ENFORCEMENT OF HUMAN RIGHTS CONVENTIONS UNDER INTERNATIONAL LAW AND ITS KEY CHALLENGES

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ABSTRACT

The key challenges in efficiently enforcing human rights conventions under international law are the central theme of this essay. Ergo, this essay 's sole intention is to highlight a slew of primary challenges faced by the international community in ensuring an effective enforcement of international human rights conventions under international law. Despite the fact the essay mentions two popular paradigms that have duly emerged under international law - Pinochet and Filartiga paradigms – which bring fresh international inventions in offering new ways of addressing human rights abuses, it never seeks, however, to offer any solution let alone practical solutions in tackling the problems of human rights abuses. This essay is essentially the improved or edited version of the earlier paper initially presented before law students at Simad University in Somalia. This essay also argues that the key challenges in effectively enforcing international human rights law ought to be given due recognition and top priority in its attempt to end the predicament of impunity plaguing the global population.

Keywords: human rights, Pinochet paradigm, individualistic. international law, International human rights conventions

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INTRODUCTION

The emergence of the doctrine of human rights is premised on the assumption that the state is in high need to duly protect and preserve human dignity. As far as the rights of human beings are to be duly honoured and ennobled, they are essentially inherent or inalienable rights that are duly bestowed upon all human beings.

Muslims believe that such rights are duly endowed by the Almighty God as succinctly stated in the Muslims' holy book - the Quran which reads "We have ennobled the Children of Adam**..." (**17**:** 7)

Be that as it may, whenever Muslims talk about human rights such rights are always viewed as *Theocentrism* (God-centred rights).[1] *Au contraire*, as far as the Western paradigm of human rights is concerned, such rights are invariably viewed under the lens of *Anthropocentrism* (men-centred rights).[2]

Ergo, historically speaking, Muslims never had to resort to any bloody war or armed conflicts to demand from the states for such rights to be duly conferred to them. Hence human rights are considered to be their birthright.

On the other hand, anyone who pores over the history of Western history will easily find that the Western people had to ferociously fight to gain due recognition of even their elementary rights[3] and to attain and enjoy such fundamental liberties many innocent lives had to be unnecessarily sacrificed. Simply put, the Western people had to "purchase" rights and liberties by trading with their sacred lives.

As we may be fully aware, the West, having indulged in the Thirty Years' War (1618-1648) finally agreed to halt such bloodshed

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1 See Macrina A Morados, "Theocentrism and Pluralism: Are They Poles Apart?," *Policy Perspectives* 5, no. 3 (2008): 37–49.

2 Pu Jingxing and Guo Song, "Abandon Selfish Western Anthropocentrism to Solve Pandemic with Chinese Man-Nature Philosophy," Global Times, 2021, https://www.globaltimes.cn/page/202109/1233265.shtml.

3 Holly J McCammon and Karen E Campbell, "Winning the Vote in the West: The Political Successes of the Women's Suffrage Movements, 1866-1919," *Gender & Society* 15, no. 1 (2001): 52–82.

by signing the Treaty of Westphalia in 1648. The Thirty Years' War was one of the most devastating war in European history resulting in a death toll of approximately eight million people.[4]

Prof Eric Posner rightly pointed out that the 1948 Universal Declaration of Human Rights arose from the ashes of the Second World War and aimed to launch a new, brighter era of international relations.[5] Armed conflict or war and poverty are often said to be the major enemies of human dignity.[6]

The enforcement let alone the effective enforcement of international human rights conventions has been facing a whole raft of challenges. Hence this essay seeks to address this issue.

This essay would, therefore, be structured in the following fashions. Firstly, it will touch on the problems faced by the international community in coming to terms with an agreed-term definition of human rights. Secondly, the essay will embark on the discussion of theories of human rights. Bearing in mind the law on human rights is far from being static, we shall also dive into the discussion on the progressive development of theories of human rights in the third limb of this essay.

As the primary aim of this essay is on the primary challenges in enforcing human rights conventions under international law, the three aforementioned issues will be deliberated in a minimalist fashion only.

And as the issue of key challenges in efficiently enforcing human rights conventions under international law is the major plank of this essay, the issue will be discussed relatively at great length in this essay. Ergo, this essay will highlight the main challenges faced by the international community in ensuring international human rights conventions under international law are duly observed. This essay will argue that the prime challenges in effectively enforcing international

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4 Joshua J. Mark, "Thirty Years' War," World History Encyclopedia, 2022, https://www.worldhistory.org/Thirty_Years'_War/.

5 Eric Posner, "The Case against Human Rights," The Guardian, 2017, https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights.

6 See: Douglas Donoho, "Human Rights Enforcement in the Twenty-First Century," *Ga. J. Int'l & Comp. L.* 35, no. 1 (2006): 1–52, https://digitalcommons.law.uga.edu/gjicl/vol35/iss1/2/.

human rights law ought to be given due recognition and top priority in ending the problem of impunity which has been plaguing the global population.

