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CHAPTER 4: STATE REPORTING UNDER INTERNATIONAL HUMAN RIGHTS TREATIES

A. INTRODUCTION

Once a government has ratified a human rights treaty, it is then required to comply with its norms and procedures of implementation. This chapter focuses on one of the most commonly used procedures for treaty implementation, namely, periodic reporting and review. The U.N. has promulgated seven principal human rights treaties currently in force in which States parties have agreed to submit periodic reports on their compliance with their agreed obligations. Those treaties include: the Covenant on Civil and Political Rights (Article 40); the Covenant on Economic, Social and Cultural Rights (Article 16); the Convention on the Elimination of All Forms of Racial Discrimination (Article 9); the Convention on the Elimination of All Forms of Discrimination Against Women (Article 18); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 19); the Convention on the Rights of the Child (Article 44); and the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (Article 73). Each government that is a party to those treaties must submit reports on the measures it has adopted to give effect to the rights recognized in the treaties and on progress made in the enjoyment of those rights. The reporting procedures, together with individual communications under four of those treaties, constitute the primary means for monitoring implementation of U.N. human rights treaties.
This chapter will focus principally upon the reporting obligations and procedures under the Covenant on Civil and Political Rights (Article 40). Many of the observations made apply also to other treaties. We begin with a discussion of the Civil and Political Covenant's procedures and then examine the Covenant's implementation in respect of Iran. A significant body of academic and policy debates has considered whether it is possible to create human rights norms that apply universally to all cultures. The debate between universality of rights, on the one hand, and cultural relativism, on the other, derives from conflicting views about the source of authority for human rights. The chapter examines the juridical basis of international human rights law using one particular right – specifically the right to be free from torture or cruel, inhuman, or degrading treatment or punishment – as a focus of discussion. The prohibition on torture appears in many human rights instruments, but this chapter focuses principally on its presence in

Article 5 of the Universal Declaration of Human Rights and Article 7 of the Covenant on Civil and Political Rights.

To aid analysis, the chapter provides examples of how the Human Rights Committee and other bodies have interpreted the prohibition against torture or other cruel, inhuman, or degrading treatment or punishment. In using those interpretations students can address the issue of whether international human rights norms are universally valid for people across all cultures or whether rights can only be understood and applied relative to particular cultural contexts. Issues of cultural relativism and international jurisprudential theories are further discussed in chapter 15.

Some instructors may choose to begin the course with this chapter as a means of introducing students to the jurisprudence of human rights. The authors have instead placed it here based on their view that students cannot effectively study sources of human rights law without some exposure to existing law and procedures.

B QUESTIONS

This chapter begins with a description of several punishments prescribed by the Islamic Penal Code of Iran which was adopted after the Islamic revolution of 1979. The questions ask students to consider whether those punishments violate international human rights law. In order to provide an instructional and procedural context for discussion, students are then asked to engage in a role playing exercise in which they serve either as members of the Human Rights Committee or as representatives of the Iranian state as it appears before the Committee. In undertaking the exercise we recommend that a wide range of countries should be represented in the membership of the committee. Some Committee members will argue that the Iranian punishments violate Article 7 of the Covenant and will seek to persuade the Iranian government to eliminate them. The government's representatives will argue that the punishments, as part of Islamic law that Iranians view as the source of human rights in their culture, do not constitute torture or other cruel, inhuman or degrading treatment or punishment. This conflict requires that readers examine the origins of the rights prescribed in international instruments as well as current interpretation and application of those rights.

In addition, students should consider whether international human rights law is binding law that sovereign states must obey or if it simply sets forth norms that states may choose to follow or disregard as they wish.

(The following questions are written from the point of view of the members of the Human Rights Committee. Students should also consider these issues from the perspective of the representatives of Iran.)

1. As a member of the Human Rights Committee, what questions would you ask the Iranian representatives?

a. Would you argue to the Iranian Government that it should refrain from crucifying its citizens, amputating their fingers, or whipping them, and, if so, how?

b. How would you try to convince the government to comply with the Covenant on Civil and Political Rights and what would compliance mean to you in the context of Iran's penal law?

[In preparing questions and responses, consider the following:]

2. Would you want to cite Shari'a provisions that appear to you to be consistent with international norms? You might want to consider what, if any, issues arise from selective use of a religious text in this context. Would members of the Human Rights Committee have the requisite expertise to cite relevant religious authority?

3. What are the precise norms Iran arguably has violated?

a. Is there a specific norm against chopping off fingers?

b. Might precision or lack thereof in the international norms affect your success in convincing Iran to comply?

c. What did the Human Rights Committee mean in its General Comment on Article 7 that the prohibition "must extend to corporal punishment"? Corporal punishment might occur in several distinct contexts, for example, by police brutality (summary punishment), formal penalties for crime (as in Iran), disciplinary measures imposed on convicted prisoners, and disciplinary measures imposed on non-criminals such as school children. Do the other international instruments excerpted in the chapter apply to all these situations?

d. How do different instruments (declarations, later treaties, and judgments of other human rights bodies) influence the Human Rights Committee's interpretation of Article 7? Does the legal status of the instrument affect the extent of its influence?

4. When did Iran ratify the Covenant on Civil and Political Rights? Is that date significant?

a. Do you think the incumbent government wants to comply?

b. Could Iran escape its obligations under the Covenant? (See Article 41(2) reproduced in Selected International Human Rights Instruments at 47.) Has Iran tried?

5. Legal philosophers have propounded various theories concerning legal obligations. In the international law context, these include: the natural law approach, the positivist view, various strands of cultural relativism, the critical-legal view, and the feminist view. See chapter 15, infra at 677-97. To which approach might a state such as Iran be most receptive?

6. Is there anything distinctive about the source of authority upon which rights theories are based that will assist or hinder you in persuading Iran to comply with international norms?

a. What generally is the source of rights in U.N. human rights instruments, and what influence might that source have on Iran?

b. What is the benefit of calling something a right?

c. Can there be a right without a remedy?

d. What type of remedy does international human rights law provide?

7. Why do governments obey or disobey laws? Why do individuals obey or disobey laws?

8. Is it reasonable to anticipate universal compliance with international human rights law? Is there universal respect for ordinary legal norms in a local context, such as the prohibition of burglary?

9. Should the international community expect countries with varying civil, political, economic, social, and cultural traditions to respect human rights standards in the same way? Is there room for diversity?

10. Is it relevant that the U.S. government has used torture and ill-treatment in its "war on terror" or has sought to limit the scope of the prohibition on torture and ill-treatment?

11. Is it relevant that Article 7 is non-derogable under Article 4 of the Covenant? Note the grounds for limitations in some articles, e.g., Article 19 on freedom of expression. Are there permissible variations among states in concepts such as public order, public morals, and national security? What consequences might these variations have for our understanding of the principle of universality?

C. REPORTING PROCEDURES

1. The Civil and Political Covenant's Human Rights Committee

Article 28 of the Covenant establishes a Committee of 18 members, "persons of high moral character and recognized competence in the field of human rights" who

are nationals of State parties but serve as independent experts. Article 31 requires that the Committee not include more than one national from any State party. In addition, “consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.” In 2006-08 the elected members were from the following countries:

Australia India South Africa
Benin Ireland Sweden
Colombia Japan Switzerland
Ecuador Mauritius Tunisia
Egypt Peru United Kingdom
France Romania United States of America

All State parties convene every two years in September to elect half of the Committee, from candidates nominated by governments. Each member serves four years and may be re-elected.

