

GLOBALIZATION AND ITS
IMPACT ON THE FUTURE
OF HUMAN RIGHTS
AND INTERNATIONAL
CRIMINAL JUSTICE

M. Cherif BASSIOUNI
(ed.)



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Criminal Justice
M. Cherif Bassiouni (ed.)

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PREFACE

This book contains the edited papers presented at the High-Level Meeting of Experts on Global Issues and their Impact on the Future of Human Rights and International Criminal Justice held in Siracusa, Italy, September 3–7, 2014. The reader is invited to look at the program and the list of participants contained in the Appendix, which shows the high level expertise of the participants and the wide-ranging interest that the subject has elicited.

The 33 contributions contained in this book, prepared by 36 authors, discuss the impact of a range of globalizing factors and contemporary issues that impact on human rights and international criminal justice (ICJ). The Executive Summary, which follows, describes these issues, as does the summary report at the end of this book.

This is the first book of its kind on such a subject, though there are of course many books that have dealt with various aspects of globalization. What is new about this book's contents is the attempt to assess the impact of a large number of globalization factors on the present and future development of human rights and international criminal justice.

I would be remiss in this respect, not to underscore the concerns of many at that conference as well as other scholars and interested parties throughout the world about the challenges which are likely to affect the future of human rights and ICJ in light of other state priorities. We are living through a period of decline in the observance of and respect for, human rights as they have evolved since the end of World War II. And we may well be witnessing a setback in the evolution of international criminal justice. In this respect, this book may be the first of its kind, in alerting the international community to the prospective challenges, not to say threats, to the value oriented goals of human rights and ICJ.

M. Cherif Bassiouni
Chicago, Illinois
March 2015

CONTENTS

| | |
|-----------------------------------|-------|
| <i>Acknowledgements</i> | v |
| <i>Preface</i> | vii |
| <i>List of Contributors</i> | xxiii |
| <i>Executive Summary</i> | xxvii |

OPENING SPEECHES

| | |
|--|----|
| H.E. Yury Fedotov | 3 |
| H.E. Ambassador Nassir Abdulaziz al-Nasser | 5 |
| H.E. Amina J. Mohammed | 9 |
| H.E. Minister Sheikh Khalid Bin Ali Al Khalifa | 11 |
| H.E. Dr. Ali Bin Mohsen Bin Fetais Al Marri | 15 |
| H.E. Ambassador Stephen J. Rapp | 17 |
| H.E. Danilo Türk | 23 |
| H.R.H. Prince El Hassan bin Talal | 27 |

PART I.

HUMAN RIGHTS AND INTERNATIONAL CRIMINAL JUSTICE

Human Rights and International Criminal Justice in the Twenty-First Century

| | |
|---|----|
| M. Cherif BASSIOUNI | 37 |
| 1. Introduction | 37 |
| 2. The Westphalian Legal Order and Internationally Protected Human Rights | 39 |
| 3. Past the UDHR Phase | 41 |
| 4. The United Nations Millennium Declaration: Reaffirming Human Rights Protection | 43 |
| 5. The Everlasting Compliance Gap | 45 |
| 6. Human Rights Bodies and Mechanisms | 49 |
| 7. Globalization and Human Rights | 55 |
| 8. Conclusion | 63 |
| 9. Additional Conclusions | 64 |

An Assessment of the Current International Human Rights Paradigm and Recommendations for Moving Forward
 Carli PIERSON 67

1. Introduction 67

 1.1. A Brief Overview of the Current State of Human Rights..... 69

2. Questioning the Efficacy of the Current International Legal Framework for Human Rights..... 72

3. Human Rights Instruments, Cultural Relativism, and Changing Global Dynamics 74

 3.1. The Beginnings of Human Rights Law: a Brief Overview 74

 3.2. Human Rights and Cultural Relativism 77

 3.3. Opposing Theories of the Future of Human Rights 77

 3.4. Modifications of HRIs: a Subtle Assertion of Cultural Relativism .. 79

4. Analysis of the Current Human Rights Paradigm 80

 4.1. Is there a Future for Human Rights? 80

 4.2. U.S. Exceptionalism and the End of the Modern Human Rights Regime 81

5. Recommendations..... 82

6. Conclusion 85

Twentieth-Century Institutions for a Twenty-First Century World?
 Stephen HOPGOOD 87

