



1-1-2010

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M. Cherif Bassiouni

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### Recommended Citation

M. Cherif Bassiouni, *Challenges Facing a Rule-of-Law Oriented World Order*, 8 SANTA CLARA J. INT'L L. 1 (2010).  
Available at: <http://digitalcommons.law.scu.edu/scujil/vol8/iss1/1>

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# **Challenges Facing a Rule-of-Law-Oriented World Order**

M. Cherif Bassiouni\*

The historic record of some forty or so civilizations over the past 7,000 years has evidenced the existence of different types of national legal systems. Seldom, however, have these legal systems evidenced the supremacy of the “Rule of Law” over those who are in power; and seldom have these legal systems upheld justice and fairness for all in contrast to the interests of those in power. Instead, these legal systems have mostly evidenced how the law can be used to achieve or preserve power and wealth for the few to the exclusion of the many. Nevertheless, these legal systems have provided some justice and they have gradually solidified the foundations of the “Rule of Law.” In some modern societies the evolution of law and legal systems has prevailed over considerations of power and wealth. At the inter-state level, powerful and wealthy states throughout history have almost invariably imposed their will over others. Even in the post-modern era of globalization when international law’s goals include the pursuit of peace, justice, and human rights, exceptionalism of the powerful and wealthy states prevails over others. Nevertheless, developments in the international protection of human rights and international criminal justice are indicative of the progress which has been

\* Distinguished Research Professor of Law Emeritus; President Emeritus, International Human Rights Law Institute, DePaul University, Chicago, Illinois; President, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy. This essay is adapted from a speech given by Professor Bassiouni on March 13, 2009 in Santa Clara, California, USA at a symposium addressing the future of international criminal law. The symposium was hosted by Santa Clara University School of Law; Santa Clara Journal of International Law; Center for Global Law & Policy at Santa Clara University; Markkula Center for Applied Ethics at Santa Clara University, and The American Society of International Law.

made in the past half century. But they also indicate how much more needs to be done. More importantly, responsibility has not permeated sovereignty.

The 1648 Westphalian model of international relations, whose imprint is still felt in contemporary times, overturned the previous medieval hierarchical order founded on force by positing principles of Christian morality expected to be voluntarily complied with by all Christian civilized states. The progress made then was that Catholic and Protestant states accepted, or at least tolerated, one another: the Treaty of Westphalia having ended “The Hundred Year War” between these two Christian denominations. That world order system was closed to other states which were not part of that small European circle.

The Westphalian model essentially achieved a decentralized semi-anarchical order based on the abstraction of national sovereignty rights. It was a model based on voluntary compliance, which was devoid of compliance-inducement mechanisms and enforcement modalities. That was nothing less than unbridled unilateralism, which is ultimately to the benefit of the stronger states and to the detriment of the weaker ones.

How that system evolved to become the foundation of the contemporary world order system is nothing short of amazing. Some of the characteristics of that model survived. This includes the principles of state sovereignty and the presumed co-equal status of sovereign states, which have become the foundation of the United Nations’ system.

The Westphalian model reflects the Hobbesian state of nature governing international relations whereby each state pursues its own interests, defines its own goals, follows its own path, relies on its own means, and is limited only by its own considerations of expediency and whatever it deems prudent to achieve its goals. This includes the ability of a state to free itself from moral/ethical considerations even when these considerations represent those of its own society. Thus, no moral/ethical limitations really restrain states in their relations with one another, except for that to which they voluntarily wish to submit themselves. Thus, states are only left with self-restraining limitations arising out of countervailing deterring factors, which arise either out of collective security measures or the threat of another state’s forceful unilateral intervention. More significantly, a state could opt out of its voluntarily accepted obligations without any other meaningful consequences than what countervailing forces could exercise upon it as a deterrent. Thus, the Westphalian/Hobbesian state is self-controlling because it is subject to its own considerations of enlightenment, expediency, and prudence. Notwithstanding

the failure of this system to achieve an international order based on peace, justice and the protection of human rights it has managed to survive to date with some positive modifications described below.

Contrary to political realists, philosophers from Aristotle to Rousseau consider morality/ethics as the foundation of states' responsible interactions. Their differing views notwithstanding, many philosophers and political scientists have since then considered responsible morality or ethical considerations as a component of state decision-making.

Gradually, notions of collective security and human rights made their inroads into the international legal order. Kantian philosophy and its methodology of pure reason, based on the metaphysical element of ethics, "Categorical Imperative" morality, have influenced many post-1800s philosophers and political scientists. Because of its value-based and value-oriented goals, the Kantian view has influenced modern international law as evidenced by the contemporary emphasis on human rights, which is based on universal values. But, this paradigm has yet to be translated into binding and enforceable norms of international law that would compel the pursuit of peace, justice and human rights irrespective of the power and enrichment imperatives pursued by those states that have one or the other, over other states that have neither the one nor the other.