Article 41 of the Covenant empowers the Committee to receive and consider complaints from one State party that another State party is not fulfilling obligations under the Covenant. No such inter-state complaints have been filed as of the publication of this book. Notably, however, a number of inter-state complaints have been filed under the European Convention on Human Rights which contains a similar provision for inter-state complaints.

Under the Covenant’s First Optional Protocol the Committee may hear complaints from individuals who claim to be victims of rights protected by the Covenant. To make a complaint the victim must be subject to the jurisdiction of a State party to the Protocol.

2. Reporting and Consideration Procedures

The primary aim of the reporting requirement is to help governments bring their laws and practices into conformity with the Covenant’s obligations. The requirement encourages governments and citizens to focus their attention on nations’ human rights performance. Ideally governments then may remedy problems that become evident while preparing reports and, thus, reaffirm their commitment to comply with treaty obligations.

a. The Initial Report

Article 40(1) of the Covenant requires each State party to report within one year after the treaty comes into force for that party. The initial report should discuss measures taken by the government to give effect to rights set forth in the Covenant, progress made in the enjoyment of those rights, and difficulties, if any, affecting

implementation. The report should stress legal aspects and assess the government's capacity to review legislation and practices to assure compliance with the obligations. Typically the initial review is drafted by the Ministry of Foreign Affairs -- in the U.S., the Department of State -- and may or may not involve other government agencies. In some countries, governments actively encourage non-governmental organization to participate in the preparation of the government's report.

The Committee's guidelines establish a framework for submitting reports and in particular, detail what a State party must present to the Committee. The initial report should:

Establish the constitutional and legal framework for the implementation of the Covenant rights;

Explain the legal and practical measures adopted to give effect to Covenant rights;

Demonstrate the progress made in ensuring enjoyment of Covenant rights by the people within the State party and subject to its jurisdiction.

Concerning the contents of the report:

A State party should deal specifically with every article in Parts I, II, and III of the Covenant; legal norms should be described, but that is not sufficient: the factual situation and the practical availability, effect and implementation of remedies for violation of Covenant rights should be explained and exemplified.

In addition, the report should explain:

How article 2 of the Covenant is applied, setting out the principal legal measures which the State party has taken to give effect to Covenant rights; and the range of remedies available to persons whose rights may have been violated;

Whether the Covenant is incorporated into domestic law in a way as to be directly applicable;

If not, whether its provisions can be invoked before and given effect by courts, tribunals and administrative authorities;

Whether the Covenant rights are guaranteed in a Constitution or other laws and to what extent; or

Whether Covenant rights must be enacted or reflected in domestic law by legislation so as to be enforceable.

Information should be given about the judicial, administrative and other competent authorities having jurisdiction to secure Covenant rights.

The report should include information about any national or official institution or machinery which exercises responsibility in implementing Covenant rights or in responding to complaints of violations of such rights, and give examples of their activities in this respect.

The guidelines also give direction on annexes to the report:

The report should be accompanied by copies of the relevant principal constitutional, legislative and other texts which guarantee and provide remedies in relation to Covenant rights. Such texts will not be copied or translated, but will be available to members of the Committee; it is important that the report itself contains sufficient quotations from or summaries of these texts so as to ensure that the report is clear and comprehensible without reference to these annexes.

In addition to these guidelines specifically addressing initial reports, the Committee also has devised general guidance for contents of all reports:

. . . The terms of the articles in Parts I, II and III of the Covenant must, together with general comments issued by the Committee on any such article, be taken into account in preparing the report.

. . . Any reservation to or declaration as to any article of the Covenant by the State party should be explained and its continued maintenance justified.

. . . The date, extent and effect of, and procedures for imposing and for lifting any derogation under article 4 should be fully explained in relation to every article of the Covenant affected by the derogation.

. . . Article 40 of the Covenant requires that factors and difficulties, if any, affecting the implementation of the Covenant should be indicated. A report should explain the nature and the extent of, and reasons for every such factor and difficulty, if any exist; and should give details of the steps being taken to overcome these.

. . . Certain articles of the Covenant permit some defined restrictions or limitations on rights. Where these exist, their nature and extent should be set out.

. . . A report should include sufficient data and statistics to enable the Committee to assess progress in the enjoyment of Covenant rights, relevant to any appropriate article.

. . . The situation regarding the equal enjoyment of Covenant rights by men and women should be specifically addressed.

. . . Where a State party has already prepared a core document . . . this will be available to the Committee: it should be updated as necessary in the report . . ..

Human Rights Committee, Consolidated Guidelines for States Reports Under the International Covenant on Civil and Political Rights, CCPR/C/66/GUI/Rev.2 (2001).

Prior to 1992 the Committee announced no "conclusions" as to the human rights situation in a country or the adequacy of its report and of government replies to questions. Individual members made observations after government replies, indicating matters they still would like to have clarified; but the Committee sought no consensus.

The Committee does issue authoritative and useful General Comments discussing the desired form and content of reports, common implementation problems, its interpretation of various treaty provisions, and its experience gained as a result of considering state reports. The Comments provide guidance to States parties and are often cited by Committee members when they pose their own questions. General Comments have also been extended and modified over time, when the Committee has clarified its thinking about the scope of obligations a state has in relation to a particular right or set of rights. The Committee's General Comments on Article 7 excerpted and noted in this chapter are an example.

In 1992, the Committee decided to supplement members' oral comments by issuing "concluding observations" on each report. At its March 1992 meeting:

The Committee decided that comments would be adopted reflecting the views of the Committee as a whole at the end of the consideration of each State party report. That would be in addition to, and would not replace, comments made by members, at the end of the consideration of each State party report. A rapporteur would be selected in each case to draft a text, in consultation with the Chairman and other members, for adoption by the Committee. Such comments were to be embodied in a written text and dispatched to the State party concerned as soon as practicable before being publicized and included in the annual report of the Committee. They were to provide a general evaluation of the State party report and of the dialogue with the delegation and to underline positive developments that had been noted during the period under review, factors and difficulties affecting the implementation of the Covenant, as well as specific issues of concern regarding the application of the provisions of the Covenant. Comments were also to include suggestions and recommendations formulated by the Committee to the attention of the State party concerned.

Report of the Human Rights Committee, 47 U.N. GAOR Supp. (No. 40) at 18, U.N. Doc. A/47/40 (1992). The decision was formally incorporated into Rule 70(3) of the Committee's rules of procedure. The concluding observations are publicized

by the Committee and are separately accessible on the U.N. human rights website, in order to confer on them extra visibility.

b. Periodic Reports

Article 40(1) of the Covenant also provides that the Committee may request such additional reports as it may decide. To further its aim of “engaging in a constructive dialogue with each reporting State” the Committee established a policy of requiring periodic reports. Report of the Human Rights Committee, 36 U.N. GAOR Supp. (No. 40), Annex IV, at 102, U.N. Doc. A/36/40 (1981).

Article 40(1) indicates that periodic reports shall be submitted whenever the committee requires. At its 13th session in 1981, the Committee adopted a decision requiring States parties to submit periodic reports every five years. CCPR/C/20/Rev.2 (1981). This decision, however, may no longer be relevant since the adoption of the new consolidated guidelines for State party reports which supersede all other guidelines on reports and make no mention of the five year requirement. For subsequent periodic reports, the Committee usually sets a date by which a following periodic report should be submitted at the end of its concluding observations. Human Rights Committee, Consolidated Guidelines for States Reports Under the International Covenant on Civil and Political Rights, CCPR/C/66/GUI/Rev.2 (2001).
The Committee guidelines governing the form and content of initial reports also govern periodic reports. See infra at.7-9. In addition, the new guidelines specifically address subsequent periodic reports:

(1) There should be two starting points for such reports:

The concluding observations (particularly “Concerns” and “Recommendations”) on the previous report and summary records of the Committee’s consideration (insofar as these exist);

An examination by the State party of the progress made towards and the current situation concerning the enjoyment of Covenant rights by persons within its territory or jurisdiction.