Finally, before concluding this essay we shall also delve into two new paradigms of the enforcement of human rights violations under international law that have fortunately emerged. The first model is known as the *Pinochet* paradigm/effect and the second model is popularly branded as the *Filartiga* paradigm. Despite the existence of these two significant paradigms which essentially seek to end impunity, these two paradigms, however, still face challenges as well in effectively ending human rights abuses.

THE PROBLEM OF RESOLVING AN AGREED DEFINITION OF HUMAN RIGHTS

It goes without saying that hitherto international law jurists have not been able to resolve the issue of the true and definitive meaning of human rights. The international legal fraternities have been wrestling even with the definitive meaning of the word "right" as the definition of such a term is highly contentious and has been subject to jurisprudential debates.[7]

The clashes of the true definition of human rights are, in fact, not a new phenomenon. Hence, the global community has been grappling with settling on a conclusive definition to date. The term ‘human rights’ is said to have appeared for the first time in the modern international document in the Washington Declaration by the United Nations on 1 January 1942.[8]

Such being the case, one may argue that the term ‘human rights’ is relatively a nascent phenomenon.

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7 M.N. Shaw, *International Law* (London: Cambridge University Press, 2014).

8 Shabtai Rosenne, *The Perplexities of Modern International Law: General Course on Public International Law*, vol. 291 (Leiden/ Boston: Martinus Nijhoff Publishers, 2002).

Some Muslim scholars, on the contrary, are of the view that Al-Quran is the *Magna Carta* of human rights.[9] The Muslim holy book seems to agree with the universalist on the right to life and dignity when it says "We have certainly ennobled the children of Adam "[17:7].

THEORIES OF HUMAN RIGHTS

Theories of human rights over the past half-century have broadly appeared to perpetuate a rigid dichotomy between a universalistic conception of human rights and a relativistic approach.[10]

The former so-called "Western" model has been accused of advocating an individualistic approach to rights that prioritises the individual's rights against society; by contrast, the "Non-Western values" approach emphasises social stability, privileging community and duties over the rights of the individual.[11]

Universalism believes that the fundamental values and principles highlighting the concept of human rights are - according to this theory - of universal character. Every human being is, therefore, entitled to be protected from any human rights infringement.

These values and principles deal with the concept of liberty and freedom, the belief in democracy and political rights, and the acknowledgment of social and economic rights. Universal human rights are frequently said to be predominantly based on Western ideologies. Historically speaking, the idea that human rights are universal is often associated with the renowned English philosopher, John Locke (1632-1704).[12]

Relativism, being a long-standing rival of universalism, is normally characterised as a set of views about the connection between

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9 *Umar* Ahmad Kasule, *Contemporary Muslims and Human Rights Discourse: A Critical Assessment* (Malaysia: IIUM Press, 2009).

10 Yvonne Tew, "Beyond 'Asian Values': Rethinking Rights" (UK: Centre of Governance and Human Rights, 2012), https://www.repository.cam.ac.uk/handle/1810/245115.

11 Tew, p.3.

12 Matthew Lower, "Can and Should Human Rights Be Universal?," *E-International Relations* 1 (2013), https://www.e-ir.info/2013/12/01/can-and-should-human-rights-be-universal/.

morality and culture or humanity. In essence, cultural relativism is based on the morals, ethics, and customs of each human society. Franz Boas, a German American anthropologist who is also known as 'the father of American Anthropologist' is often said to have expounded the theory of cultural relativism.[13]

Relativists believe that experience is primarily human's connection to reality. From experience, judgment is derived. Human's judgment is culturally bound too, according to this theory. The idea of relativism challenges universalism and the intent of the declaration. Hence, relativists believe that beliefs, values, and therefore rights are a product of culture. They vary. And they differ from culture to culture or place to place. Relativists hold the view that there is no such thing as " one size fits all" in so far as human rights are concerned.

If Asia and Africa are to be placed in a box marked as "Third World States" it is often said that as far as these two continents are concerned, the social and economic rights trump other human rights and it characterises the Asians and Africans view on human rights.[14] Yvonne Tew believed that the "Asian values" are a good illustration of cultural relativism.[15] The same may also apply to the "African values".[16]

THREE GENERATIONS OF HUMAN RIGHTS

As the law of human rights is not static, jurists of international law have developed new theories of human rights based on the progressive development of such rights. Hence many commentators have talked of 'generations' of human rights, which is, according to Martin Dixon, another way of describing how the substance of human rights has

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13 Suresh Gurramkonda, "Cultural Relativism," Eden IAS, 2022, https://edenias.com/cultural-relativism-by-dr-suresh-gurramkonda/.