1. Introduction 87

2. Syria: Out of the Light into the Darkness 88

3. The Role of Europe and the United States 90

4. The (Relative) Decline of Western Power..... 91

5. The End of the Age of Empire 93

6. Conclusion 95

Human Rights and International Criminal Justice: Looking Back to Reclaim the Future
 Micheline ISHAY 99

1. Introduction 99

2. Four Moments of Liberal Internationalism..... 102

 2.1. Internationalism after 1864 and the Franco-Prussian War (1870–1871)..... 102

 2.2. Liberal Internationalism after World War I 104

 2.3. Liberal Internationalism after World War II 106

 2.4. Liberal Internationalism after the Post-Cold War..... 108

| | | |
|--|---|-----|
| 3. | Globalization and the Future of International Criminal Justice and Human Rights | 109 |
| 4. | Conclusion | 112 |
| The Future of the United Nations Human Rights System | | |
| | William SCHABAS | 115 |
| The Past, Present and Future of International Criminal Justice and Human Rights | | |
| | Lawrence WILKERSON | 123 |
| The Future of International Criminal Justice: Recent Empirical Studies on the Impact of Justice Mechanisms on Human Rights and Conflict | | |
| | Kathryn SIKKINK | 135 |
| 1. | Introduction | 135 |
| 2. | The TJRC Data Project | 136 |
| 3. | The Impact of Human Rights Prosecutions on Physical Integrity Rights | 139 |
| 4. | The Impact of International Criminal Justice on Peace and Conflict ... | 142 |
| 5. | Moving towards New Models | 144 |
| 6. | Conclusions | 145 |
| International Criminal Justice, Plato, and Global Due Process | | |
| | Larry MAY | 147 |
| 1. | Introduction | 147 |
| 2. | Plato in Siracusa | 148 |
| 3. | The Social Contract | 150 |
| 4. | A Global Rule of Law | 153 |
| 5. | The Future of International Criminal Justice and Human Rights. | 155 |
| International Criminal Justice: Reflections on the Past and the Future | | |
| | Hassan B. JALLOW | 159 |
| 1. | Introduction | 159 |
| 2. | Contribution of the Ad Hoc and Hybrid Tribunals to Combating Impunity | 160 |
| 3. | Best Practices | 164 |
| 4. | Expanding the Frontiers of International Law | 165 |
| 5. | The Challenge of State Cooperation | 166 |
| 6. | Restructuring the Architecture | 167 |
| 7. | Challenge of Universal Application of the Law | 169 |
| 8. | Conclusion | 170 |

Assessing the Impact of Security and Geopolitical Considerations on the Protection of Human Rights and the Pursuit of International Criminal Justice

Hans CORELL 173

1. Introduction 173
2. World Governance, Past and Present 174
3. The Need for Democracy 175
4. The Need for the Rule of Law 175
5. Future Global Governance with a Focus on the Protection of Human Rights and Criminal Justice 178
6. Concluding Reflections 185

Responsibility of States in Case of Human Rights Violations and of Obligations to Prevent and Punish Serious Violations of Human Rights and International Crimes

Alain PELLET 189

1. Introduction 189
2. An Aggravated Regime of State Responsibility 190
 - 2.1. Re-thinking the Law of State Responsibility 190
 - 2.2. From Common Values to Peremptory Norms 193
 - 2.3. From Peremptory Norms to International “Crimes” of States 196
3. International “Crimes” of States and Criminal Responsibility of Individuals under International Law 197
 - 3.1. A Criminal Responsibility of States? 197
 - 3.2. Penal Consequences of Serious Breaches of Obligations Arising under a Peremptory Norm of General International Law 199
 - 3.3. Reacting to “Serious Breaches” 200
4. Conclusion 206

PART II.
CONTEMPORARY CHALLENGES

Failing States Impact on Human Rights and International Criminal Justice

Mario SILVA 209

The International Legal Architecture and the Conflicts of the Middle East: An Obsolete Framework or Simply Underutilized?