(2) Periodic reports should be structured so as to follow the articles of the Covenant. If there is nothing new to report under any article it should so state.

(3) The State party should refer again to the guidance on initial reports and on annexes, insofar as these may also apply to a periodic report.

(4) There may be circumstances where the following matters should be addressed, so as to elaborate a periodic report:

There may have occurred a fundamental change in the State party's political and legal approach affecting Covenant rights: in such a case a full article by article report may be required;

New legal or administrative measures may have been introduced which deserve the annexure of texts and judicial or other decisions.

Human Rights Committee, Consolidated Guidelines for State Reports Under the International Covenant on Civil and Political Rights, CCPR/C/66/GUI/Rev.2 (2001).

The periodic reports thus can relay information previously requested by the Committee, information relevant to concluding observations, changes made by the State party in response to the Committee's concerns, and difficulties in implementing the Covenant. If the State is a party to the Covenant's Optional Protocol, the Committee also wants to know what remedies have been provided for cases under the Optional Protocol. Id.

The Committee has developed a practice of assigning second periodic reports to a group of four members. The members meet during the week preceding the Committee's sessions, review information received, and prepare a list of questions to be addressed during consideration of the report. The list then is given to each Committee member to enrich the oral examination process. The Committee follows a similar procedure while considering third periodic reports but urges governments to concentrate on developments occurring after submission of the second report. Report of the Human Rights Committee, 48 U.N. GAOR Supp. (No. 40), Annex X, at 218, U.N. Doc. A/48/40 (1993).

During the consideration of periodic reports a dialogue often develops between the government and the Committee, in which concerns are articulated and sometimes repeated. The focus in later reports should be on progress made in responding to those concerns. The questioning and requests for information often are challenging -- particularly if the government representatives are not adequately prepared.

In 1999 the Committee decided that lists of issues would be adopted at the session prior to the examination of the countries report. Adopting the list of issues at the prior session gives the State party two months to prepare responses. Since oral communications are central to the consideration of a State party report the advance notice of the issues should lead to more thorough consideration of state practices and responses to violations.. Report of the Human Rights Committee, U.N. Doc. A/60/40 (2005) at 15.

As with initial reports, Committee members make concluding observations at the end of the dialogue. The Human Rights Committee Chairperson has developed a

practice of expressing his/her conclusions just after the government's remarks, so as to be available to the media at the same time as the government remarks.

c. Supplementary Reports

Governments often have found reporting requirements to be substantial, requiring extensive effort and considerable expenditure. The Committee is not satisfied with anecdotal information. Hence, the government must establish mechanisms for its own monitoring of treaty obligations so that it can prepare reports which provide accurate descriptions and factually based material. Statistics must be in such detail that Committee members obtain a realistic sense of situations facing the entire nation, as well as regions and significant groups. Incomplete reports are not uncommon; and during questioning the government representative may be unable fully to answer questions posed and may choose to refer them back to the government. Additional information and responses to unanswered questions are supplied through supplementary reports. Rule 70 of the Rules of Procedure authorizes requests for additional information from states whose reports seem inadequate.

The Committee's consideration of supplementary reports largely mirrors the approach established with respect to both initial and periodic reports. The Committee's procedure for handling additional information and for dealing with cases where information has been promised but not submitted is as follows:

(a) Whenever additional information is received at the same time as the next periodic report or shortly before the next periodic report is due, to consider the additional information together with the periodic report;

(b) When additional information is received at other times, to decide, on a case-by-case basis, whether it should be considered, and to notify the State party concerned of any eventual decision to examine the additional information;

(c) Where promised additional information has not been received, the Bureau of the Committee will consider sending appropriate reminders to the States parties. The Secretariat, in corresponding with States parties concerning the date for submission of their next periodic reports, is also to remind them of their promise, during consideration of their previous reports, that additional information would be supplied to the Committee.

Report of the Human Rights Committee, 41 U.N. GAOR Supp. (No. 40) at 9-10, U.N. Doc. A/41/40 (1986).

d. Emergency Reports

The Committee occasionally has used its authority under Article 40 to request reports regarding emergency situations. It considers emergencies to be "recent or current events indicating that the enjoyment of human rights protected under the Covenant ha[s] been seriously affected." Report of the Human Rights Committee, 48 U.N. GAOR Supp. (No. 40), Annex X, at 219, U.N. Doc. A/48/40 (1993).

In it's 1993 Annual Report the Committee had requested emergency reports from Iraq (April 11, 1991), the Federal Republic of Yugoslavia (November 4, 1991), Peru (April 10, 1992), Bosnia and Herzegovina, Croatia, and the Federal Republic of Yugoslavia (October 6, 1992). All parties complied and participated in the consideration of those reports. Id. At its October 1993 meeting, the Committee requested emergency reports from Burundi and Angola. The Committee has debated the question whether states derogating from obligations under Article 4 should have special reporting requirements to the Committee, but no rule has been adopted. Pursuant to Article 4(3) derogating states must notify the other States parties of all measures taken pursuant to derogation.

After the early 1990's the Committee stopped requesting emergency reports. In March 2004, the Committee's Bureau discussed the possibilities of reviving the urgent procedure/ad hoc report procedure.

3. Problems with the Reporting Structure

Many States parties have failed to comply in a timely fashion with the reporting requirements under Article 40 of the Covenant. Reports are rarely submitted on time and many subsequent reports are massively overdue. As of July 2005, 97 State parties (representing over three-fifths of States parties) were delinquent in their reporting. The State party most overdue in reporting is Gambia whose second report was due in 1985. Equatorial Guinea's initial report was due in 1988 and has not been submitted. Iran's third report was due in 1994, its fourth report was due in 1999, and its fifth report was due in 2004, but they have not been submitted. Report of the Human Rights Committee, U.N. Doc. A/60/40 (2005).

There is, however, a fairly uniform set of procedures for response to late reports. First, the Committee issues increasingly firm reminders. Second, the Committee through its chairperson, a member from the same geographical region as the state concerned, or the Office of the U.N. High Commissioner for Human Rights seeks to make personal contact with the government. If those steps do not induce compliance, the Committee has developed a means for encouraging compliance with the reporting requirement, including sending a letter to the meeting of all State parties regarding non-compliance, citing non-compliers in the Annual Report to the General Assembly, and sending a "Chairman's letter" to the government's Minister of Foreign Affairs. In addition to non-reporting the Committee has also had states fail to send delegations to the session at which a State party's report was to receive consideration. Human Rights Committee, General Comment 30:

Reporting Obligations of States parties under Article 40 of the Covenant, CCPR/C/21/Rev.2/Add.12 (2002); Dominic McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights ¶ 3.9 (1991).

To address these problems the Committee amended its Rules of Procedure. The amendments allow the Committee to review a State party in the absence of a periodic report. Further, if a State party fails to attend a session of the Human Rights Committee at which its report was to be reviewed the Human Rights Committee may notify the state of a new date for the review or proceed with the review as scheduled. The Committee first applied its amended procedure at its seventy-fourth session and reviewed the situation in Gambia in the absence of a report or government representatives.