14 See supra, Note 7

15 See supra, Note 10.

16 The relativism influence can be seen, for example, in one of the preambles of the African Charter on Human and People's Rights where it is stated that "Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights".

become more refined as the very concept of "human rights" has become more entrenched in the system of international law.[17]

First generation of human rights

The first generation rights essentially entail civil and political rights which are considered to be the core of most human rights treaty regimes. Such rights include matters as such as the right to life, the abolition of slavery, the right to a fair trial, the prohibition of torture, and the right to recognition before the law.[18]

Second generation of human rights

When many colonised states had been emancipated from the yoke of colonialism and in turn gained independence, they, along with countries such as China, began to assert another form of human rights which related to matters of social and economic significance, such as the right to work,[19] the right to social security, the right to an adequate standard of living, and the right to education. And the jurists have catalogued all of these rights under the rubric of the second generation of human rights.[20]

As far as the enforcement mechanisms for second generation rights are concerned, they, however, tend to be more flexible and less powerful than those available to the individual claiming a violation of their civil and political rights.[21]

Third generation of human rights

As far as the third generation rights are concerned they often include very general concepts such as rights to development, the right to a

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17 Martin Dixon, *Textbook on International Law* (USA: Oxford University Press, USA, 2013).

18 Dixon.

19 See for instance Article 15 of African Charter on Human and People's Rights which provides that "Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work". See also Article 27 (1) of the Asean Human Rights Declaration which states "Every person has the right to work, to the free choice of employment, to enjoy just, decent and favourable conditions of work and to have access to assistance schemes for the unemployed."

20 See supra, Note 17.

21 Ibid.

protected environment, the right to peace, and a wide-ranging right of self-determination.[22]

ENFORCEMENT OF HUMAN RIGHTS UNDER INTERNATIONAL LAW

The desire to effectively enforce international human rights laws stems from the common mission of the international community which is based on a shared understanding that international law has a key role to play not only in setting standards for governments, non-state actors, and their agents, but also in prescribing the consequences of a failure to meet those standards.[23]

Though the idea of holding individuals responsible for egregious conduct toward their fellow human beings is not totally foreign, the duty to regulate such behaviour is often reserved for municipal or domestic criminal law and is part of civil law. Hence when it comes to the enforcement of human rights laws, it would be, relatively speaking, much easier to enforce human rights obligations that are contained in municipal or domestic law as states are generally equipped with a whole raft of enforcement agencies - such as police force - at their disposal. Any individual who violates human rights protection under any relevant law would be sufficiently dealt with by states via the relevant enforcement agency. Be that as it may, the likelihood of impunity would be relatively minimal.

Generally, human rights protections are enshrined in many constitutions of many states in the world.[24] And such constitutions are

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22 Ibid.

23 Steven R Ratner, Jason S Abrams, and James L Bischoff, "Individual Accountability for Human Rights Abuses: Historical and Legal Underpinnings," in *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, ed. And Steven R. Ratner, Jason S. Abrams and James L. Bischoff (Oxford: Oxford University Press, 2009).

24 See, for example, The Federal Constitution of Malaysia and The Provisional Constitution of the Federal Republic of Somalia respectively. Both of these constitutions are replete with provisions relating to certain guaranteed set of human rights.

more often than not treated as the supreme law of such states.[25] Be that as it may, any law or act which is repugnant to such constitutions would be generally considered to be invalid and unconstitutional. Unless such states are being catalogued as failed states, the issue of enforcement of human rights is, in general, not problematic. If at all such enforcement is infected with inefficiency such a problem is often associated with the lack of a strong political will in enforcing such embedded rights due to a slew of elements such as corruption or abuse of power. But it needs to be emphasised here even though the issues of enforcement of human rights laws in municipal or domestic law are quite relevant to this essay, they are not its focus herein.

MAJOR OBSTACLES IN ENFORCING INTERNATIONAL HUMAN RIGHTS CONVENTIONS

Harold Koh was right when he argued that whilst international human rights are under-enforced, "they are enforced" through the transnational legal process.[26]

International law has been invariably subject to juristic debates in that some of the jurists are of the view that it is not, in essence, a "true" law because the popular view seems to suggest it is not generally enforceable. Such criticism is founded on the assumption that the hallmark of a system of law is that its rules are capable of being enforced against malefactors. And such a vital element - to the critics -

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25 See Article 4 (1) of the Federal Constitution of Malaysia which enshrines the supremacy of the constitution by prescribing "This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void" ; see also Article 4 (1) of The Provisional Constitution of the Federal Republic of Somalia which states that "After the Shari'ah, the Constitution of the Federal Republic of Somalia is the supreme law of the country. It binds the government and guides policy initiatives and decisions in all sections of government".

26 C Harris Lecture Addison and Hongju Koh, "How Is International Human Rights Law Enforced?," *International Law of Human Rights* 74, no. 4 (2017), https://www.repository.law.indiana.edu/ilj/vol74/iss4/9.

is absent in international law.[27] Some international lawyers argue that international law has long been burdened with the charge that it is not really law.[28]

In addition to that, critics seem to formulate a test that determines the binding quality of any 'law' is the presence or absence of assured enforcement of its rules. This paper is, however, not aimed at rebutting such a debatable test.

