

AALS Annual Convention Plenary Panel: Impact of Globalization on Human Rights – Globalization and Human Rights

By Judge Patricia Wald

[Editors' Note: From the plenary panel that presented at this year's Association of American Law Schools Annual Convention on January 4, 2003, in Washington, DC. The remarks of the panelists appear exclusively in German Law Journal with the kind permission of the authors and the AALS.]

I am going to discuss three aspects of globalization that have an impact on human rights. The first is the greater knowledge around the world about what is happening in far away places that has resulted from the advances in communications technology and in the mobility, if not of masses of people, of influential people, including journalists.

The second aspect, which is closely associated with the first, is the greater concern in one part of the world with what is happening someplace else. That concern can stem from various bases. It can arise from a national self-interest resulting and probably does in a majority of cases because of from everyone's increased vulnerability to new military technologies and our dependence on critical resources in the rest of the world. It also can emanate, in some cases, from an expansion of our concepts of humanitarian law. There has been an explosion in the past fifty years of humanitarian doctrines and treaties that deal with the rights of human beings as such. This explosion has been accompanied by the emergence of a plethora of non-governmental organization (NGO) monitors scattered around the world which constantly bring pressure to "do something" about the atrocities brought into our living rooms, by on-the-scene reporters in faraway places.

The third aspect, which I am more tentative about, is a greater willingness on the part of the international community (or at least certain leaders in the international community) to intervene, whether militarily, legally or diplomatically, in the affairs of other countries.

Particularly with respect to the third of these developments, I think international law itself has had some influence. International law has graduated in the last half century from an orientation on the relationships between states to one that focuses on the protection of rights that inhere in individuals regardless of their nationality. Thus law not only responds but contributes to the other aspects of globalization. We have seen a steady expansion of the definition of basic human rights, which is reflected in compacts like the International Convention on Civil and Political Rights and the European Convention on Human Rights. The charters of the two ad hoc Tribunals, for Yugoslavia and Rwanda, as well as the Rome Statute, are also examples of this proliferation in human rights documents. Other illustrations include the Genocide Convention, the Torture Convention, the Refugee Convention, and the Convention Against Discrimination of Women.

Along these same lines, we have seen an increasing commonality in what a majority of countries say they are willing to recognize as basic human rights. One instance of this phenomenon is that the rights of women have become human rights in the course of the last half-century. This progress is especially apparent in the area of humanitarian law. In the Nuremberg prosecutions there were no separate prosecutions of the specific crimes committed against women in World War II, in spite of the fact that there was evidence of such crimes. Those crimes have since come to the forefront in the two ad hoc War Crimes Tribunals where entire prosecutions have been based upon the violations of the human rights of women. Admittedly, the commonality regarding the substance of human rights that I am suggesting is not universally observed. That fact does not, however, detract from the widespread recognition of the existence of such rights; even outlaw and rogue governments show some defensiveness in denying or explaining accusations of human rights violations.

A common, global recognition of human rights has also brought a greater expectation that human rights ought to be honored and this has been translated into a focus on enforcement mechanisms in the last half century, whether at the national, regional or international level. Nuremberg, albeit a military tribunal, forged a pathway for international courts to punish individual perpetrators for war crimes and crimes against humanity. Some called it victor's justice, but I think its legacy cannot be easily discounted. In the forty years following Nuremberg there were some national prosecutions of former Nazis, but it wasn't until the 1990's that the United Nations established two international criminal tribunals to prosecute and try war crimes, crimes against humanity and genocide, which arose out of the ethnic conflicts in Yugoslavia and Rwanda. But since then we have also seen varying forms of international, national and hybrid courts doing the same thing. These efforts have occurred in Sierra Leone, East Timor and Cambodia.

This emerging emphasis on enforcement has not only taken the shape of judicial tribunals. Different kinds of forums have been created by post-war transitional governments to address the atrocities of the former governments. Truth and reconciliation commissions, where the leaders and the followers of former governments who had been implicated in human rights violations were encouraged to confess and do community penance, were constituted, with South Africa being the leading example. But there have been others in Chile, El Salvador, Sierra Leone, even Bosnia and Serbia.

The doctrine of universal jurisdiction has taken hold in a few places as well. Universal jurisdiction allows third party countries to try suspected human rights violators when they can obtain physical jurisdiction over the suspect (sometimes even in absentia) when the prosecuting state itself, under traditional international law, would not have had the necessary jurisdictional ties to the crime or the suspect.

We have also seen the emergence, in the last fifty years, of many new regional courts, including the European Court of Human Rights, European Court of Justice, Inter-American Court of Human Rights, and African Commission on Human Rights. I am told that there are now 300 International judges presently at work. And the Secretary General of the United Nations has identified the consolidation and advancement of international law as the second highest priority of the U.N. for the Twenty-First Century.

One commentator on globalization (Peter Singer) has opined that, whether globalization ends up as a plus or minus for human rights depends on how we respond to the notion that we are living in one world. He sites the need for more effective bodies of global governance to establish meaningful global standards that can and will be enforced. To that I say, good luck! We have many of those rules now, but not always the political will to apply them. Space does not permit me to address the civil side of international law; there has also been a significant effort toward globalization of civil law and institutions like the American Law Institute are working on developing governing norms for that sphere, including international bankruptcies and civil procedure for the enforcement of foreign judgments. That phenomenon is worth mentioning in this context only because trading companies, which are so obviously concerned with international civil law, may ultimately become a source for exerting pressure on foreign governments to adhere to human rights, particularly as those private entities come to face boycotts from NGOs when they are complicit in human rights violations.