Nevertheless, modern political realism reflects the disjunctive and contradictory forces which exist in international intercourse while rejecting the proposition that binding norms could be established to restrain states in their conduct other than by their voluntary acceptance, based on self-interest. Political realists see the international system as essentially an arena in which a Hobbesian state of nature controls the behavior of states without externally imposed limitations. They reject the Kantian view and similar ones which postulate universal values of peace, justice and human rights as the basis for limiting the unilateral powers of states whose actions contradict these values.

The unilateralism of the Five Permanent Members of the United Nations Security Council who have veto power over collective security and sanctions decisions has time and again shown the aleatory nature of that system. Progress has been made in the area of collective security through the United Nations' Security Council system. Even though, occasional practices of double-standards and *de facto* exceptionalism have permitted the mighty to violate obligations that are otherwise binding upon them. Modern institutions of collective security like the Security Council and NATO, have been selective in the situations they address, inconsistent in how they address essentially similar situations, and only

occasionally persuasive as to their reasons of what can best be described as *ad hoc*. But of greater concern is their failure to be fully responsive to the needs of collective and human security.

Modern international law is still based on the Westphalian fiction of the equality of sovereign states which the United Nations system reinforces. Inter-state relations are still largely based on the voluntary acceptance of international obligations with limited external obligations and even more limited external enforcement. Intervention in the domestic affairs of any state is prohibited except when ordained by the United Nations collective security system, as determined on an *ad hoc* basis by the Security Council. This paradigm implicitly accepts the inequities of power-relations whereby the stronger can impose their will on the weaker. Such a model is a contradiction in terms with an international legal order based on substantive legitimacy and procedural legality which brooks no double standards. Yet, *de facto* exceptionalism and the double-standard for the mighty states exist, and they have provided a window of opportunity, with impunity, for the commission of international crimes and the violations of internationally protected human rights. Moreover, the normative and enforcement gaps which exist with respect to the protection of certain international social, economic, political and cultural interests have enhanced the opportunities for many states to commit human rights violations, and other forms of harmful conduct, against their own people and against other peoples, with scant negative consequences.

The assumptions of political realists and, more particularly, of the school of *realpolitik*, are that relations between states are in a constant state of flux, because they reflect ongoing changes in power and interest relations. However, in the age of globalization where so much interdependence exists between states and also between peoples of different states, multilateral interests have gradually asserted themselves over and above certain manifestations of unilateralism. The analogy here is to the giant Gulliver who represents the unbridled power of political realism at its best. Gulliver in the age of globalization becomes tied down by many strings which represent the commonly-shared values and the common or collective interests of the international community. Admittedly however, the giant of unilateralism, with all that it comports of *de facto* exceptionalism, is far from being tamed.

The age of globalization has, however, increased the incentives for the giant of unilateralism to voluntarily accept some limitations on the exercise of power by those states that possess it. But, globalization is so far seen as involving

communications, commerce, and finance; and only in part does it invoke collective security. It has to fully accept the values and goals of fair and effective international protection of human rights and international criminal justice. Moreover, the goal of social and economic justice for all is not yet to be a part of this new international equation. More importantly, this equation still does not include the collective “Responsibility to Protect.” Globalization has not ripened into an international social contract a la Rousseau, as it only reflects a portion of the commonly-shared values and interests of the international community.

Rules governing inter-state and international relations must be flexible, because they are open to interpretation by those states which are subject to them, and because there are limits to the effectiveness of multilateralism. International rules are also likely to respond or give way to countervailing considerations of different state interests and to the imperatives of power-relations which are ever present. Without flexibility, states would not “buy into” a system that hamstringing them into compliance with collective rules without having the countervailing benefits of an international social contract a la Rousseau. But the basic *quid pro quo* that exists in a national community does not have the same counterpart in the international community, due substantially to the fact that the imbalance of power and wealth among the members of the international community can hardly be redressed.

The unilateral quest for power and accumulation of wealth continues to be among the goals pursued by states. A new world order seeking to achieve peace, justice, and the protection of human rights on an equal basis, must also contain an obligation of wealth-sharing, transfer of technology, and know-how from developed to developing nations. But that is far from being accepted by the powerful and wealthy states.

Experience demonstrates that to enunciate human rights without concomitant enforceable remedies makes them pyrrhic pronouncements. Human rights without remedies and without enforcement are empty promises. The expectation of putting an end to impunity by means of effective complementary international/national enforcement is still very much a work in progress.