Many believe that the major stumbling block in effectively enforcing a plethora of international human rights laws is that international law is purely a state action. Yes, the key underlying feature of international law is the state consent. As rightly pointed out by Noura Erakat, the enforceability of international law heavily depends on voluntary state consent and compliance. Therefore, in the absence of the political will to make state behaviour compatible with the law, violations are the norm rather than the exception.[29].

By virtue of this very element, any international conventions - inclusive of conventions dealing with human rights under international law - are only binding against the state if the same are duly signed, acceded and ratified. And interestingly the states are not bound to sign, accede and ratify any international human rights conventions. In other words, they cannot be compelled to do so as international law duly recognises the sovereignty of any state. Be that as it may, each state possesses the sovereign right to decide upon its social and economic structures as well as to lay down laws that will influence the national character of the state and of life within it.[30]

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27 Hersch Lauterpacht, "The Doctrine of Non-Justiciable Disputes in International Law," *Economica*, no. 24 (1928): 277–317, https://doi.org/https://doi.org/10.2307/2548052.

28 Eric Posner and Jack Landman Goldsmith, *The Limits of International Law* (United States of America: AEI: American Enterprise Institute for Public Policy Research, 2005), https://coilink.org/20.500.12592/qvrh9b.

29 Noura Erakat, "No, Israel Does Not Have the Right to Self-Defense in International Law against Occupied Palestinian Territory," *Jadaliyya*, 2014.

30 Vaughan Lowe, *Sovereignty Inside the State* (in Oxford University Press eBooks, 2015), https://doi.org/https://doi.org/10.1093/actrade/9780199239337.003.0005.

Another major obstacle which hinders any effective enforcement of international human rights conventions will be the following factor. International law itself consciously permits states to impose some reservations to specific Articles in such conventions when the requirement of the Article may be seen to have conflicted with an area of domestic law.

In essence, reservations and understandings are statements made by state parties at the end of such conventions thus limiting some of their obligations under the terms of such conventions. Reservations and understandings which are absolutely legal and lawful under international law may, however, weaken the efficacy of the enforcement let alone effective and efficient enforcement of any international human rights convention.

To rub salt to the wound, under dualist conception, international obligations effectively would only gain the status of domestic law upon the actual incorporation of such international obligations into the domestic system. This is because a dualist system always treats the international and domestic systems of law as separate and independent.[31]

In other words, international legal obligations have to pass through a "domestic filter" to attract the status of enforceability in the domestic legal order. International law highly values the sovereignty of any state. Hence each state has the sovereign right to decide upon its social and economic structures, and to lay down laws that will influence the national character of the State and of life within it. The upshot of this is that any state that embraces the doctrine of dualism may, for instance, duly sign and even ratify any international human rights instruments, but it may concomitantly procrastinate to implement and execute such laws by not taking any necessary action to incorporate such international human rights instruments into domestic laws. [32]

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31 Marko Novaković, "Basic Concepts of Public International Law– Monism & Dualism," *Међународни Проблеми* 66, no. 1–2 (2014): 322–43.

32 In the case of Air Asia Bhd v Rafizah Shima bt Mohamed Aris [2014] 5 MLJ 318, the Malaysian Court of Appeal held that for an international treaty to be operative in Malaysia, it requires legislation by parliament. The decision shows that Malaysia embraces the dualism doctrine. See

Be that as it may, the dualist conceptionis always viewed as an anathema to the efficacy of enforcing any international human rights instruments. Until and unless a state is ready and willing to embrace the ideology of monism which treats international law obligations, ipso facto, as part of the domestic legal system, and enforceable like any other source of domestic law, the dualist conception would oftentimes pose a great obstacle in successfully enforcing any international human rights instruments as these instruments need to be firstly domesticated before they can be enforced like any other municipal law. States often provide a whole raft of justifications and excuses in refusing to domesticate such international human rights instruments even though they may, at the same time, duly acknowledge the positive elements appearing in those international instruments.

As international law does not possess a system of institutionalised enforcement such as the absence of a "police force" or compulsory court of general competence, it badly needs the "help" of individual states to enforce any ratified international treaties on human rights in the domestic domain. This is another major factor contributing to the weak enforcement of international human rights conventions.

It is often argued that the watershed for the development of the principle of individual accountability for human rights abuses was the exercise undertaken by the victors of World War II following the previously unimaginable atrocities of that conflagration, particularly the Holocaust.

Despite the unimaginable atrocities - systemic and serious human rights violations - committed in World War II, the said War, ironically produced positive development as far as the enforcement of human rights doctrines was concerned. To cite one glaring example was the timely creation of the International Military Tribunal at Nuremberg and the related war crimes trials driving home this pertinent point - no individual could escape from the long arm of international law when he committed crimes or atrocities against anyone.

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also Mohamed Hanipa Maidin, "THE IMPLICATIONS OF THE PARIS AGREEMENT AND NDC TO MALAYSIA" [2023] 3 MLJ ccxvii.