Another substantive problem is that initial reports often are self-congratulatory and not self-critical. They often tend to focus on formal legal protections within a particular state rather than their enforcement or the practice of protecting rights by the state and its agents. The Committee does not take these reports at face value and their scrutiny is reflected by careful questioning.

The Committee currently meets for three-week sittings three times per year, once in New York (generally March) and twice in Geneva (generally July and October). At its July 2006 meeting in Geneva it considered the second periodic report of the Central African Republic, the second and third periodic reports of the United States, and the first report of the Interim Administration Mission in Kosovo. Further, in preparation for its next session in October, the Committee adopted lists of issues on reports submitted by Bosnia and Herzegovina, Madagascar, Ukraine as well as on the country situation (absence of report) of San Marino. Presentation of a report -- including the government's introduction, questions and comments by members, the government's reply, and further observations -- may take two or possibly three days.

The procedures for reporting are set forth in Committee rules. Pursuant to Rule 68 each reporting government is invited to send a representative to the public meeting who may orally introduce the report and place it in legal, social, economic, and political context. The representative also may update information submitted earlier. McGoldrick, supra, ¶ 3.19.

After the introduction Committee members, in turn, engage in a dialogue with the representative by asking questions about the report and the government's fulfillment of treaty obligations. When reviewing initial reports the Human Rights Committee selects one member -- usually from the same region as the reporting government – to serve as the principal and initial questioner of the government. Though the focus of the initial report is on legal developments relevant to the Covenant, the Committee also expects descriptions of actual practices. When

reviewing a State's subsequent reports the Committee may select as many as four members to lead the questioning on various issues. Government representatives are given time to prepare oral replies or, alternatively, to refer questions back to the government. After the replies, Committee members may again question the representatives. Id. ¶ 3.20.

Committee members are not limited to information in the state's report but may utilize their own expertise, information available from other sources, and materials submitted informally by NGOs. Members from governments under consideration generally have not questioned their own governments, but, informally, may provide information to colleagues on the Committee. Id. ¶ 3.20.

Delinquencies in State reporting are not confined to the Human Rights Committee. As of October 2005 there were more than 1,200 overdue reports to various U.N. treaty bodies. Hence, about 60% of all reports due are submitted late. If all overdue reports were submitted, it would take a decade to clear the resulting backlog. In part to address the delinquencies in State party reporting, U.N. Secretary-General Kofi Annan called for the development of harmonized reporting guidelines for human rights treaty bodies. Revised guidelines to harmonize the reporting requirements were considered at the seventeenth meeting of the chairpersons of the treaty bodies in 2005. The chairpersons agreed that additional review was needed and agreed to form a technical working group to look further into reporting harmonization. A key issue that multiple reporting raises is the extent to which new treaty obligations further defining and refining human rights entitlements ought to be pursued within the UN system.

Harmonizing the reporting requirements may address some delinquencies in state reporting, but other problems will remain including: overlapping competencies, poor visibility, complex procedures, backlog of reports, lack of adequate staff, and weak compliance monitoring. To address these issues a proposal to unify the treaty bodies is under consideration. The proposal envisions a full time committee and staff. The committee could take the form of a single body, chambers operating in parallel, chambers operating on functional lines, chambers along treaty lines, chambers along thematic lines, and/or chambers along regional lines. Regardless of the form, the unified committee would be responsible for reporting compliance, individual complaints, inquiries, general comments, follow-up, early warning, and fact-finding. Formation of the unified body would pose legal difficulties. The various treaty monitoring bodies were created by the treaties they monitor. It would be necessary to either amend all the treaties (directly or through an optional protocol) or an overarching amending procedure protocol. Further the unified body would need to accommodate the different ratification patterns of states. Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, U.N. Doc. HRI/MC/2006/2 (2006).

4. Distribution of Committee Reports and Comments

Article 40(4) of the Civil and Political Covenant requires that the Committee transmit all its reports and General Comments to each party to the Covenant. In addition, that provision authorizes the Committee to send copies to the Economic and Social Council (ECOSOC). While Article 40(5) authorizes states to submit observations on comments made under Article 40(4), there is no precise indication of ECOSOC's required or permitted role in response to Committee communications.

Article 45 provides that the Committee "shall submit to the General Assembly . . ., through the Economic and Social Council, an annual report on its activities." These reports include Committee views on individual cases under the Optional Protocol, the General Comments promulgated during the year, and a summary of its considerations of state reports. As with ECOSOC the General Assembly's role is unclear in respect of these report. Also, because the Committee technically is not an organ of the U.N. but is a treaty body, its duty to follow Assembly recommendations is unclear. In general, however, perhaps because the Committee depends on U.N. funding and staff assistance, Committee members carefully consider Assembly observations while planning and executing their work. McGoldrick, supra, ¶ 3.40.

NOTES AND QUESTIONS

1. The International Labour Organization (ILO) also utilizes reporting to monitor compliance with its treaties. One ILO counterpart to the Human Rights Committee is its Committee of Experts on the Application of Conventions and Recommendations, formed in 1927. Like the Human Rights Committee it is composed of independent experts from various countries. Unlike the Human Rights Committee, which reviews reports only under the Civil and Political Covenant, the ILO Committee reviews consolidated reports that discuss practices under numerous ILO treaties. As of March 2006, the ILO had promulgated 185 covenants and 195 recommendations. The Committee of Experts uses government reports and other information to analyze states' compliance with ILO treaties and then comments formally on compliance. See Chapter 16 infra.

The ILO also sponsors a Conference Committee on the Application of Conventions and Recommendations, which is larger than the Committee of Experts and is composed of representatives of governments, employers, and workers. It is established by the International Labour Conference after each annual meeting, and it uses the Committee of Experts' report to select governments as to which a more-detailed analysis of discrepancies and implementation measures seems appropriate.

The second main difference between the Human Rights Committee and ILO committees is that the ILO is largely staff-driven whereas the Human Rights Committee is largely member-driven. For example, ILO comments are drafted by staff and circulated to Committee members, who then make comments and

changes. In contrast, the Human Rights Committee drafts its own comments and questions with relatively little assistance from staff. For further additional information on ILO procedures, see Chapter 16 supra.

2. Compare and contrast the Civil and Political Covenant's reporting procedures with those of the Convention on the Elimination of All Forms of Racial Discrimination (Racial Treaty):

Article 8

1. There shall be established a Committee on the Elimination of Racial Discrimination . . . consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems. . . .

Article 9

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the State concerned; and (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.

2. The Committee shall report annually, through the Secretary-General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

The Civil and Political Covenant was adopted on December 16, 1966, one year after the Racial Convention, adopted on December 21, 1965. What differences do you note in the words of the reporting provisions? Are the differences significant?

3. The Convention on the Rights of the Child (Children's Convention), adopted in 1989, contains a more recent codification of reporting requirements. Compare the reporting procedures of the Covenant and the Racial Treaty with those of the Children's Convention that are excerpted below. Note that the Children's Treaty contains more explicit instructions. Why might U.N. drafters have decided to codify these provisions as part of the treaty itself rather than as part of committee rules of procedure?

Article 43

1. For the purpose of examining progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided. . . .

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfillment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1(b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children’s Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the

United Nation's Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention . . . [and] to submit reports on the implementation of the Convention;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nation's Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

Note that the Children's Convention, by specifying desired roles, avoids debate (as has occurred under the Civil and Political Covenant) involving the proper role of U.N. specialized agencies. See Committee on the Rights of the Child, Report on Seventh Session, U.N. Doc. CRC/C/34 (1994).