H.R.H. Prince El Hassan BIN TALAL 223

1. The Role of the International Legal System 225
2. Understanding Conflict as Failures of Social Justice 228

| | | |
|----|---|-----|
| 3. | Prepare for the Expected | 229 |
| 4. | Discussions about Indigenised Transitional Justice..... | 230 |
| 5. | Brainstorming Alternate Approaches | 230 |

An Assessment on the Use of Armed Conflict Data

| | | |
|----|--|-----|
| | Mark S. ELLIS..... | 233 |
| 1. | Introduction | 233 |
| 2. | Overview of Armed Conflict Data | 234 |
| 3. | Definitions of ‘Armed Conflict’ and ‘Victims’ | 235 |
| | 3.1. The War Report 2012 | 235 |
| | 3.2. The Economist..... | 236 |
| | 3.3. The Pursuit of International Criminal Justice | 236 |
| | 3.4. UCDP/PRIO Conflict Data | 237 |
| 4. | Analysis..... | 238 |
| | 4.1. Differences in Statistical Data..... | 238 |
| | 4.1.1. Comparison of The War Report 2012 with UCDP/PRIO Conflict Data (2012)..... | 238 |
| | 4.1.2. Comparing The Pursuit of International Criminal Justice with UCDP/PRIO Conflict Data (1946–2008) | 240 |
| | 4.1.3. UCDP/PRIO Conflict Data (2009–2011)..... | 241 |
| | 4.2. Differences in Statistical Data on Victims | 242 |
| | 4.2.1. 2012..... | 243 |
| | 4.2.2. 1989–2008 | 243 |
| | 4.2.3. 1946–2008 | 243 |
| 5. | Conclusions..... | 244 |
| | 5.1. Armed Conflicts | 244 |
| | 5.2. Victims | 246 |
| 6. | Closing Thoughts..... | 246 |
| | Annex I | 248 |
| | Annex II..... | 250 |
| | Annex III..... | 251 |

Outsourcing War: Private Military and Security Companies under International Humanitarian Law

| | | |
|----|--|-----|
| | Yannic KÖRTGEN..... | 253 |
| 1. | Introduction | 253 |
| 2. | Legal Status..... | 255 |
| | 2.1. PMSCs and Mercenaries | 255 |
| | 2.2. PMSCs and the Status of Civilians and Combatants..... | 257 |
| | 2.3. PMSCs and ‘Direct Participation in Hostilities’ | 260 |
| | 2.4. Responsibility & Accountability..... | 265 |

| | | |
|--------|--|-----|
| 3. | Finding a Solution | 268 |
| 3.1. | Options for Regulation | 268 |
| 3.2. | Perspectives | 276 |
| 3.2.1. | Direct Participation in Hostilities | 276 |
| 3.2.2. | Drawing a Frame for State Responsibility | 276 |
| 3.2.3. | Creating a System of Oversight and Enforcement | 277 |
| 4. | Conclusion | 278 |

Old and New Terrorist Threats: What Form will they Take and How will States Respond?

