historic origins of human rights.¹ Legal historians have found the very concept to be part of legal systems going back five thousand years²

* Distinguished Research Professor of Law *Emeritus*; President Emeritus, International Human Rights Law Institute, DePaul University; President, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy; and Honorary President, International Association of Penal Law, Paris, France.

1. See, e.g., MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 2-14 (2004).

2. 1-2 JEAN IMBERT ET. AL., *HISTOIRES DES INSTITUTIONS ET DES FAITS SOCIAUX* (1956); 1-3 JOHN HENRY WIGMORE, *PANORAMA OF WORLD LEGAL SYSTEMS* (Wm. M. Gaunt

while theologians have found the rights of human beings posited in almost every religion, particularly the Abrahamic faiths, Hinduism and Buddhism.³ But it was the European Age of Enlightenment that established the philosophical foundations for the nineteenth century liberalism⁴ that in turn developed the conceptual framework of the post WWII International Human Rights Law regime.⁵

Postmodernism denies the proposition that there is a master historical account that would help us understand how human rights have come to be and how they have evolved, while on a parallel track, contemporary multiculturalism places every group in a victim category. But, when everybody is a victim and there is no historical framework, how can there be a human rights system other than a chaotic environment where anything and everything goes and where ultimately power prevails? Paradoxically these postmodernism and multiculturalism postulates acknowledge human rights values as primary factors in historical and socio-political transitional phases such as post-colonialism. From post WWII to the era of globalization, no matter what method is used, various stages of history reveal a process of historic thought accretion whose transmission substantiates, within and among civilizations, a theory of historic evolution that leads to the conceptual framework of post WWII human rights articulations. Thereafter, the legal methods of international law were used for the actualization of human rights values and their transference to legally enforceable norms and standards. In turn, this post WWII actualization of human rights is being tested in the transitional phase of globalization by emerging systems, processes, structures, actors, resources, and changing dynamics in the interrelations of states, private sector entities, and individuals and groups. How and when the present transitional phase ends is difficult to identify, but when it does, human rights as we have known it since the end of WWII is likely to take on a new shape. This applies to all three complementary legal regimes, described below, whose “value-oriented goals”⁶ encompass human rights.

& Sons, 1992) (1928); PIERRE-CLEMENT TIMBAL & ANDRE CASTALDO, *HISTOIRE DES INSTITUTIONS PUBLIQUES ET DES FAITS SOCIAUX* 13 (11th ed. 2004); RENE DAVID & JOHN E.C. BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* (2d ed. 1978).

3. DAVID S. NOSS & BLAKE R. GRANGAARD, *A HISTORY OF THE WORLD'S RELIGIONS* (13th ed. 2011).

4. WILLIAM M. SPELLMAN, *A SHORT HISTORY OF WESTERN POLITICAL THOUGHT* 109 (2011).

5. ISHAY, *supra* note 1.

6. The late professor McDougal and his Yale colleagues are credited with having developed in the 1960s a new framework and methodology for understanding international law. This “New Haven” school, as it became known, employed its own terminology, which includes the term used above. Professor Nanda was an early student of the New Haven school. See MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW*

If history teaches us anything, it is that certain fundamental values will survive no matter what historic exigencies may dictate. History does not evolve in cycles but in repetitions triggered by the occurrence of certain human experiences. It may simply be the case that when it comes to human affairs, history records variations on the same themes. How different societies under different circumstances adapt to new or newly perceived realities is like the flow of a river, which in some places runs deep and slow, and in others shallow and fast. At times the river of human history also runs stagnant and even likely runs dry until new confluents energize its flow. The course of the human river, however, keeps going on and maybe, just as it started out in its evolutionary course, it will proceed into its conclusionary one.⁷

What this transitional phase of globalization means to the general scheme of history is beyond prediction. But that it will affect human rights as we have understood them since WWII seems rather certain.