4. The body charged with monitoring, implementing, and enforcing the Economic, Social and Cultural Covenant is the Economic and Social Council (ECOSOC), which has delegated its responsibility to the Committee on Economic, Social and Cultural Rights. For discussion of reporting and examination procedures under that Covenant, see Committee on Economic, Social and Cultural Rights, Report on the Seventh Session, at 12-19, U.N. Doc. E/1993/22 (1993) and chapters 4-5, supra.

5. For general reading, see:

Philip Alston and James Crawford, The Future of UN Human Rights Treaty Monitoring (2000);

Amnesty International, Monitoring and Investigating Human Rights Abuses in Armed Conflict (2001);

Amnesty International, United Nations: Proposals to Strengthen the Treaty Monitoring Bodies (2003);

Anne F. Bayefsky, The UN Human Rights Treaty System: Universality at the Crossroads (2001);

Ineke Boerefijn, The Reporting Procedure Under The Covenant On Civil And Political Rights: Practice And Procedures Of The Human Rights Committee (1999);

Ineke Boerefijn, Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights, 17 Hum. Rts. Q. 766 (1995);

Ineke Boerefijn, United Nations, 23 Neth. Q. Hum. Rts. 273 (2005);

Agnès Callamard, Monitoring and Investigating Torture, Cruel, Inhuman or Degrading Treatment, and Prison Conditions (2000);

Stephanie Farrior, International Reporting Procedures, in Guide to International Human Rights Practice 189 (Hurst Hannum ed., 4th ed. 2004);

Camille Giffard, The Torture Reporting Handbook: How to Document and Respond to Allegations of Torture within the International System for the Protection of Human Rights (2000);

Human Rights Committee, Guidelines Regarding the Form and Content of Periodic Reports from States Parties, U.N. Doc. CCPR/C/20/Rev.1 (1991);

The International Covenant on Civil and Political Rights: Cases, Materials and Commentary (Sarah Joseph, Jenny Schultz, and Melissa Castan eds., 2nd ed. 2004);

International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller (Gudmundur Alfredsson ed. 2001);

Lawyers Committee For Human Rights, The Human Rights Committee: A Guide For NGOS (1997);

Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2005);

Michael O'Flaherty, Human Rights and the UN: Practice Before the Treaty Bodies (1996);

Michael O'Flaherty, The Reporting Obligation under Article 40 of the International Covenant on Civil and Political Rights: Lessons to be Learned from Consideration by the Human Rights Committee of Ireland's First Report, 16 HUM. RTS. Q. 515 (1994);

Jennifer Riddle, Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process, 34 Geo. Wash. Int'l L. Rev. 605 (2002);

Janusz Symonides, Human Rights: International Protection, Monitoring, Enforcement (2003);

Kathy Vandergrift, Challenges in Implementing and Enforcing Children's Rights, 37
Cornell Int'l L.J. 547 (2004).
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D. THE SITUATION IN IRAN

1. Creation of the Islamic Republic of Iran

In January 1979, the Shah of Iran was compelled to abdicate under pressure of violent resistance to his continued rule. In place of the Shah's westernized government the resistance instituted a republic founded on tenets of Islam. To implement the transformation, the new government created a system of revolutionary courts, military police, and provisional laws. Readers should keep that history in mind when reading the material on Iran that follows. One of the major projects of the new government was to adopt an Islamic penal code, which forms the basis of discussion in this chapter. The following excerpt examines the four general categories of Islamic Penal Code of Iran: hudud, qisas, ta'zir, and diyat.

Nadar Entessar, Criminal Law and the Legal System in the Revolutionary Iran, 8 B.C. Third World L.J. 91, 96-98 (1988):

In general, the Islamic Republic's penal code has divided crimes into the four categories of hudud, qisas, ta'zir, and diyat based on the type of punishment for each category of offense. Hudud crimes are acts prohibited by God and punishable by mandatory penalties defined in the Quran. Although Islamic jurists differ on the precise nature of hudud crimes, the Iranian penal code considers the following as hudud offenses: theft, robbery, adultery, apostasy, drinking of alcoholic beverages, and rebellion against Islam as interpreted and defined by the religious [and legal authorities] in Iran.

Since hudud crimes are specific and their penalties are specified in the Quran, the judge exercises no discretion as to the type of punishment imposed. The harshness of the punishment of hudud crimes, such as amputation of hands for theft or stoning to death for adultery, have cast a negative image on revolutionary Iran's administration of justice. However, the Iranian authorities rebut Western criticism

of their country's system of justice by claiming that lawbreakers should not be seen simply as sick individuals, and their punishment as a form of treatment for their sickness. As the Islamic Republic's Chief Justice, Ayatollah Mussavi Ardabili, has contended: "Islam teaches us that it is equally important to punish a lawbreaker, as a punishment is considered to have three purposes - repentance of the crime, admonition to not repeat it, and a lesson to others." In the same vein, Ayatollah Khomeini, responding to domestic critics of Iran's new penal code, stated: "When a measure of punishment is carried out, it teaches the person concerned a lesson and this is beneficial for the nation . . .. It is a sin to be merciful to someone who should be receiving a certain measure of punishment. In fact, it would be damaging to the person concerned . . .."

Of all punishments of hudud crimes, severance of thieves' hands has become the most frequent method of punishment under Iran's Islamic penal code. The authorities have, in fact, boasted that they have developed a perfect device for the speedy amputation of hands, which is carried out primarily by the Judicial Police inside the prisons. According to Abbas Hashemi Ishaqpour, the head of the Judicial Police, several persons from the Ministry of Health, Coroner's Office, and Tehran and Beheshti Universities Medical Faculty have been consulted to develop a "safe and speedy" method of amputation of arms and hands.

Qisas crimes include murder, manslaughter, battery, and mutilation. The Islamic law regards such offenses as acts against the victim and his family and allows for "inflicting on a culprit an injury exactly equal to the injury he inflicted on his victim." The decision to inflict retribution on the culprit rests with the victim and the victim's family in the case of murder. Although retribution in kind and vendettas are allowed under the [qisas] crimes and punishment, it is important to note that both the Quran and the Iranian penal code recommend forgiveness, because the act of forgiving pleases God. On numerous occasions, Ayatollah Khomeini has chastised the clerical authorities for their zealous advocacy in encouraging retribution and vendettas in qisas cases.

The practice of qisas, more than any other aspect of Islamic criminal law, had its origin in pre-Islamic Arabia, where acts of vengeance and blood feuds pitting one bedouin tribe against another were accepted practices of conflict resolution. With the advent of Islam, the practice of taking vengeance against the whole tribe was reduced to acts of retribution against the culprit alone and not his family or tribe. Also, the family of the victim was allowed to ask for alternatives, such as blood money, or even forgiveness of the slayer, rather than physical acts of vengeance.

Ta'zir offenses are those for which no specific penalties are mentioned in the Quran or hadith. Therefore, the punishment of ta'zir is left to the discretion of the Islamic judge, who should take the public interest and changing requirements of time to mete out an appropriate punishment. However, the judge's discretion is not boundless. In the Islamic penal code, the range of punishment of ta'zir crimes has

been determined and codified in law, which ranges from admonition, to fines, to seizure of property. Such punishments also include public flogging, which has become a common ta'zir punishment in the Islamic Republic of Iran for such offenses as "immoral behavior," "immodest clothing," public drunkenness, and the like.