However morally compelling arguments about individual human rights and their enforcement are, it is still necessary to offer states an inducement to “buy-into” the recognition of such rights and their enforcement. The need for such an inducement arises because outcomes deriving from an international legal system based on the “rule of law” are likely to be detrimental to some individual and collective state interests. The states’ “buy-in” argument must necessarily include considerations for corresponding state interests. The argument supporting this

proposition is that the collective protection of human rights enhances peace and security, reduces domestic, regional and world disruptions, and is ultimately more economical than having to engage in military humanitarian interventions and providing for the costs of nation-building after conflicts.

Reduced to its basics, what still motivates states in their relations since time immemorial, is not enduring values as those that bind human beings, but interests whose significance and timeliness are in a relatively constant state of flux. Thus, the contemporary dominant feature of inter-state relations is still characterized by state interests. Nevertheless, it is evident from the evolution of inter-state and international relations that the international community deems certain values to be part of its commonly shared values and that these values require effective protection.

This is at the base of the progress achieved in the post-modern era, which is reflected in the many changes which have occurred in the international legal system. The emergence of multilateral decision-making processes which limit state sovereignty, as well as the recognition given to human rights and international criminal justice, evidence the positive changes that have occurred in the post-WWII period. These changes are reflected in many treaties on human rights, the growing influence of treaty-bodies on states' unilateral actions in connection with human rights enforcement, and the emergence of international criminal justice. If nothing else, these developments have consolidated the values underlying the international legal system, and enhanced the coalescence of the value-oriented goals of world order based on respect for human rights; the protection of world peace and security; and the reduction of impunity of serious transgressions of international criminal law.

Since Westphalia, various models of international governance have hypothesized an international community bound by international legal obligations flowing from commonly-shared values and interests. One historic model that could be applied to the contemporary international system is that of the *civitas maxima* derived from Roman law. This proposed model is based on certain commonly-shared values and interests, which recognize the need to pursue certain value-oriented goals such as peace, justice and the protection of human rights on an equal basis.

The Roman law's *civitas maxima* reflected the existence of a body politic that included the different nations and tribes comprising the Empire, though at that time not on the same footing as Rome. But it was also a reflection of the collective

belief in the existence of an intangible whole which is greater than its individual parts. The Roman *civitas maxima* engendered a collective social bond from which emanated duties that transcended the interests of the singular unit of the Empire. The moral or ethical ligament and the pragmatic and experiential bonds which had developed at the time coalesced in the precepts of the *civitas maxima*. From that whole, legal obligations arose that the community as a whole had to enforce for the benefit of all. Admittedly this concept was applicable only to Rome and to Romans, as well as to those peoples to whom Rome had bestowed such rights. Thus, it lacked the universality which a contemporary *civitas maxima* should have.

A contemporary *civitas maxima* model should include self-imposed and externally-imposed limitations which are collectively enforced when they are transgressed. However, a process must guide such a model, lest it turn into a form of a collective Hobbesian state of nature where the powerful and wealthy nations dominate the community's collective processes and arrogate to themselves the prerogatives of exceptionalism. The proposed contemporary *civitas maxima* must therefore be subject to an international "Rule of Law," which includes certain binding legal norms that transcend domestic norms and follow certain international processes applicable to state and to non-state actors, and which should be subject to international enforcement.

More importantly, the contemporary *civitas maxima* must be founded on substantive legitimacy and procedural legality. These two conditions of substantive legitimacy and procedural legality should be inspired by what Aristotle referred to as the "right of reason," which includes commonly shared ethical concepts. Moreover, they should be embodied in enforceable norms without *de facto* exceptionalism.

Legitimacy is the "right reason" premised on existing positive norms, though not excluding the application of higher norms deriving in part from the commonly-shared values of the times, and enduring values represented in "General Principles of Law." Legality is reflected in processes based on the "Rule of Law." It reduces the latitude of relativism and *de facto* exceptionalism which undermine the certainty and equal application of the law to all concerned, while enhancing the predictability and consistency of outcomes in inter-state relations, particularly as they impact human rights. Without legitimacy and legality in state and collective actions, the international legal system has no predictable and consistent outcomes; worse yet, it has little chance of enhancing states' voluntary compliance.

Substantive legitimacy and procedural legality should therefore become the foundation of the new international legal order. The ultimate utilitarian reward for

compliance with the norms and processes of an international legal system based on legitimacy and legality would surely achieve a more enduring peace among nations and enhance justice and human rights for the peoples of the world.

This approach would also become the foundation of the most recent international concept presently advocated, namely the “responsibility to protect.” At the very least this must mean a collective duty to prevent, control, and repress the international crimes of: aggression; genocide; crimes against humanity; war crimes; torture; slavery and slave-related practices; trafficking in human beings for sexual and other forms of exploitation; and terror-violence; whether committed by state and non-state actors, and without distinctions or double-standards.