2. THE THREE COMPLEMENTARY INTERNATIONAL LEGAL REGIMES ENCOMPASSING HUMAN RIGHTS

Since WWII, three different international legal regimes have co-existed whose "value-oriented goals" include the protection of human rights.⁸ 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, which is not the case. But 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

AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION (1961); MYRES S. MCDUGAL, HAROLD D. LASWELL, & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980).

7. See generally HENDRICK WILLEM VAN LOON, UPDATED BY JOHN MERRIMAN, THE STORY OF MANKIND (1999); THEODORE ZELDIN, AN INTIMATE HISTORY OF HUMANITY (1994).

8. See MCDUGAL & FELICIANO, *supra* note 6; MCDUGAL, LASWELL, & CHEN, *supra* note 6.

they require (in different and varying ways) international and domestic enforcement measures, sanctions, and ultimately remedies for victims.⁹

The recognition of the individual as a subject of international law protected by legal rights limits the powers of the state. It is the other side of the coin that provides for the individual's international criminal responsibility.¹⁰ This was first embodied in the Charter of the International Military Tribunal ("IMT")¹¹ and the Statute of the International Military Tribunal for the Far East ("IMTFE"),¹² 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.¹³ The Charter and Statute added to the core "war crimes" charge, those of "crimes against humanity"¹⁴ and "crimes against peace,"¹⁵ both of which 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.¹⁶ Since then, aggression, genocide, crimes against humanity, and war crimes became the four core crimes of International Criminal

9. 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).

10. M. Cherif Bassiouni, *The Discipline of International Criminal Law*, in 1 INTERNATIONAL CRIMINAL LAW 3, 21 (M. Cherif Bassiouni ed., 3rd ed. 2008); see M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 64-71 (2003).

11. 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.

12. 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).

13. 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).

14. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 95 (2011).

15. 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).

16. 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).

Law ("ICL").¹⁷ ICL and International Humanitarian Law ("IHL") paved the way for the paradigm shift mentioned above that was indispensable for the establishment of the IHRL regime.

What all three international legal regimes have in common is the protection of certain individual human rights from violations committed by states. Some of these rights extend to collective rights, but they too are posited in the nature of a relationship between a given collectivity and a given state.

The International Human Rights Law Regime (IHRL)

International Human Rights Law applies to states. The first, second, and third generations of human rights under IHRL are not absolute rights that can be claimed by the protected person or persons against other individuals or organizations whether they be IGOs, NGOs, or business legal entities (with some exceptions).¹⁸ Conceptually, the new post WWII paradigm of the individual being the subject of internationally established rights and obligations is only in relationship to a state and even in that respect there are some limitations as to which state that may be. Individual rights are usually limited in their application to the state of nationality or the state of residence with some exceptions for certain human rights violations which are not limited to these two categories of states such as migrant and refugee rights,¹⁹ racial discrimination,²⁰ and the right to be free from cruel, unusual, and degrading treatment or punishment under the International Covenant on Civil and Political Rights ("ICCPR") Article 15²¹ and the CAT.²²

The 1948 Universal Declaration of Human Rights²³ and the two 1966 Covenants on Civil and Political Rights ("ICCPR")²⁴ and Economic

17. Rome Statute of International Criminal Court, *supra* note 9, arts. 5 – 8.

18. *Contra* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006). The author postulates the proposition that human rights protect the individual from any source of harm. The author is ahead of his time, but that is maybe where globalization is heading. This writer is more skeptical though sympathetic to Chapham's *desideratum*.

19. Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

20. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD].

21. International Covenant on Civil and Political Rights, art. 15, Dec. 16, 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407 (entered into force Mar. 23, 1976; art. 41 entered into force Mar. 28, 1979) [hereinafter ICCPR].

22. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT].

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

and Social Rights²⁵ formed the core of what scholars refer to as the “International Bill of Human Rights.”²⁶ While the Universal Declaration²⁷ was at first deemed declaratory, it subsequently became part of customary international law.²⁸ 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.