Diyat punishment is not strictly a separate category of punishment under the Islamic law. It refers to a form of compensation, or blood money, which is to be paid to the victim or his family as reparation for an injury or murder. In other wards, diyat becomes a form of punishment if a victim or his family (in case of unintentional manslaughter) choose to forgo their right of retribution under qisas and instead demand blood money from the perpetrator of the crime. The Iranian penal code has extensively codified the nature of diyat for various types of crimes and the time element required in payment of diyat in each case.

Amnesty International, Iran, New Government Fails to Address Dire Human Rights Situation 25-26, 27-28, 33, AI Index: MDE 13/010/2006 (2006):

Torture has been used systemically in Iran for many years for the purpose of extracting information and confessions. Torture is facilitated by laws and procedures governing detention and interrogation which permit solitary confinement and ban access of detainees to lawyers until the process of investigation is completed, and by the existence of parallel and sometimes informal institutions which run their own detention centres to which the judiciary has no access.

In addition, Iranian legislation permits the use of cruel, inhuman and degrading punishments which amount to torture, such as flogging and amputations.

[Since 2005], flogging sentences have continued to be imposed by the courts and implemented on a frequent basis. For example, on 28 December 2005, the daily 'Etemad reported that three men had been flogged in public in Velayat Square in Jahrom after being convicted of drinking alcohol and unruly behavior by Branch 102 of Jahrom General Court.

Sentences of amputations have also been implemented. In November 2005, an Iranian television station in Khuzestan was reported to have announced that, after confirmation of the sentence by the Supreme Court, an amputation was carried out in Karoun Prison, Ahvaz city on the left foot of a person named only as Abbas G,. A local Justice Ministry official was reported to have said, "He was sentenced by a Revolutionary Court in Mahshahr to have his right hand and left leg severed in public for taking part in armed robbery and creating fear among the public." On 28 November 2005, ISNA reported that another amputation, on the left foot of a man named only as Adel also carried out in Karoun Prison after his sentence for armed robbery, passed by the Revolutionary Court in Mahshahr, was upheld by Branch

32 of the Supreme Court. On 2 January 2006 the Iran newspaper reported that an unnamed 32-year-old man had been sentenced to three-and-a-half years' imprisonment, 40 lashes and amputation of his hand for repeated burglary.

A woman, identified only as "Soghra" was sentenced to death by stoning in October 2005 after a conviction of adultery, despite a moratorium on stoning imposed in December 2002 under a directive from the Head of the Judiciary. Amnesty International has recorded several sentences of stoning being imposed since the moratorium was announced, although it is not aware of any such sentences being carried out.

2. Human Rights Committee

Chapter 1 introduced the Human Rights Committee and this chapter examines in detail the Covenant's only obligatory implementation mechanism -- the submission of reports from States parties for examination -- and the Committee's practice of issuing concluding observations on the reports. Before proceeding, students should read carefully the "Reporting Procedures" section of this chapter at 7. In order to illustrate the process, this section includes excerpts from Iran's 1982 and 1992 reports, and the Committee's discussion of those reports.

The Committee's interpretations of its role in commenting on reports further illustrate the goal of cooperation and assistance. Article 40 instructs the Committee to transmit "its reports, and such general comments as it may consider appropriate, to the States Parties."

This chapter also contains the Committee's General Comments on Article 7 of the Covenant -- the article prohibiting torture and other cruel, inhuman, or degrading treatment or punishment -- as an example of the Committee's interpretive guidance on the meaning of specific provisions of the Covenant, which may be useful in evaluating the actions of Iran at issue here.

* * * * *

Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Reports of States Parties Due in 1977. Addendum, Iran at 2-5, U.N. Doc. CCPR/C/1/Add.58 (1982):

In implementation of article 40 of the International Covenant which reads: "The States Parties to this Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights . . .", and with a view to submitting a report on the law and regulations approved to guarantee the individual's rights and liberties, I have the honour to inform you as follows: . . .
The Islamic Revolution of Iran is based on the belief that so long as man is not

liberated from ideological, cultural, political and economic enslavement and dependence, freedom and independence will not be possible and without freedom and independence respect for human rights will not have any correct and proper applicability. Accordingly, the intention of the Islamic Revolution is to liberate man from slavery and servitude to another "slave", and to bestow upon him human growth and grandeur ("In order to liberate man from servitude of man and direct him to servitude of God"). It is on the basis of this belief that the third principle of the Constitution of the Islamic Republic of Iran reads as follows:

Principle 3: The Government of the Islamic Republic of Iran is bound to take into consideration all its possibilities to achieve the objectives . . . for:

1. Creation of a favourable atmosphere for furtherance of moral virtues based on the faith and righteousness and struggle against all manifestations of corruption and ruin; . . .

6. Putting an end to any despotism, autocracy and oligarchy; [and]

7. Ensuring political and social freedom within the domain of the law; . . .

[A]ll the laws which for long years governed the deprived people of this country, were enacted in such a way as to bring about the domination of a small group over the rest of the people while disregarding the equality, liberties and rights of human beings. Since the Revolution therefore, the Ministry of Justice of the Islamic Republic of Iran has set out to review and amend these laws or to rewrite or change them in a rational and reasonable manner so as to guarantee the individual's rights and liberties. . . .

[B]ills and laws have been approved and enacted to determine and ensure the rights and liberties of the people. The measures taken in this regard may be summarized as follows: . . .

Laws and regulations approved to ensure rights and liberties

1. The Constitution of the Islamic Republic of Iran

The Constitution of the Islamic Republic of Iran, every word, or better, every letter of which is the crystallization of the drops of the pure blood of the martyrs who have freely and consciously chosen martyrdom, is persuasive evidence of respect for and guarantee of human rights and liberties. . . .

2. State General Inspection Act

This Act, which, on the basis of Principle 174 of the Constitution of the Islamic Republic of Iran, was passed, in 14 articles and several notes, by the Islamic Consultative Assembly, enables the Judiciary to investigate, in its continuous and

extraordinary inspections, any discord or offence committed by civil and military organs and all the Revolutionary Institutions, and to pursue the matter through legal channels until the attainment of the final results. . . .

3. Administrative Court of Justice Act

. . . Principle 173 of the Constitution of the Islamic Republic of Iran . . . provides:

To investigate litigations, complaints and protests of the public against Government officials, units or regulations and to administer justice in such cases a tribunal known as the 'Administrative Court of Justice' shall be formed under the control of the Supreme Judicial Council. The jurisdiction and procedure for the functioning of this tribunal shall be established by law.

Enactment of a law in such a manner is unprecedented in the history of the Iranian Ministry of Justice. If ever such a law has been enacted under other titles it has never been put into practice. The approval of the Administrative Court of Justice Act permits and enables any individual of the nation to lodge a complaint with one of the benches of the Administrative Court of Justice against any injustice or oppression committed by Government employees or units, through regulations or decrees, against people and cause justice [to] be administered. . . .

It must be acknowledged that in a Revolutionary society in which all former criteria and rules are reversed, much time is needed to establish a new order. This is natural and ordinary in any revolution. For this very reason and in order to see us through this critical period, the Leader of the Revolution declared the year 1360 (1981) as the Year of the Law and, in his orders and edicts, instructed all to comply with laws and protect the rights of individuals.

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Report of the Human Rights Committee, 37 U.N. GAOR Supp. (No. 40) at 66-74, U.N. Doc. A/37/40 (1982):

Iran

298. The Committee considered the report of Iran (CCPR/C/1/add.58) at its 364th, 365th, 366th and 368th meetings held on 15, 16 and 19 July 1982 (CCPR/C/SR.364, 365, 366 and 368).