Historically, individual officials bore personal responsibility for outrageous conduct toward their citizens and noncitizens during wartime and they ought to be held accountable for such crimes.

Consequently, the IMT Charter, for instance, contained a very significant provision holding individual criminal responsibility for violations of the laws and customs of war, as well as other egregious acts in connection with the war encompassed under the rubric of' crimes against humanity. The criminalisation of the war was also incorporated under the said Charter.

As if foreseeing the strength of several possible powerful criminal defences for several international crimes such as the defences of superior orders, command of the law, and act-of-state immunity, the Charter decided to eliminate all such defences thereby subjecting even heads of state to criminal liability. These principles could be found in the Charter of the Tokyo Tribunal and Control Council Law No. I0, the latter of which governed many significant prosecutions of Nazis below the level of those tried before the IMT and endorsed by the UN General Assembly in 1946.

THE INEFFECTIVE ROLE OF SECURITY COUNCIL IN THE ENFORCEMENT OF INTERNATIONAL LAW

Hannah Moscrop argues the birth of international human rights law was under the United Nations, created by the victors of World War II. As such, she contends that the UN system therefore favoured, and indeed still does, the interests of the powerful states of the mid-1940s. This is most strongly reflected in the powers of the P-5 in the Security Council.[33]

Under the existing make-up of the UN Charter, it is plain and obvious that the UN has specifically reserved the enforcement powers only to the Security Council especially when such enforcement powers have to do with matters involving the existence of any threat to the peace, breach of the peace, or act of aggression. And such enforcement

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33 Hannah Moscrop, "Enforcing International Human Rights Law: Problems and Prospects," E-International Relations, 2014, https://www.e-ir.info/2014/04/29/enforcing-international-human-rights-law-problems-and-prospects/.

measures are clearly spelt out in Chapter VII of the UN Charter (comprising several Articles ranging from Art 39 to Art 54 of the Charter).

The five permanent members of the UN Security Council (P5)[34] are fully aware that the United Nations would not have been founded without them having the power of the veto, hence these five members have invariably exploited these advantages to the hilt in ensuring that all major decisions would require the support, or at least the acquiescence, of them.

Some scholars argue that the veto power conferred by the UN Charter is the most significant distinction between permanent and non-permanent members of the Security Council. But from the get-go, the veto has been a steady source of tension between the permanent members and the wider membership of the U.N.[35] It is undisputed that vetoes affect the Council's ability to address some of the most serious violations of the U.N. Charter and international law.

Historically speaking China has used its veto more actively and, in each of these cases, has done so with Russia. Together with Russia, it vetoed resolutions on Myanmar and Zimbabwe in 2007 and 2008, with its remaining 11 vetoes in this period being on resolutions related to Syria.[36]

Since 2000, Russia has effectively vetoed many draft resolutions particularly on Syria and on Ukraine. It also vetoed resolutions on the 20th anniversary of the genocide in Srebrenica, Georgia, Yemen sanctions, Venezuela, and climate and security.[37]

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34 The permanent members are China, France, Russia, the United Kingdom, and the United States.

35 Shamala Kandiah Thompson, Karin Landgren, and Paul Romita, "The United Nations in Hindsight: Challenging the Power of the Security Council Veto," URL: https://www. justsecurity. org/81294/the-united-nations-in-hindsight-challenging-the-power-of-the-security-council-veto (дата звернення 07.12. 2023), 2022, https://www.justsecurity.org/81294/the-united-nations-in-hindsight-challenging-the-power-of-the-security-council-veto/.

36 Thompson, Landgren, and Romita.

37 Security Council Report, "In Hindsight: Challenging the Power of the Veto," Security Council Report, 2022,

The United States is the only member of the P3 (France, the United Kingdom and the United States) that has continued to use its veto with all but two resolutions related to the Israel-Palestine conflict. It vetoed a resolution on Bosnia and Herzegovina in 2002, and its most recent veto was on a counter-terrorism resolution in August 2020.[38]

As these numbers and issues indicate, vetoes affect the Council's ability to address some of the most serious violations of the U.N. Charter and international law. On matters related to Syria, the use of the veto has blocked the Security Council's condemnation of chemical weapons attacks, shut down a chemical weapons investigation mechanism and prevented a referral to the International Criminal Court.

As far as the issue of Ukraine is concerned, the use of the veto has effectively blocked investigations and the establishment of criminal tribunals, as well as condemnation of Russian aggression against Ukraine.

It goes without saying that as far as the situation in the Middle East - including the Palestinian issue - is concerned, the veto arguably is one of the major obstacles hindering the cessation of the ongoing armed conflicts involving Israel in Palestine. The veto power - frequently invoked by the Israeli major ally (the United States) has prevented, for instance, the condemnation of the building of illegal settlements, and the use of violence against Palestinians. The 2020 U.S. veto of a draft resolution on the prosecution, rehabilitation, and reintegration of foreign countries and Russia's 2021 veto of a draft resolution on climate and security may portend their new readiness to deploy the veto on thematic issue.[39]

In exercising such powerful powers, the UN has also provided, for instance, several key articles in the UN Charter in ensuring the SC could efficiently and effectively carry out such enforcement powers. Two central planks which substantially characterise international law

https://www.securitycouncilreport.org/monthly-forecast/2022-05/in-hindsight-challenging-the-power-of-the-veto.php.