The declarative and prescriptive stages of IHRL were followed by two subsequent stages, the specialization stage of normative prescriptions and the proscriptive stage (described below under “ICL”).²⁹ The first was characterized by a number of international conventions whose subject matter and normative prescriptions addressed, with varying degrees of specificity, some of the rights that were enunciated in more general terms in the ICCPR. They include women’s rights,³⁰ children’s rights,³¹ racial equality,³² migrants’ rights,³³ rights of the disabled,³⁴ and other subject matters of human rights protections.³⁵ This new stage of normative prescriptive rights provided specificity to different subject matters and offered the promise

24. ICCPR, *supra* note 21.

25. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

26. John P. Humphrey, *The International Bill of Human Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 528-34 (1976).

27. 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).

28. THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW*, 42 (1989).

29. See M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 193 (1982).

30. See Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

31. See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict, May 25, 2000, 2173 U.N.T.S. 222; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

32. See ICERD, *supra* note 20.

33. See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003).

34. See Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

35. See Human Rights: A Compilation of International Instruments, ST/HR/1/Rev.6, U.N. Sales No. E.02.XIV.4 (2002).

of enforcement through the established treaty-bodies.³⁶ The treaty-bodies were designed as implementation mechanisms for each of these covenants and conventions; they were intended to enhance compliance and reduce violations of the human rights protections guaranteed by these international instruments. But these objectives were hardly achieved.³⁷ Treaty mechanisms were never assessed in terms of their effect on enhancing compliance and reducing violations.³⁸ In fact, these mechanisms have proven to be nothing more than procedural devices that limit the consequences of a state party's violation to the mere issuance of periodic reports by the respective treaty-body.³⁹ Considering that most of these treaty-bodies are staffed by government officials and former government officials, it is no wonder why so many of these treaty bodies have done so little to induce state parties' compliance and thus reduce violations.

The declarative and prescriptive stages of IHRL 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.⁴⁰ 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.⁴¹ Thus, the center of gravity of human rights has, as it should, moved from internationalization to nationalization, much as this writer believes that the future of international criminal

36. See NEW CHALLENGES FOR THE U.N. HUMAN RIGHTS MACHINERY: WHAT FUTURE FOR THE UN TREATY BODY SYSTEM AND THE HUMAN RIGHTS COUNCIL PROCEDURES? (M. Cherif Bassiouni & William A. Schabas eds., 2012) (listing the Committee on Elimination of Racial Discrimination; the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee on the Elimination of Discrimination against Women; the Committee against Torture; the Subcommittee on Prevention of Torture; the Committee on the Rights of the Child; the Committee on Migrant Workers; the Committee on the Rights of Persons with Disabilities; and the Committee on Enforced Disappearances).

37. *Id.*

38. M. Cherif Bassiouni, *Introduction* to NEW CHALLENGES FOR THE U.N. HUMAN RIGHTS MACHINERY, *supra* note 36, at xi - xxii.

39. None of them provides for independent fact finding as they are essentially predicated on periodic reports by governments which are then reviewed by the respective treaty bodies who issue periodic reports containing whatever findings and recommendations these bodies elect to make.

40. BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW*, *supra* note 10, at 583-671.

41. *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 INTERNATIONAL REVIEW OF PENAL LAW (1994); *Inquisitorial-Accusatorial: The collapse of dogmas in criminal procedure*, 68 INTERNATIONAL REVIEW OF PENAL LAW (1997).

justice and ICL and IHL as a whole are destined to follow this path. The future of IHRL, ICL, and IHL is their absorption into national legal systems whose enforcement mechanisms are likely to have a far more effective impact on compliance than any assisting or prospective international set of mechanisms.

The International Criminal Law Regime (ICL)

Following the normative prescriptive stage of IHRL described above, another stage in the development of human rights protections ensued through specialized conventions proscribing violations of certain fundamental human rights as in the case of torture,⁴² slavery and slave-related practice,⁴³ human trafficking,⁴⁴ and enforced disappearances.⁴⁵ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁶ (“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 Universal Declaration,⁴⁷ the ICCPR,⁴⁸ and other regional instruments declaring the prohibition of torture⁴⁹ amount to customary international law binding upon all states

42. See CAT, *supra* note 22; SIR NIGEL RODLEY & MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (3rd ed. 2009); J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* (1988).