299. The report was introduced by the representative of the State party who explained the ideological foundation of the Islamic Revolution in Iran. . . .

300. The representative stated that, although many of the articles of the Covenant corresponded to the teachings of Islam, in the case of differences between the two sets of laws, the tenets of Islam would prevail. . . .

324. [The Iranian representative] stressed that the criteria for determining the validity of any law would be the values given by God and transmitted to earth, that since human traits were considered to be in harmony with revealed values, values derived from human civilization and from reason were held to be close to Islamic values, and that whenever divine law conflicted with man-made law, divine law would prevail. He explained that the Koran contained guidance on a comprehensive range of matters involving morals, historical analysis, a criminal code and precepts regarding the distribution of wealth, teachings on community growth and spiritual values, and when a nation recognized and accepted the principles of Islam, as the basis for its existence, Islamic precepts would be followed in resolving problems. However, in Shi'ite canon law the basic requirements governing the continuity of community life could be viewed in historical terms, and the divine laws could be interpreted and implemented accordingly. Unfortunately, the conspiracies that had occurred in Iran since the revolution had prevented the Government from having sufficient time to develop new laws along those lines. Nevertheless, an attempt was being made to establish, at an early date, the three separate powers of the judiciary, the executive and the legislative in conformity with Islamic law. After the legislative power had been established, the relative conformity of each law with Islamic precepts would be determined. In this connexion, he explained his Government's position on the incorporation of international instruments on human rights in Islamic law and stated that if the intention was that such instruments should complement and add to the Islamic laws with a view to harmonizing them in a single legal system, then his Government would have to respond negatively, since it considered that the Islamic laws were universal and Shi'ite canon law would take any new needs of society into account. If, however, it was intended that international instruments on human rights and Islamic laws should be taken together in an effort to achieve mutual understanding and to explore what they had in common, then such an endeavour would be accepted with pleasure. He pointed out that laws of non-religious inspiration were not necessarily contrary to the Moslem faith; however, any laws contrary to the tenets of Islam would not be acceptable.

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Report of the Human Rights Committee, General Comments on Article 7 of the Covenant, 37 U.N. GAOR Supp. (No. 40) at 94-95, U.N. Doc. A/37/40 (1982):

[Ed. Note: The following selection consists of the first General Comment on Article 7 of the International Covenant on Civil and Political Rights issued by the Human Rights Committee pursuant to Article 40 of the Covenant. This General Comment predates the drafting of the Convention Against Torture, which includes a more detailed definition of torture in its Article 1.]

1. In examining the reports of States parties, members of the Committee have often asked for further information under article 7 which prohibits, in the first place,

torture or cruel, inhuman or degrading treatment or punishment. The Committee recalls that even in situations of public emergency such as are envisaged by article 4 (1) this provision is non-derogable under article 4 (2). Its purpose is to protect the integrity and dignity of the individual. The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation. Among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers and family members access to the detainees; provisions requiring that detainees should be held in places that are publicly recognized and that their names and places of detention should be entered in a central register available to persons concerned, such as relatives; provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in court; and measures of training and instruction of law enforcement officials not to apply such treatment.

2. As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood. It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment. In the view of the Committee the prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure. Even such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this article. Moreover, the article clearly protects not only persons arrested or imprisoned, but also pupils and patients in educational and medical institutions. Finally, it is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority. For all persons deprived of their liberty, the prohibition of treatment contrary to article 7 is supplemented by the positive requirement of article 10 (1) of the Covenant that they shall be treated with humanity and with respect for the inherent dignity of the human person.

* * * * *

Iran’s second report was due in 1983, but the government did not submit it until May 12, 1992. Excerpts from that report are provided below.

Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Second Periodic Reports of States Parties Due in 1983. Addendum, Islamic Republic of Iran at 1-2, 18-19, U.N. Doc. CCPR/C/28/Add.15 (1992):

2. According to article 2 of the Constitution, the Islamic Republic is a system based on belief in: . . .

6. The exalted dignity and value of man and his freedom coupled with responsibility before God in which equity, justice, political, economic, social, cultural independence and national solidarity are secured by recourse to:

(a) Continuous Ijtehad (exegesis of divine law) of Fughaha (Islamic Jurist) possessing necessary qualifications;

(b) Science and arts and the most advanced results of human experience . . . ;

(c) Negation of all forms of oppression . . ..

3. According to article 4 of the Constitution: "All civil, penal, financial, economic, administrative, cultural, military, political and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution, as well as to all other laws and regulations, and the Fughaha of the Guardian Council are to supervise this matter."

4. Article 91 of the Constitution provides that "with a view to safeguard the Islamic ordinances and the Constitution, in order to examine the compatibility of the legislation passed by the Islamic Consultative Assembly with Islam, the Guardian Council will consist . . . of six fughaha . . . and six jurists . . .." . . .

6. The provisions of the Covenant are incorporated in the Constitution as well as in other laws and put into force accordingly. . ..

. . . Article 7

77. The laws of the Government of the Islamic Republic of Iran are based on negation of any form of mistreatment of all individuals. This overriding principle has been accorded due attention in the Constitution. In order to ensure effective respect for this principle, not only has the Constitution provided for the punishment of those who ignore the prohibitions and commit acts of mistreatment and torture, but provisions have also been made for the legal protection of the victims of torture. . . .

80. Another measure taken by the legislature to prevent torture and mistreatment of individuals, is outlined in article 62 of the Ta'azirat (Reproof) Law. According to this article, "If any judicial or non-judicial employee or official, in discharging his

duties or due to such actions, subjects someone to mistreatment or orders such an act without legal authorization, he will be sentenced to retribution or blood-money or 74 lashes, as the case may be." . . .

* * * * *

The Human Rights Committee examined Iran's second report in 1993. Excerpts of the observations and questions of Committee members are reproduced below.

Human Rights Committee, Summary Record of the 1194th Meeting at 2, U.N. Doc. CCPR/C/SR.1194 (1993):

4. With regard to the implementation of the Covenant in general, [Committee Member Prado Vallejo, of Ecuador] noted that, under article 4 of the Constitution, all civil, penal, financial, economic, administrative, cultural, military, political and other laws and regulations must be based on Islamic criteria. . . . While that in itself was a perfectly respectable option, the developments that had occurred in the world since the emergence of Islam made it permissible to ask whether the fact of ordering the whole life of a country on the basis of such ancient precepts could not give rise to certain problems. . . .
* * * * *

Human Rights Committee, Summary Record of the 1196th Meeting at 11-14, U.N. Doc. CCPR/C/SR.1196 (1993):

33. [Committee Member] Mr. DIMITRIJEVIC [of Yugoslavia] wished first of all to clarify a certain point. In his view, the Iranian delegation was using a false assumption as a point of departure in stating that the Covenant could be interpreted according to the principle of cultural relativity. It was not the first time that representatives for a State party had stated in theCommittee that the Covenant should be interpreted in the light of the culture of a specific country and that that culture should influence the application of the Covenant to the extent that the Committee was unable to understand the human rights situation in that country. He challenged that point of view since the Covenant was the result of a multicultural effort. . . . He recalled that the Iranian authorities had freely ratified the Covenant because they had considered it to be compatible with the basic cultural values of their country. . . . Generally speaking, and regardless of cultural heritages, it could be generally agreed that the Covenant constituted a zone of convergence for all cultures in an extremely important sphere. . . . On a whole series of rights the Covenant left a certain amount of leeway to the State party which could, to a varying extent, restrict those rights subject to certain conditions. Yet there were some fundamental principles from which no derogation was possible. . . .