This emerging concept is nothing more than the flip side of sovereignty, just as obligations are the flip side of rights.

The identification, application, and enforcement of commonly-shared values and interests by the international legal system presuppose the existence of an international community that can postulate certain universal objects and moral imperatives in turn. Such a process requires the international community to develop prescriptions and proscriptions of certain actions deemed harmful to peace and deleterious to justice and human rights. It further necessitates other inducement-compliance modalities that can achieve the goals of preventive control and suppression.

The premise for the imposition of limits on collective and unilateral state action (and the establishment of cooperation obligations between states) is pursuit of the common good and attainment of the common interest. This obviously pragmatic approach is not, however, devoid of moral/ethical content. On the contrary, it is essentially based on a moral/ethical content, which is, however, converted into a social/pragmatic underpinning for international regulation and inter-state cooperation, up to and including collective preventive and coercive enforcement measures.

Common experience teaches, based on the lessons of justified pragmatic considerations, that enlightened self-interest and prudent judgment require the imposition of limits on unilateral state action, and impel collective state cooperation as well as action for the common interest and for the common good. The acceptance of this postulate is not dependent on the existence or even the desirability of a world government; in fact it is the best substitute for such an option.

The recognition of the individual as a subject of law, and the establishment of

treaty rights and enforceable remedies inuring to the benefit of the individual, who is also granted standing to seek the enforcement of these rights before national and international administrative and judicial institutions, necessarily implies that the international community as a whole has a responsibility to protect certain social, economic, and cultural human rights.

The expectations of peace, justice, and human rights have gradually been embodied in peremptory norms of international law which by reference to Roman law are encompassed within the contemporary meaning of *jus cogens*. Aggression, genocide, crimes against humanity, war crimes, torture, slavery and slave-related practices, human trafficking for sexual and other forms of human exploitation, and terror-violence are no longer the prerogatives of states, nor are they permissible by non-state actors. They have become international crimes applicable to state and non-state actors from which not even heads of state can claim immunity. But the issues of equality in application and consistency in enforcement are yet to be attained. The present state of occasional and selective enforcement is far from achieving their intended goals.

Research undertaken by a number of experts under this writer's direction for the past few years has disclosed that during the period 1948-2008, the world community has witnessed some 310 conflicts, irrespective of how they have been legally characterized (i.e. international, non-international and purely domestic conflicts). The estimated number of deaths, let alone injuries and other human and material harms, resulting from these conflicts ranges from a minimum of 92 million to a maximum of 101 million persons. The low end of the estimate represents more than twice the combined number of the victims of WWI and WWII. Yet with only a few exceptions during the course of this long strand of human tragedies occurring in every region of the world, has the international duty to prevent and protect been effectively invoked and acted upon. Only since the establishment of the ICTY, ICTR, and particularly the ICC, has there been evidence of a duty to provide for international criminal accountability. In very few instances has the international collective security system of the Security Council been effectively invoked to protect individuals and collectivities from death, human suffering, and other human depredations committed by states. In most of these cases, an injudicious political realism has prevailed, even in the face of ample early warnings, as well as, in the face of unfolding stark realities.

The prevention and control of "crimes of state" and other forms of "mass atrocities," irrespective of whether they are committed by state or non-state actors, should be a priority in the agenda for world order in this era of globalization. But it

must expand beyond the concerns for direct human harm, and encompass other social, economic, political and cultural harms that ultimately impact the human condition. In this respect, the protection of the human environment and natural resources should be paramount. A variety of other global issues must also be added to this short list. They include the collective responsibility to protect the environment, as well as equalize opportunities for economic development by diverse societies to fight hunger, poverty and disease.

This is the challenge that the international community faces for the sake of its survival as a civilized community, let alone if it is to survive at all. Given the state of human rights depredations and the other environmental and social harms that states produce, these dangers are all too self-evident. Yet, the actualization of these goals by the various world actors is limited.

Today's *de facto* exceptionalism, double standards, imposition of unilateralism by force, and other coercive means by the powerful and wealthy states undermine a more humane and collectivistic world order based on social solidarity and collective inter-dependence.

A statement from the Talmud says: "the world rests on three pillars. It rests on truth, on justice and on peace." And a commentary adds that the three are truly only one, because in order to have justice you need truth, and if you have truth and justice, then you have peace. This statement's wisdom is self-evident as is its holistic conception of universal values. But it is not devoid of a pragmatic message. If you have no justice, then you have no peace, and if so how can the world survive? If it survives for the benefit of the strong and to the detriment of the weak, for how long does it continue to survive, and at what cost to the whole of the international community? To translate these values into reality impels congruence between national and international values, and coherence between individual and collective state actions. This precedes the questions of the means and methods needed to achieve these goals which are so important to the survival of our human universe.