43. See Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227; ICCPR, *supra* note 21, art. 8; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3; Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 254; see also M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT’L L. & POL. 445 (1991).

44. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319; Elizabeth Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT’L L. 1 (2004).

45. See International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

46. CAT, *supra* note 22.

47. Universal Declaration of Human Rights, *supra* note 23.

48. ICCPR, *supra* note 21.

49. 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).

irrespective of whether a given state is a state party to any of these multilateral conventions.⁵⁰

The proscription of other international human rights violations reflect certain human values protected by IHRL as in the protection of vulnerable groups such as civilians threatened by “terrorism.”⁵¹ Fifteen multilateral conventions and seven regional conventions address different manifestations of “terrorism.”⁵² The proscription of certain

50. See RODLEY & POLLARD, *supra* note 42.

51. 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).

52. 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 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 Organisation of the Islamic Conference on Combating International Terrorism, July 1, 1999, *available at* <http://www.unhcr.org/refworld/publisher,OIC,,,3de5e6646,0.html> (deposited with the General Secretariat of the

acts 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.

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 of what the United States has euphemistically referred to as "extraordinary rendition."⁵³

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/47fdb290.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/refworld/publisher,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).

53. 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*

While ICL is a regime essentially geared to sanction what has come to be regarded as international and transnational crimes, these crimes are committed by individuals and groups in different contexts and for different purposes.⁵⁴ Non-state actors include: (1) groups that pursue ideological purposes by violent means and that are referred to as “terrorists,” (2) groups that seek to obtain profit by the use of violence that are referred to as “organized crime”⁵⁵ groups and, (3) groups that are parties in conflicts of a purely internal and non-international character.⁵⁶ These groups’ activities overlap and frequently drift in and out of these legal categories, which reveals the failure of international legislative policy.

The “value-oriented goals”⁵⁷ of these multiple sub-regimes of ICL include not only human rights considerations but the preservation of international peace and security and the security and public interests of

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).

54. M. Cherif Bassiouni, *International Criminal Law and Human Rights*, in INTERNATIONAL CRIMINAL LAW 15-25 (M. Cherif Bassiouni ed., 2d ed. 1999).

55. TOM OBOKATA, TRANSNATIONAL ORGANISED CRIME IN INTERNATIONAL LAW 14-19 (2010).

56. 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, 713-14 (2008).

57. MCDUGAL & FELICIANO, *supra* note 6, at 262-63, 302; MCDUGAL, CHEN, & LASWELL, *supra* note 6, at 3-6.

states. The balancing of these interests necessarily affects the goals and methods pursued by states, individually and collectively. That which at one time can tip the scales in favor of human rights, can also tip them in the direction when considerations of security are deemed to affect those pertaining to human rights.

The International Humanitarian Law Regime (IHL)

Another international legal regime protecting human rights is IHL. The four Geneva Conventions⁵⁸ of August 12, 1949 and the two Additional Protocols of 1977⁵⁹ are the normative cornerstones of this regime that also includes the customary law of armed conflict.⁶⁰ The IHL legal regime applies to the protection of certain persons, targets, and means employed during the course of international and non-international conflicts but does not extend to purely internal conflicts.⁶¹ The protected scheme of IHL has been interpreted by states as having greater application in the context of conflicts of an international character than conflicts of a non-international character, even though doctrine has equated the protective rights for non-combatants as well as combatants in these two contexts.⁶² The practice of states however has not followed the writings of scholars in connection with the same applicability of IHL protections in both contexts, but international tribunals have.⁶³

IHL and IHRL overlap, as evidenced by the International Court of Justice (“ICJ”) decision in the *Wall* case involving Israel’s treatment of

58. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

59. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 610.

60. 1 MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR 134-39 (3rd ed. 2011); ICRC, *Violence and the Use of Force*, 8-10 (July 2011).

61. HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW 17-19 (1990).

62. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 554-55 (1995).