| | | |
|------|---|-----|
| | Ben SAUL | 281 |
| 1. | Old and New Terrorism | 281 |
| 2. | The Puzzle of Global Counter-Terrorism | 282 |
| 3. | Evolving and Future State Responses | 283 |
| 4. | Military Responses – Law on the Use of Force | 284 |
| 5. | Military Responses – Law of Armed Conflict | 286 |
| 6. | Criminal Law Responses | 289 |
| 6.1. | Sectoral Counter-Terrorism Treaties | 290 |
| 6.2. | Security Council Resolution 1373 and the Definition of Terrorism | 291 |
| 6.3. | UN Draft Comprehensive Convention | 293 |
| 6.4. | Separation of Terrorism from Armed Conflict, Liberation Violence, and State Violence | 295 |
| 6.5. | Conflation of Insurgency, Armed Conflict, and Terrorism in National Law | 297 |
| 6.6. | Differentiation of Democratic Protest | 298 |
| 6.7. | Preventive Offences | 299 |
| 6.8. | Membership Offences and Group Proscription | 300 |
| 7. | Criminal Procedure | 302 |
| 8. | Other Impacts on Human Rights | 304 |
| 9. | Conclusion: Persisting Legal Challenges in Countering Terrorism | 305 |

The Future of Global Transnational Criminality and International Criminal Justice

| | | |
|----|---|-----|
| | Robert CRYER | 309 |
| 1. | Introduction | 309 |
| 2. | What is Transnational Criminality and Is there an International Criminal Justice System? | 311 |
| 3. | Torture and the <i>Habré</i> Case: Values (Probably) Reaffirmed | 314 |
| 4. | Drug Trafficking: A Broken or Ever Absent Consensus? | 317 |

| | | |
|------|--|-----|
| 5. | Terrorism, Transnational Criminal Law, International Criminal Law, and the International Criminal Justice System | 318 |
| 5.1. | Terrorism as a Transnational Crime | 318 |
| 5.2. | Terrorism by Another Name | 320 |
| 5.3. | A Separate Crime of Terrorism? | 321 |
| 6. | Transnational Crimes and the Globalised World | 325 |

Rethinking Multilateral Responses to Organized Crime

| | |
|-------------------------------------|-----|
| Mark SHAW and Walter KEMP | 327 |
|-------------------------------------|-----|

| | | |
|-------|--|-----|
| 1. | Introduction | 327 |
| 2. | Understanding the Impact | 328 |
| 3. | Playing Catch-up | 330 |
| 4. | Seeing Clearly | 332 |
| 5. | Proactive rather than Reactive | 334 |
| 6. | Clarifying the Drug Policy Debate | 337 |
| 7. | Organised Crime as a Development Issue | 338 |
| 8. | Responding to Organized Crime on the Ground | 339 |
| 9. | Regional Building Blocks for Global Cooperation | 341 |
| 10. | Towards a System Fit for Purpose? | 343 |
| 11. | Five Steps to Building a New System | 345 |
| 11.1. | More Leadership, less Co-ordination: A UN Office for Justice . . . | 345 |
| 11.2. | Remove the Confusion in Current Approaches by Separating out Health and Justice Issues | 346 |
| 11.3. | Rethink the Implementation of the UN Convention against Transnational Organized Crime | 346 |
| 11.4. | Invest in Analytical Capacity within the UN System on Organized Crime and Include Organized Crime Goals and Indicators in the SDGs | 347 |
| 11.5. | A Better Global System Means Regional Enforcement | 348 |

Preventing Genocide and Crimes against Humanity: Reflection on Future Challenges and Opportunities

| | |
|-----------------------|-----|
| Adama DIENG | 349 |
|-----------------------|-----|

| | | |
|----|--|-----|
| 1. | Introduction | 349 |
| 2. | International Criminal Justice as a Preventive and Punishment Element | 350 |
| 3. | The United Nations and the Prevention of Atrocity Crimes | 351 |
| 4. | Protection of Human Rights as an Element of the Prevention of Genocide and Other Atrocity Crimes | 354 |
| 5. | Future Challenges and Opportunities | 355 |
| 6. | Final Remarks | 357 |

Evolving Advocacy: Suggestions for the Next Phase of Civil Society Support of International Criminal Justice
 Christopher “Kip” HALE 359

1. Introduction 359
2. Persuasive Advocacy on the Benefits of ICJ..... 360
3. Informed Targeting of ICJ Resources..... 363
4. More Effective, Broader, and More Responsible Education on ICJ 371

