

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

M. Cherif BASSIOUNI
(ed.)



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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

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EXECUTIVE SUMMARY

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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.