63. See Prosecutor v. Milosevic, Case No. IT-98-29/1-PT, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 12, 2007); Prosecutor v. Tadic, Case No. IT- 94-1-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Int’l Crim. Trib. for Rwanda Sept. 2, 1998); Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence (Int’l Crim. Trib. for Rwanda Sept. 4, 1998).

Palestinians and Palestinian occupied territories.⁶⁴ As evidenced in this case, the ICJ held that the two regimes are simultaneously 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.⁶⁵

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”⁶⁶ activities, “terrorism,”⁶⁷ or drug trafficking.⁶⁸ It has not yet been established by the ICJ or by experts how to address the overlay between ICL and IHRL.⁶⁹

More importantly, 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*.

3. INTERNATIONAL CRIMINAL JUSTICE

Although international criminal justice has made progress with the establishment of such institutions as the International Criminal Tribunal for the Former Yugoslavia,⁷⁰ International Criminal Tribunal for Rwanda,⁷¹ International Criminal Court,⁷² and the mixed model

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

65. *Id.* ¶ 105-06.

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

67. Bassiouni, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, *supra* note 51, at xxv-xxix; Karawan, McCormack, & Reynolds, *supra* note 51, at 233-35.

68. 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.

69. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 4-7 (2d ed. 2008); ILIAS BANTEKAS, INTERNATIONAL CRIMINAL LAW 19-20 (Hart Publishing, 4th ed. 2010); ALEXANDER ZAHAR & GORAN SLUITER, INTERNATIONAL CRIMINAL LAW: A CRITICAL INTRODUCTION 15-17 (2008).

70. S.C. Res. 827, ¶ 1, U.N. Doc. S/RES/827 (May 25, 1993); See M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 202-08 (1996); 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 37-48 (1995).

71. S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994); See VIRGINIA MORRIS & MICHAEL P. SCHARF, 1-2 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 37-46 (1998).

tribunals,⁷³ the values of international criminal justice have not yet become part of the goals of globalization.⁷⁴ The present stage of globalization has emphasized economic and financial interests over humanistic and humanitarian values and principles. Economic and financial interests, whether in the public or private sectors, continue to prevail over humanistic and humanitarian values. Contemporary economic and financial crises in the world dominate the interests of states to the detriment of their interest in human rights. Moreover, concerns for internal security and stability have prevailed as states' interests over the interests of humanitarian and humanistic values.

Efforts by the international community to advance the theory of universal jurisdiction for certain international crimes, which are designed to protect human rights and prevent genocide, crimes against humanity, war crimes, torture, and extrajudicial executions, have not been successful.⁷⁵ Universal jurisdiction remains a *desideratum* that has been thwarted by the interest of states seeking to advance their state interests. *Realpolitik* has once again prevailed over the lofty humanistic and humanitarian values reflected in so many international conventions and in the writings of scholars.⁷⁶ For maybe similar reasons, states have resisted the proposition that human rights are universal and should be universally enforced. The international community is as reluctant to enforce ICL universally as it is to universally enforce IHRL.

This is evident in the high number of general amnesties provided by states after internal conflicts. The number of amnesties has reached 125 out of a total of 313 conflicts that occurred between 1945 and

72. See Rome Statute of International Criminal Court, *supra* note 9, art. 1.

73. Statute for the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. Doc. S/RES/1757, art. 1 (May, 30 2007); Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 1, Jan. 16, 2002, 2178 U.N.T.S. 138; GA Res 52/135, ¶16, U.N. Doc. A/RES/52/135 (Feb. 27, 1998); S.C. Res. 1272, ¶1, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (created the UN Transitional Administration in East Timor); S.C. Res. 1244, ¶5, U.N. Doc. S/RES/1244 (Jun. 10, 1999) (created the United Nations Interim Administrative Mission in Kosovo); BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 10, at 548-50.