38 Security Council Report.

39 See supra, Note 35.

are the principle of state sovereignty and the principle of non-intervention. And these two vital elements seem to have been duly embodied in Article 2 (7) of the Charter. Despite the fact that Article 2 (7) is ominously silent in prescribing the entity which has the authority to decide whether in any particular case the reservation of domestic jurisdiction applies, the *proviso* in the said Article, nevertheless, seems to offer the necessary way out when it provides "this principle shall not prejudice the application of enforcement measures under Chapter Vll." Unfortunately, this proviso is rarely invoked for genuine purposes. More often than not, the proviso was indiscriminately invoked by superpowers in "disciplining the recalcitrant states" - a term which is haphazardly coined by them in justifying the "punishment" against such purported "recalcitrant" states. The unilateral military action by the US and its allies against states such as Iran, Syria and Iraq were cases in point.

While some commentators argue that the primary purpose of the United Nations is the enforcement of international peace and security, others assert that the United Nations has a second and equally important purpose as evidenced in the Charter's preamble, namely the international protection of human rights.[40]

As human rights violations have been occurring in the present internal conflict in Sudan in which the UN can simply take a judicial notice, the UNHCR, - the UN Refugee Agency - addressed the international community in desperate need of a humanitarian intervention to end the human rights violations in that country.[41] As of May 2023, the Human Rights Council reported that more than 600 people had been killed in the fighting, more than 150,000 had fled Sudan, and over 700,000 had become internally displaced.[42]

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40 Johannes Van Aggelen, "The Preamble of the United Nations Declaration of Human Rights," *Denv. J. Int'l L. & Pol'y* 28 (1999): 129.

41 UNHCR - The UN Refugee Agency, "Sudan: UNHCR Warns of Increasing Violence and Human Rights Violations Against Civilians in Darfur," UNHCR, 2023, https://www.unhcr.org/news/press-releases/sudan-unhcr-warns-increasing-violence-and-human-rights-violations-against.

42 Peter Louis, "Sudan Violations in Spotlight at UN Human Rights Council," UN News, 2023, https://news.un.org/en/story/2023/05/1136552.

It is germane to state here that despite the fact the rules of law are supposed to be nonreciprocal - meaning that they apply irrespective of what the other side has done - what we are witnessing in the current ongoing armed conflict between the superpower Israel and the helpless Palestinians, the human rights protections duly enshrined in a plethora of international human rights conventions are more often than not consistently violated rather than adhered to.[43]

Yes, International Humanitarian Law (IHL), or the laws of war, has existed in some form for thousands of years even before the birth of the Hague Regulations of 1907 and Geneva Conventions of 1949, alongside other treaties, and customary international law in ensuring, for instance, human rights are duly observed. Unfortunately, violations - such as deliberately targeting civilians or imposing collective punishment - are a matter of routine in the present war between Israel and Hamas in Palestine.

It goes without saying that the United Nations Security Council has miserably failed to cease the war and in turn duly protect human rights as the United States - being a close ally of Israel - has been consistently vetoing any resolution which called for a humanitarian ceasefire on the said ongoing situation in Gaza. The US and its close allies have been endlessly invoking the oft-quoted excuses namely Israel's right to defend itself must be duly acknowledged.[44] While Israel's right to self-defence may be arguably relied upon by Israel after the Hamas' attack on October 7, 2023, the counter-attacks by Israel have been beset by revenge rather than a legal and justified self-defence under the provisions contained in the UN Charter.

The UN special rapporteur on human rights in the occupied Palestinian territories - Francesca Albanese - forcefully argued that Israel's right to self-defence has been duly forfeited under international law in that such a defence can only be properly invoked when a state is

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43 Clive Baldwin, "How Does International Humanitarian Law Apply in Israel and Gaza?," Human Rights Watch, 2023, https://www.hrw.org/news/2023/10/27/how-does-international-humanitarian-law-apply-israel-and-gaza.