Appendix: Complementarity Capacity Chart..... 374

Breaking the Rules: Kenya, the ICC, and the Twelfth Assembly of States Parties Session
 Elizabeth EVENSON 437

1. Introduction 437
2. Africa, the ICC, and the ASP..... 441
3. Landscape Leading up to ASP12..... 443
 - 3.1. AU Extraordinary Summit on the ICC..... 443
 - 3.2. Security Council Vote on Article 16 Request 446
 - 3.3. Introduction of Rules Amendments on Presence at Trial 447
 - 3.4. Bilateral Political Interests..... 451
4. Developments at ASP12 451
 - 4.1. Special AU Segment 452
 - 4.2. New Rule 134 quater..... 453
5. Assessing ASP12..... 455
6. Conclusion 456

PART III.
 POPULATION, RESOURCES, AND ENVIRONMENTAL CHALLENGES

Global Pluralism: The Next Stage in Global Governance, Human Rights, and International Law
 Errol P. MENDES 463

Decentralized Democracy in Political Reconstruction
 Roger B. MYERSON 479

1. Introduction 479
2. Effective Democratic Competition Requires more than Just Elections 480
3. Advantages of Democratic Decentralization 482
4. Forces against Decentralization 482
5. Problems of Separatism and Ethnic Violence 483

| | | |
|----|--|-----|
| 6. | Establishing a Stable Federal Division of Powers | 484 |
| 7. | Conclusions | 485 |

Population, Resources and Environmental Challenges Between Now and 2050, and Their World Impacts

| | | |
|----|--|-----|
| | Martin LEES | 487 |
| 1. | Introduction | 487 |
| 2. | The Emerging Global Challenges of the 21 st Century | 488 |
| 3. | The Prospects and Consequences of Demographic Change | 490 |
| | 3.1. The Size of the World Population | 490 |
| | 3.2. The Distribution of World Population | 491 |
| | 3.3. Rapid Urbanization | 492 |
| | 3.4. The Changing Age-Structure of Population | 493 |
| | 3.5. What should be the Priorities for Policy and Action? | 493 |
| 4. | Social Challenges | 494 |
| 5. | Economic Challenges | 495 |
| 6. | Environmental Challenges | 497 |
| | 6.1. Ecological Degradation | 497 |
| | 6.2. Energy and Resources | 498 |
| | 6.3. Water | 499 |
| 7. | The Realities of Climate Change | 500 |
| 8. | New Challenges to Justice, Human Rights and Global Governance in Facing up to Climate Change | 503 |
| | 8.1. Issues of Justice and Human Rights in the Climate Negotiations. | 503 |
| | 8.2. Issues of Governance Arising in the Negotiations | 505 |
| | 8.3. The Influence of Corporate and Financial Interests on the Intergovernmental Climate Negotiations | 507 |
| 9. | The Consequences of Emerging Global Challenges for World Order | 510 |
| | 9.1. A Business-as-Usual Scenario | 510 |
| | 9.2. Choosing a Sustainable, Equitable, and Inclusive Future | 512 |

The Relationship of Climate Change to Global Security

| | | |
|----|---|-----|
| | Donald J. WUEBBLES, Aman CHITKARA, and Clay MATHENY | 515 |
| 1. | Introduction | 515 |
| 2. | Our Changing Climate | 516 |
| 3. | Projections of Climate Change | 522 |
| 4. | Climate and World Security | 525 |
| | 4.1. Natural Disasters | 527 |
| | 4.2. Lack of Freshwater Resources | 529 |
| | 4.3. Food Security | 532 |
| | 4.4. Migration | 533 |

| | | |
|------|---|-----|
| 5. | Security and Criminal Justice | 534 |
| 5.1. | Crime and Climate Change..... | 534 |
| 6. | Natural Disasters and Crime | 537 |
| 7. | Climate Change and Crime – An Equity Issue..... | 540 |
| 8. | Climate Change Induced Migration and Crime..... | 541 |
| 9. | Conclusions..... | 544 |