74. M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269, 276 (2010).

75. M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 137 (2001); see L. REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 1-3 (2003); *The Princeton Principles on Universal Jurisdiction*, PRINCETON UNIV. PROGRAM IN LAW AND PUB. AFFAIRS, 22-29 (2001), http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

76. Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 74, at 291; M. Cherif Bassiouni, *Challenges Facing a Rule-of-Law-Oriented World Order*, 8 SANTA CLARA J. INT'L L. 4 (2010); M. Cherif Bassiouni, *The Perennial Conflict between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541, 546-47 (2006).

2008.⁷⁷ Accountability for International Crimes is also an area that is more talked about than carried out, as evidenced by the fact that in the 313 conflicts mentioned above—which resulted in the deaths of at least 92 million—only 727 international prosecutions took place.⁷⁸

4. GLOBALIZATION AND THE FUTURE OF 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 have the capability of enhancing future human rights prospects. These agents include international and national civil society and a sensitized private sector economy, which can more directly impact human rights outcomes than any other segment of the globalized society. For those whose interest is to categorize the periods of evolution or development of IHRL, the new horizons of human rights in this globalized era will probably be classified as the fourth generation of human rights.⁷⁹ But this new generation of human rights will be based on a number of paradigm shifts whose outcomes cannot be predicted.

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 globalized society than in a Westphalian state based system.⁸⁰ 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'

77. Christopher Mullins, *Post-Conflict Justice 1945-2008*, in *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE*, vol. 1, at 80 (M. Cherif Bassiouni, ed., 2010).

78. M. CHERIF BASSIOUNI, *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE*, vol. 1, 34 (2010) [hereinafter BASSIOUNI, *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE*]; M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 74, at 280; Jane E. Stromseth, *Justice of the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?*, 1 *HAGUE J. ON THE RULE OF L.* 87, 90 (2009).

79. *See generally* ISHAY, *supra* note 1, at 245-313.

80. *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).

capacity to carry out their obligations under the traditional terms of a "social contract."⁸¹ Whether the shift towards globalized systems and processes is likely to replace that which is being eroded is at least speculative.

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 the increased ungovernability of contemporary societies. The reduced capabilities of governments to protect, preserve, and enforce human rights, in the absence of 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. This raises a number of issues which include, whether there is something called the global society that could be held accountable for the violation of human rights in this transitional phase to globalization and whether individuals will be able to make human rights' claims against the global society and if so, in what manner and before what forum?

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.

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

81. See generally JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Dover Publications 2003) (1762).

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.⁸² 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 world's most advanced, have been the more resistant to these and other human rights claims deriving 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.⁸³

Globalization is not necessarily a recipe for a more harmonious world or for one that is more likely to uphold human rights on a universal and non-discriminatory basis. It is bringing about new realities in the lives of individuals whose traditional family support systems have disappeared or substantially eroded. The state, as has been evident in the last 200 years or so, has not been able to provide a substitute for these support systems other than by offering social services devoid of the human element that is so important in the life of persons. Can one expect a globalized society to do any better? Surely international and national civil society, which will expand in the era of

82. 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).

83. 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, accordingly, the risk of violent conflict. In particular, more than 90 percent of civil wars since 2000 occurred in places that previous civil wars 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 BILLION: WHY THE POOREST COUNTRIES ARE FAILING & WHAT CAN BE DONE ABOUT IT (2007) (discussing the correlation between economic development and globalization).

globalization, are not likely to provide a substitute for the traditional (and now maybe historic) support systems of family community, tribe, or village. But no one can anticipate the outcomes of realigning social structures.⁸⁴

CONCLUSION

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 who have committed human rights violations. But even though the principle of accountability has been widely recognized, its application is at least symbolic.⁸⁵

The economic crisis of 2008 and its consequences on world poverty and the crisis of governability are eroding the ability of states to fulfill their part of the traditional "social contract." As a result, states' legitimacy is being undermined and peoples are turning to other ways to protect human rights. What we have come to know as human rights since WWII is increasingly conditioned by economic and socio-political realities evidenced in state practices and in collective state actions and inactions. One such example is the failure of the fledgling principle of the Responsibility to Protect⁸⁶ to become part of an institutionalized process of decision-making leading to consistent practice by the international community. 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.⁸⁷ The conduct of states during these conflicts reveals that they intervene mostly when their national interests are at stake and not necessarily when the human rights of peoples are subject to large scale depredations are at risk.