44 Shakeeb Asrar, "How The US Has Used Its Veto Power at the UN in Support of Israel," Al Jazeera, n.d., https://www.aljazeera.com/news/2023/10/26/how-the-us-has-used-its-veto-power-at-the-un-in-support-of-israel.

duly threatened by another state, which is, in her opinion, not the case. It is undisputed that since 1967, the international community has designated the West Bank, and the Gaza Strip as militarily occupied. Thus, she also argues that Israel never claims it has been threatened by another state. *Au contarire,* Israel always claims that it has been threatened by an armed group within an occupied territory. Under such circumstances, she contends that Israel cannot claim the right of self-defence against a threat that emanates from a territory it occupies, from a territory kept under belligerent occupation.[45]

While we concede that laws of war only apply in specific situations, notably during an armed conflict or an occupation, international human rights law, as rightly argued by a senior legal adviser of Human Rights Watch, would be applicable and enforceable at all times, governing the duties of all states to protect the rights of the people in the territory where they have jurisdiction or a degree of control.[46]

THE NEW PARADIGMS SHIFT IN ENFORCING HUMAN RIGHTS VIOLATIONS

Sovereignty essentially affirms the territorial integrity of the state, and the rule of non-intervention has long been considered the *grundnorm* of international law but the emergence of a few normative and institutional seem to have challenged the sovereignty norm. This is evident in a slew of human rights litigations.[47]

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45 Kunal Purohit, "Does Israel Have the Right to Self-Defence in Gaza?," Al Jazeera, accessed March 7, 2024, https://www.aljazeera.com/news/2023/11/17/does-israel-have-the-right-to-self-defence-in-gaza; See also: Erakat, "No, Israel Does Not Have the Right to Self-Defense in International Law against Occupied Palestinian Territory."

46 See supra, Note 43.

47 William J Aceves, "Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation," *Hastings Int'l & Comp. L. Rev.* 25, no. 3 (2001): 261.

In modern times new paradigms of the enforcement of human rights violations have fortunately come to the surface and they are often known as the *Pinochet* paradigm and *Filartiga* paradigm.

In *Regina Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet,*[48] British House of Lords decided that traditional principles of immunity could not protect a former head of state from prosecution in the face of torture claims. And In *Filartiga v. Pena-Irala,* [49]the Second Circuit Court of Appeals acknowledged the universal prohibition against torture and the potential civil liability of perpetrators in the United States courts.

Via these two cases, national tribunals held government officials accountable for serious human rights abuses. We may say that with the emergence of these two important paradigms, the sovereignty norm should, in principle, never be improperly invoked to mask human rights abuses. Yes, in both cases, we may safely argue that human rights norms trumped the sovereignty norm.

One may also argue that the international endeavour in establishing individual responsibility for human rights abuses, and its determination to remove the immunity of government officials for these acts as duly reflected in the *Pinochet* and *Filartiga* case is not really a new invention or a nascent phenomenon.

Many international law scholars hold the view that one of the earliest efforts to establish individual responsibility for human rights abuses as well as to remove the immunity of government officials for these heinous acts, was detectable in the Charter of the International Military Tribunal at Nuremberg for the Charter established individual criminal responsibility for crimes against peace, war crimes, and crimes against humanity.[50]

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48 Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 2 All E.R. 97 (H.L. 1999) (Amnesty International and others intervening).

49 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

50 Aceves, "Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation."

PINOCHET PARADIGM/ EFFECT

Despite the fact the House of Lords believed that a large majority of the charges against Pinochet were not proper grounds for extradition under British law, it nonetheless, held that Pinochet could potentially be extradited for alleged acts of torture committed after Britain's 1988 ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In driving to the latter conclusion, the majority of Law Lords dismissed Pinochet's claim that he was entitled to immunity from arrest on the torture charges because of his status as a former head of state.[51]

It is germane to share herein the opinion of one of the lords - Lord Brown-Wilkinson - who found that not all acts by a head of state constitute official acts of state that merit immunity from prosecution. In his view, the critical issue is to determine which acts constitute official functions of a head of state. He suggested that it would be inconsistent if international law prohibited and criminalized certain acts and yet recognized that such acts could be designated official functions subject to immunity.[52]

As far as international lawyers are concerned the General *Pinochet* paradigm drives home this pertinent point: the courts of many countries were closed to investigations or lawsuits involving abuses by the local military or police, due to formal amnesty laws or informal threats, bribes, or other pressures. As such, many advocates of international human rights believe that the *Pinochet* paradigm has rekindled a new hope in bringing any violators of human rights to justice thus the *Pinochet* case is often seen as a viable alternative. Unlike before, transnational prosecutions of human rights violations in the courts of other states are now considered to be legally possible.[53]

Via this new model there is a new way for bringing a former head of state to trial outside his home country and such a model signals

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51 Curtis A Bradley and Jack L Goldsmith, "Pinochet and International Human Rights Litigation," *Mich. L. Rev.* 97 (1998): 2129.

52 Aceves, "Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation."

53 Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press, 2005), http://www.jstor.org/stable/j.ctt3fj29r.

that neither the immunity of a former head of state nor legal amnesties at home could shield participants in the crimes of military governments. The most important thing is that victims of torture and crimes against humanity truly believe that their tormentors might be brought to justice.[54]

FILARTIGA PARADIGM

The second paradigm of the enforcement of human rights violations is popularly known as the *Filartiga paradigm*. This paradigm was officially born after the 1980 decision of *Filartiga* which involved a Paraguayan resident of the United States who sued a former general of the Stroessner regime for the torture and murder of her brother. About 20 cases had been decided in favour of victims of, inter alia, torture; cruel, inhuman, and degrading treatment; forced disappearance; extra-judicial killing; and genocide.