Population, Resources, and the Environment: Challenges Ahead

| | | |
|--------|--|-----|
| | Ved P. NANDA | 545 |
| 1. | Introduction | 545 |
| 2. | The Nature and Scope of the Challenge | 547 |
| 3. | Programme of Action of the 1994 International Conference on Population and Development..... | 549 |
| 4. | The Progress Made since 1994 | 552 |
| 5. | Population Policies of Selected States..... | 557 |
| 5.1. | Physical Coercive Measures..... | 558 |
| 5.1.1. | India | 558 |
| 5.1.2. | China | 559 |
| 5.1.3. | Romania..... | 561 |
| 5.2. | Non-Physical Coercive Measures..... | 562 |
| 5.3. | Human Rights Implications of Coercive Policies | 562 |
| 6. | Conclusion | 564 |

PART IV.

THE ROLE OF IGOs, NGOs AND GLOBAL GOVERNANCE

**The Role of International Non-Governmental Organizations,
Globalization, and International Criminal Law**

| | | |
|----|--|-----|
| | Andrew CLAPHAM | 567 |
| | Inter-Governmental Organisations and International Non-Governmental Organizations in the Era of Globalization, and How They can Protect Human Rights and Support International Criminal Justice | |
| | Stephen MATHIAS | 575 |
| 1. | Introduction | 575 |
| 2. | Inter-Governmental and Non-Governmental Organizations: Human Rights | 576 |
| 3. | Inter-Governmental and Non-Governmental Organizations: International Criminal Justice..... | 581 |
| 4. | Conclusions..... | 586 |

The Role of Non-Governmental Organizations in Advancing International Criminal Justice

Charles C. JALLOH 589

1. Introduction 589
2. NGOs as Active Participants in Global Governance 593
 - 2.1. NGOs as Active Participants in the United Nations System 593
 - 2.2. NGOs in Regional Organizations and Human Rights Advocacy.. 595
3. NGOs in International Criminal Justice 598
 - 3.1. The Existence of NGOs before World War I. 598
 - 3.2. The Existence of NGOs during and after World War I. 599
 - 3.3. The Role of NGOs in Advocating for Ad Hoc International Tribunals. 601
 - 3.4. The Role of NGOs in the Processes of the International Criminal Court 603
4. The Various Roles of NGOs in International Criminal Justice 605
 - 4.1. NGOs and their Impact on Prosecutor Offices in International Courts 605
 - 4.2. NGO Influence on Rights of Victims. 610
 - 4.3. NGOs as Supplements to States 612
 - 4.4. NGOs as Advocates for Global Cooperation 614
5. Some Criticisms of NGOs: Issues of Transparency, Accountability, and Legitimacy. 614
6. Conclusion 616

The Fate of R2P in the Age of Retrenchment

David SCHEFFER 617

1. Using Military Force when Our Core Interests are at Stake or Our People are Threatened 623
2. Shifting Our Counter-Terrorism Strategy by More Effectively Partnering with Countries where Terrorist Networks Seek a Foothold. 623
3. Continuing to Strengthen and Enforce International Order through Evolving our Institutions, such as NATO and the United Nations 624
4. Supporting Democracy and Human Rights around the Globe, Not Only as a Matter of Idealism, But One of National Security 625

Global Constitutionalism and Global Governance: Towards a UN-Driven Global Constitutional Governance Model

Giuliana ZICCARDI CAPALDO 629

1. Introduction: An Open and Participative Constitutional Reform Process Launched by the UN. 629

| | | |
|------|--|-----|
| 2. | The Process of Constitutional Change and Its Impact on Institutions: Strengthening the Rule of Law and Legality..... | 634 |
| 2.1. | The ICJ's New Approach to Human Rights Protection..... | 635 |
| 2.2. | Maintenance of Peace and Court-Council Functional Parallelism | 639 |
| 3. | The Principle of Separation of Powers and the New Concept of Complementarity Between UN Organs..... | 643 |
| 3.1. | Overcoming Veto Rule..... | 645 |
| 4. | An Embryonic System of Checks and Balances: Judicial Review of Global and National Governance Bodies..... | 647 |
| 4.1. | ICJ Control over the Activities of UN Organs | 647 |
| 4.2. | Judicial Review over SC Decisions by Regional and National Courts | 652 |
| 4.3. | The ICJ's Control over State Organs..... | 654 |
| 5. | The Crucial Choices to be Made in the Development of Global Constitutional Governance | 655 |
| 6. | Conclusion | 660 |