84. Francis Fukuyama, *The Future of History: Can Liberal Democracy Survive the Decline of the Middle Class?* 91 FOREIGN AFFAIRS 53, 59-61 (2012).

85. Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 74, at 284.

86. See U.N. GAOR, 60th Sess., 2005 World Summit Outcome, para. 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); ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES 1-5 (2009). See also Jennifer Moore, *R2P=MDGs, Implementing the Responsibility to Protect Through the Millennium Development Goals*, in this book.

87. BASSIOUNI, THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 78, at 34.

What is more likely to characterize the next phase?

1. The economic disparities between what is called developed, developing states, and the less developed states for the some one billion people of the world⁸⁸ are increasing. The bottom billion is likely to increase by 50 percent to 100 percent in the next 20 years (for demographic and economic reasons) while the top billion will likely suffer from the economic crisis that erupted in 2008. Many will fall below the poverty level and the so-called middle class will struggle more to preserve its hitherto economic privileges. States will increasingly be unable to provide the economic and social services they historically offered or promised. Their part of the “social contract” will be increasingly unfulfilled, and the states’ legitimacy will be undermined. The globalized system will not be a substitute for state’s social and economic responsibilities. Individual human rights will shift from social and political rights reflecting the ideas of liberal democracy to basic needs rights deriving from economic necessities. Distribution of wealth, resources and allocation of public services will become a priority over what will seem as the luxury of individual social and political rights in the exercise of democratic freedoms.

2. The legitimacy of state powers will no longer derive from the protection of liberal democratic freedoms and their exercise by as many individuals as the state may help accede thereto. Rather, state powers will derive from insuring human survivability and public safety. In the process of this focus shift, individual and collective social and political rights will be eroded while emphasis will shift to the exigencies of survivability. This focus shift will be driven by increased difficulties and costs of governments, which has been referred to herein as the governability crisis that seems to have permeated so many governments whether they be in developed, developing, or less developed states. But new factors will emerge at the global level in such dimensions that states’ capabilities to confront them will be significantly challenged. This includes famine and natural disasters such as floods, tsunamis, earthquakes, and other consequences of climate change, and industrial disasters whether related thereto or such nuclear ones. In the last few years alone, the world has witnessed a number of these tragic situations in Africa and Asia, evidencing the inability of states to prevent and to effectively respond.⁸⁹ As the effects of climate change increase while the global community stands hopelessly unable to

88. THE WORLD BANK, *supra* note 83, at 1-2.

89. See, e.g., *Somalia*, N.Y. TIMES (Feb. 3, 2012), <http://topics.nytimes.com/top/news/international/countriesandterritories/somalia/index.html?scp=10&sq=disasters%20in%20africa&st=cse>; see, e.g., *In-depth: When disaster strikes: the response to the South Asia Earthquake*, IRIN (June 5, 2006), <http://www.irinnews.org/InDepthMain.aspx?InDepthId=6&ReportId=34369>.

prevent further deterioration, the impact on the basic human rights to life and safety will increase. The priority of protecting individual human rights will fall in consideration of these new threats.

3. The economic and social factors described above have already resulted in more than 40 failed and failing states out of a total of 194 states.⁹⁰ It is within these states that internal conflicts usually arise necessitating external intervention at enormous costs that other states and the international community are increasingly finding beyond their means. Failed and failing states also impact the stability and economy of neighboring states, thus increasing the range of their negative situations beyond their borders. But it is the enormity of the human harm produced by these states that challenges every conception of human rights.⁹¹ Will globalization provide for a better solution or will it be an escape hatch for states to resume the status quo of looking the other way irrespective of the harmful human rights outcomes likely to result?