It is interesting to note that in *Filartiga*, the United States court held that customary international human rights norms are part of the United States federal common law thus the United States courts may therefore hear claims for damages based on violations of those norms. In particular, the court found that "official torture is now prohibited by the law of nations" and that torturers, like pirates before them, are *hostes humani generis* (enemies of all humankind), and therefore subject to suit under American law i.e. the Alien Tort Statute (ATS). Hence under this new model, the court held that torture, long prohibited by virtually all nations' laws and several international conventions and declarations, is now prohibited by customary international law. The case further provides for jurisdiction in a disinterested forum for individual torture claims.[55]

Subsequently, in the case of *Sosa v. Alvarez-Machain*[56] the United States Supreme Court finally took the opportunity to grant jurisdiction for claims alleging violations of modern customary

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54 Roht-Arriaza.

55 Michael Danaher, "Torture as a Tort in Violation of International Law: Filartiga v. Pena-Irala," *Stan. L. Rev.* 33, no. 2 (1980): 353–69, https://doi.org/https://doi.org/10.2307/1228482.

56 542 U.S. 692 (2004)

international human rights norms. The case also upheld the *Filartiga paradigm* thus reaffirming that international law is part of the United States law and making a clear statement in favour of accountability for violations of human rights.

It is beyond doubt those two aforementioned paradigms have enlivened hope for many victims of human rights abuses around the globe. Nowadays they start to believe that human rights violations in any part of the world would never be left unaddressed by the global community though it may take many years to end the impunity.

ARE PINOCHET AND FILARTIGA PARADIGMS EFFECTIVE TOOLS IN ENDING IMPUNITY?

Though both *Pinochet* and *Filartiga* paradigms establish a good template in which individual responsibility attaches to government actors that commit human rights abuses and immunity no longer protects them from prosecution, the enforcement of human rights norms in the international scene remains ineffective. This is due to the conspicuous absence of effective international institutions in enforcing such rights. Hence most of the enforcement of human rights norms has devolved to national institutions.

It is argued that the enforcement of human rights abuses by national institutions may suffer from herculean challenges due to several factors - the primary one would be a lack of political will. To cite one glaring example, despite the fact Israel showed a strong commitment to bringing Adolf Eichmann - one of the greatest Nazi war criminals - to justice in the Israel court but hitherto no attempt has been made to bring Benjamin Netanyahu - the Israeli Prime Minister - to book for his alleged war crimes or other international crimes in the Israeli court.

CONCLUSION

Though human rights violations around the world have not shown any sign of decrement, the enforcement of such violations, unfortunately, remains the weakest component of either the international or municipal human rights system.

Having said that, we could still, nonetheless, exhale a sigh of relief that the emergence of the light at the end of the tunnel seems to be almost certain. Nowadays we notice the readiness of the international community to create new paradigm shifts in enforcing human rights transgression by the emanation of new models such as the *Pinochet* and *Filartiga* paradigms in ensuring any human rights violations should never be left unaddressed.

It is instructive also to note that in August 2015, France, with the support of Mexico, launched the "Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocity". The aim was to have the permanent members – the P5 – voluntarily pledge not to use the veto in cases of genocide, crimes against humanity, and war crimes on a large scale.[57]

Among the veto-wielding permanent members, so far only France and the United Kingdom have supported this initiative. As of April 2020, 103 member states and two U.N. observers had signed the declaration.[58]

In a similar vein, in July 2015, the Accountability, Coherence and Transparency (ACT) group, which consists of 27 small and medium-sized states working to enhance the Council's effectiveness by strengthening its working methods, developed a code of conduct for member states regarding Security Council action against genocide, crimes against humanity and war crimes. The code is meant to encourage timely and decisive action by the Council to prevent or end the commission of genocide, crimes against humanity, and war crimes.[59]

As with the later French-Mexican initiative, the code of conduct urges the permanent members to agree to refrain from using their veto in situations involving mass atrocity crimes and also invites current and aspiring elected members to refrain from casting a negative vote in

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57 Thompson, Landgren, and Romita, "The United Nations in Hindsight: Challenging the Power of the Security Council Veto."

58 Thompson, Landgren, and Romita.

59 Security Council Report, "In Hindsight: Challenging the Power of the Veto."

such cases, as it envisions the fight against atrocities as a collective responsibility of all member states.[60]

As of 10 February 2022, the code of conduct had been signed by 122 member states, including eight currently elected Council members, two permanent members (France and the United Kingdom), and two observers.[61]

*This paper was initially presented before the law students at SIMAD University, Somalia on 17 September 2023. The title of the presentation was "The Enforcement of Human Rights and the Key Challenge in the 21st Century". This is the improved and edited version of the said paper.

60 Security Council Report.
61 Security Council Report.