Implementation of the Right to Development and International Criminal Justice

| | | |
|----|---|-----|
| | Ahmed FATHI SOROUR..... | 663 |
| 1. | Introduction | 663 |
| 2. | Content of the Right to Development..... | 664 |
| 3. | Obligations Derived from the Right to Development | 665 |
| 4. | Implementation of the Right to Development..... | 667 |
| 5. | Implementation of the Right to Development and International Criminal Justice | 668 |
| 6. | Effects of Challenges of Development in International Criminal Justice..... | 669 |
| 7. | Effects of Promotion of International Criminal Justice of Development..... | 670 |
| 8. | Conclusions..... | 671 |

CONCLUDING REMARKS AND APPENDICES

Concluding Remarks: Globalization, Values, and World Order

| | | |
|------|---|-----|
| | Shahram DANA | 675 |
| 1. | Overview..... | 675 |
| 2. | Preliminary Themes and their intersection with Globalizing Forces... .. | 678 |
| 2.1. | Globalization and the Traditional World Order | 678 |
| 2.2. | Globalization and Values..... | 681 |

| | |
|---|---------|
| 2.3. Human Rights, Atrocity Crimes, and Failure of Existing Institutions | 684 |
| 3. Crisis and the Ability of States and the International Legal Order to Govern | 689 |
| 3.1. State Sovereignty and National Security Issues | 689 |
| 3.1.1. Globalizing Forces, International Order, and Separates Movements | 691 |
| 3.1.2. The Impact of Globalizing Forces on State Stability | 693 |
| 3.2. Population Growth, Poverty and Food Security | 696 |
| 3.3. Environmental Sustainability | 698 |
| 3.4. The Globalization of Economic Markets | 701 |
| 3.5. The Impact of Changing Priorities on International and National Decision-Making Processes | 703 |
| 4. Non-State Actors in National and International Arenas | 704 |
| 4.1. Non-State Actors as Civil Society | 704 |
| 4.2. Non-State Actors in Global and Civil Conflict | 705 |
| 4.3. The Role of Transnational or Multinational Corporations | 708 |
| 4.4. Non-State Actors in Transnational Criminal Activity | 709 |
| About ISISC | 711 |
| Global Issues and Their Impact on the Future of Human Rights and International Criminal Justice: List of Confirmed Participants & Speakers . . | 713 |
| Global Issues and Their Impact on the Future of Human Rights and International Criminal Justice: Program | 719 |

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EXECUTIVE SUMMARY

M. CHERIF BASSIOUNI

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 others it was rapid and even exponential in its growth – as has been the case in the expansionist era of globalization that developed since the 1960s. 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 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 violative 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 such 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, which 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 requiring 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 principal actors benefit from impunity while their harmful conduct and its consequences negatively impacts 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 among 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 good will 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 are the environmental consequences of our societies' policies and practices on 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 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.

18. All this leads to the following conclusions, which, along with other topics listed in the Conference program, have been discussed. They are:

- 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;
- as the cumulative impact of global factors on individuals and societies becomes more pervasive and less controllable, new challenges arise, 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 the world order;

- international and national processes are increasingly unable to cope with the emerging needs and demands of an ever more dependent international community of peoples of the world, and national boundaries notwithstanding, are bound and impacted by global factors;
- 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;
- 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;
- 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;
- the presently perceived countervailing force is international civil society and some concerned states. 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;
- 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. So much more remains to be done.