4. The contemporary tension between human rights and security is reminiscent of the historical tensions between states' exercise of power from time immemorial up to the nineteenth century and the rights of individuals recognized since WWII. No one today argues that states, because they are states, have the right to arbitrarily kill a person or to engage in torture. Instead the contemporary argument is that even though the right to life and physical integrity is recognized, there are exceptions justified by security needs. The United States makes this argument in connection with its usage of drones to attack individuals who are deemed (by a small segment of persons in government, namely military and intelligence establishments) to pose a threat to the security of the United States.⁹² In the same vein, "extraordinary rendition" and torture in Guantanamo, Cuba, Abu Ghraib, and Bagram have been used by U.S. military and intelligence personnel as well as private contractors.⁹³ At no time did the Bush Administration, which engaged in this practice, argue that torture was not illegal. What was argued was that these acts either did not constitute torture or were

90. *The Failed States Index 2011*, FOREIGN POLICY, http://www.foreignpolicy.com/articles/2011/06/17/2011_failed_states_index_interactive_map_and_rankings (last visited Feb. 10, 2012).

91. THE WORLD BANK, *supra* note 83, at 3-4.

92. Scott Shane, *Coming Soon: The Drone Arms Race*, N.Y. TIMES (Oct. 8, 2011), <http://www.nytimes.com/2011/10/09/sunday-review/coming-soon-the-drone-armsracehtml?pagewanted=all>.

93. *Court Case Reveals Details of Secret Flights*, USA TODAY (Sept. 9, 2011), <http://www.usatoday.com/news/washington/story/2011-09-01/Court-case-reveals-details-of-secret-flights/50218452/1>.

justified for national security reasons.⁹⁴ Seldom is the argument of human rights, let alone of the rule of law, given much acknowledgement in political and even legal circles.

The security argument is a *de facto* displacement of the applicability of human rights. In other words, it is a theory of exceptionalism that is gaining public recognition primarily in the United States and in some Western European countries who now join the list of states that have consistently resorted to such exceptionalism as a way of safeguarding their national political interests. The U.S.'s invasion of Iraq and Afghanistan are two such examples, as is NATO's bombing of Libya. All three had one thing in common, regime change, and few raised concerns over the human rights violations caused by these armed attacks.

5. The outlines of a new historical phase for human rights are already identifiable. It will include a new paradigm shift from the protection of individual human rights *vis à vis* states to the predominance of state interests over those of individuals as was the case before WWII. This paradigm shift will emphasize individual responsibilities and the primacy of collective security interests within and between states over the post WWII approach, which emphasized the predominance of certain fundamental individual human rights over state interests. But the decline of human rights in the context of relations between the state and the individual will be counterbalanced by the strengthening of collective rights *vis à vis* states and the international community.⁹⁵

6. A number of indicators point to the erosion of human rights as we came to know them since the end of WWII. What will replace it is difficult to foresee except in one respect. The concept of human rights as the embodiment of human dignity has become both the ethos and the pathos of so many in our seven billion world population. The fact that states and the global society may be unable to deliver their sides of the new social contract will not affect the demand side for human rights. And the demand in keeping with the market laws of free enterprise capitalism, which is an integral part of globalization, will play its part in preserving the supply side, namely states and the institution and processes of the globalized society. What these new processes will be, and how they are likely to produce positive human rights outcomes is of course difficult to predict. But to paraphrase Mark Twain, news about the complete demise of human rights is premature. But news about its transformation is reasonably certain. Whether the new human rights

94. Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES (Oct. 4, 2007), <http://www.nytimes.com/2007/10/04/washington/04interrogate.html>.

95. COSTAS DOUZINAS, THE END OF HUMAN RIGHTS 380 (2000).

outcomes will make a positive contribution to peoples' lives in the new era of globalized society and with respect to what sectors of that society is something crystal ball gazers in our field have yet to discern. But for sure, the new globalized society will face daunting global problems that will take priority over individual human rights if, in the trade-off, the human rights of the masses are better protected, the balance sheet will be acceptable. Considering, however, the dimensions of the problems that the global society faces and will face in light of states' willingness to collectively address what is in the offing, the prospects are not too positive.