Still, I think it cannot be denied that the supply side of enforcement runs significantly below the demand side. The international courts can handle only a very small number of egregious human rights violators, usually in the aftermath of civil

war. The national courts are going to have to do the bulk of enforcement work if it is going to be done at all. And many if not most of those institutions are located in countries where the violations have taken place and are woefully inadequate for the task; often reluctant or downright unwilling to undertake it. At the substantive level, states must pass new laws defining human rights crimes. There is also a need to equip states to take up their role in the enforcement of human rights. To meet international standards states must: train investigators and prosecutors; reform court procedures; introduce new concepts of the rights of the accused and victims; provide for witness protection; and guarantee competent, appointed counsel. The new International Criminal Court is designed to spur these efforts at improving domestic human rights enforcement. The complementarity principle that underlies its jurisdictional competence provides that a country, whose national is the subject of charges before the ICC, can have the accused transferred back to the jurisdiction of that state for prosecution, unless it is shown that the state either lacks the will or the ability to provide a genuine, fair and impartial trial. The European union has similar incentives to make prospective members adhere to basic human rights guarantees. Thus, international courts play a pivotal role in setting standards for fair trials of the worst violators of human rights, and their interpretations are bound to influence national courts. But by their very nature the international courts will always have to be selective with respect to who they can prosecute and the bulk of the work enforcing human rights will fall to national governments, globalization or no.

I have touched upon some of the aspects of globalization that seem to militate toward greater human rights recognition and enforcement. There are negatives as well. Advanced technology means the ability to wage war more often from farther away. And more wars (I am told there are over 30 wars at any one time being fought on the face of the globe) inevitably means more human rights violations. A second negative impact globalization has had on human rights is the rise of non-state actors. Whereas NGOs have positively influenced human rights, it is also the case that many of the worst violators of human rights come from private groups, whether paramilitary or terrorist organizations. These groups are unrestrained by any kind of international rules or even international pressure. Make no mistake: mass terrorism violates human rights. And its atrocities are not confined to the battlefield. Instead, individuals carry the battlefield on their backs or in their bags.

Another impediment toward more effective mechanisms for the enforcement of human rights is the current, aggressive stance by the United States against the International Criminal Court, which includes not only its own repudiation of participation but a pervasive campaign to obtain agreements from Party and Non-Party States not to refer cases involving any U.S. nationals to the Court. This could result in a weaker Court and accordingly a weaker deterrent to would-be-tyrants. Up

until now (and this was made clear to me during my work with the ICTY) the U.S. contribution to international justice was strong financially and intellectually. In my experience, the legal and evidentiary contribution of the U.S., particularly through the use of our superior intelligence gathering capabilities and our trained personnel, was invaluable. The fact that the ICC will not get the benefit of this is most regrettable.

I would also like to suggest a few of the areas where law teachers can help make globalization work for human rights. The first one is obvious. Law school should teach and train students more intensively in international law and human rights. Most law schools now are doing this, even if belatedly. The students will almost certainly be globetrotters and global players and they need to be inculcated with the knowledge, both of where human rights now stand and where they should be headed. Students also need comparative law training. Our cherished procedures are not, I have found out, the only ones that can produce justice. The search for common fundamental tenets of fair treatment has to continue. Furthermore, facility in languages is vitally important to any international effort; I fear that our public education system is woefully insufficient in exposing our students to a number of the languages that they will need in whatever part they play in globalization.

Finally, as to the way international courts and truth commissions work: they are imperfect in many ways, but they are learning and they can still profit from constructive critiques. To name just a few areas, most of the growth in international law enforcement has been in criminal areas, compensation mechanisms for the victims of human rights violations are still very primitive. The International Criminal Court has made legal provision for some compensation scheme (even if we are not yet sure where the money will come from) but the implementation will be difficult, probably controversial. There are also potential problems *vis-à-vis* inconsistent interpretations of human rights law by international tribunals. There are tricky areas such as command responsibility, criminal enterprise, evidentiary rules, even the elements of rape. The decisions of these international courts need to be more accessible to law students and teachers and, conversely, attention also has to be paid to the many indigenous fora, which are going to be hearing human rights cases, where abuses as well as vindications can occur. As to this point, witness the Tribal Council in Pakistan that ordered gang rape as a punishment for a teenage girl. In another worrisome example, Rwanda has deputized 200,000 lay judges to speed up processing of war crimes. How they exercise their powers needs to be watched. The selection of International judges, candidly too often in the past dominated by regional and national politics, needs to be more transparent and based on individual merit. The recent elections of the ICC judges mark a vast improvement in this regard. Those judges ultimately selected need codes of conduct and ethical norms, particularly because these international courts are so independ-

ent, they are not part of a national system in which their decisions can either be reviewed by higher courts or exposed to the larger societal trends. These courts also need to have much better meshing of civil and common law systems of trial and they need to become beacons for national systems and human rights enforcement.

Anything you can do to help any of these efforts will, I think, help the impact of globalization on human rights to be a positive one.