37. Mr. PRADO VALLEJO [of Ecuador] . . . reverted specifically to the matter of punishment which had been referred to at length by other members of the

Committee. He quoted the head of the judiciary, who had allegedly stated in 1991 that punishments, and in particular lapidation [stoning], were an integral part of Islam. In his own opinion, no concept could justify the punishments that had been mentioned. . . .

39. The practice of torture was contrary to article 7 of the Covenant. The Committee could never accept the idea that torture, amputations or flogging should be provided for by the law or recognized as normal practice. If a State's legislation, practice and customs were contrary to the Covenant, it should change them. . . .

47. The Islamic Republic of Iran was not the only State party to the Covenant whose Constitution was based on Islamic law. There was considerable leeway in the interpretation of Islamic law by Islamic theologians and experts, and the Islamic Republic of Iran should be able, without difficulty, to bring its legislation and practice into line with the Covenant and thereby to comply with its international obligations. It should, for example, be possible to replace punishments such as amputation or lapidation by others which were in conformity not only with Islamic law but also the international Covenants. . . .

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Human Rights Committee, Summary Record of the 1230th Meeting at 5-6, U.N. Doc. CCPR/C/SR.1230 (1993):

14. [The Iranian representative, in response to questions regarding whether Iranian authorities would consider bringing their legislation into line with the Covenant, stated that] Iranian criminal law provided for certain forms of corporal punishment, including flogging and stoning. If a court decided that a person who had been found guilty should be flogged, the flogging was not considered to be torture, since that form of punishment existed under Islamic law. . . .

19. Mr. Dimitrijevic had argued that the Covenant was an expression of fundamental humanitarian principles that were beyond interpretation according to any particular culture. That was also his Government's understanding of the Covenant, as an embodiment of universal principles of justice and humaneness. It was on specific issues, however, that interpretations would differ from culture to culture -- for example, in the definition of certain crimes or of the civil rights of individuals. Those who practised justice did so in a humanitarian way, but their interpretation of how the laws should be executed would differ.

20. The Islamic Republic of Iran had, like the previous regime, accepted the Covenant. The Republic, however, had an inescapable obligation to the majority of its people, who had by their vote established that Iran must have a Government based on Islamic law. All legislation in the country must therefore be based on Islamic laws and ratified as such. . . . Regardless of the Committee's categorical

interpretation of the provisions of the Covenant, his Government, when an Islamic decree was at odds with a provision of the Covenant, could not take sides without alienating its people and its elected parliament, who had voted for the decree. . . .

NOTES AND QUESTIONS

1. In 1992, the Human Rights Committee adopted new General Comment on Article 7 of the Covenant on Civil and Political Rights. It retains the language of the previous comment, while elaborating on concepts not directly pertinent to this chapter. The new comment focuses particularly on States parties' reporting obligations. See International Covenant on Civil and Political Rights: Note by the Secretary-General, U.N. Doc. E/1992/58 (1992).

2. Readers should note that Iran made no reservations when it ratified the Covenant on Civil and Political Rights. Regarding reservations, see chapters 1, 4, and 13.

3. Compare the Committee discussion of Iran's 1982 report with its responses to the 1992 report. How has the Committee's approach changed? Is the new approach appropriate? Effective? Can it be explained by reference simply to the Committee's interface with Iran or by reference also to other political and legal developments?

4. The Iranian representatives and reports have noted Iran's efforts to prevent the use of torture during interrogation. Note that bodily harm might be inflicted by state officials in at least five distinct contexts: to obtain confessions; by police brutality, without regard to confession and sometimes against persons not in detention; as a penalty for crime, either in lieu of or in addition to imprisonment; as a disciplinary measure against convicted prisoners; and as a disciplinary measure in a non-penal institution such as a school or hospital. Does the meaning of Article 7 vary among these situations, or remain constant?

3. Country Rapporteur Process of the U.N. Commission on Human Rights

Following this note are excerpts from the reports by the U.N. Commission on Human Rights ("Commission") Special Representative on Iran. The Commission has, until 2006, been a body comprised of 53 governmental representatives as contrasted with the 18 experts on the Human Rights Committee. The Commission developed the process of appointing rapporteurs and representatives as part of its broader efforts to monitor the human rights situation in specific countries where serious problems have arisen. The Commission has authorized these country rapporteurs and representatives pursuant to ECOSOC resolution 1235 which grants it authority to "make a thorough study of situations which reveal a consistent pattern of violations of human rights." The Commission has established several

approaches to implementing ECOSOC resolution 1235 that are examined in chapter 6 of this book. At this point, however, it is only important to note that the Special Representative to Iran acted under the Commission's authority in the context of the U.N. Charter, while the Human Rights Committee acts under authority granted by the Covenant on Civil and Political Rights. Consequently, the Special Representative's report relied on a broad range of U.N. instruments in evaluating the human rights situation in Iran; whereas the Human Rights Committee only has authority to monitor implementation of the Covenant. The meaning of the Covenant, however, might be informed by other instruments or the interpretations made by other monitors or treaty bodies, as this problem illustrates.

The Commission never developed specific guidelines for its rapporteurs and representatives to follow in carrying out their investigative duties. Rather, the resolution establishing each rapporteur specifies the rapporteur's/representative's mandate in broad terms, usually involving a direction to study the human rights situation in the country at issue and prepare a report to the Commission, including conclusions and recommendations. The mandate of the Special Representative to Iran, described in this excerpt from his report, is typical. As part of their fact-finding, several rapporteurs and representatives have conducted on-site missions in the countries which they were assigned to investigate. Such fact-finding efforts are discussed in chapter 9 of this book. Though the Special Representative on Iran was authorized in 1984, Iran did not permit an on-site visit until January 1990. After January 1990, the Special Representative on Iran made three additional visits. After February 1996, Iran has refused to permit visits.

Resolutions establishing special rapporteurs and representatives generally has authorized the Chair of the Commission, after consultation with regional representatives, to appoint a recognized international human rights expert. Often the Chair consulted with the country under consideration as well, to enhance the likelihood of that country's cooperating with the special rapporteur. Most mandates are of only a year's duration, but the Commission usually renewed the mandate on a yearly basis until the country resolves the situation or the Commission decided to drop the case. The Commission in 1999, however, decided to impose a term limit of six years to any particular individual who served as rapporteur or representative. Several countries have been the subject of rapporteur investigations, including: Afghanistan, Bolivia, Burundi, Cambodia, Chile, Congo, Cuba, Democratic Kampuchea, El Salvador, Equatorial Guinea, Guatemala, Haiti, Iran, Iraq, Myanmar, Palestine, Poland, Romania, Rwanda, Somalia, Southern Africa, Sudan, Togo, former Yugoslavia, and Zaire. For particularly egregious human rights violations -- such as apartheid in South Africa -- the Commission has appointed a working group of experts rather than a single rapporteur to study the human rights situation. For additional information on the country-specific rapporteur process and practice, see Marc Bossuyt, The Development of Special Procedures of the United Nations Commission on Human Rights, 6 Human Rts. Q. 179 (1985); Howard

Tolley, Jr., The U.N. Commission on Human Rights 111-24 (1987); see also chapter 6, infra.

In 2006 the General Assembly replaced the Commission on Human Rights with the Human Rights Council ("Council"). The Council assumed all of the functions of the Commission, including responsibility for country rapporteurs. The Council is composed of forty-seven members elected for three-year terms. The allocation of members is based on geographic distribution with thirteen members from Africa, thirteen from Asia, six from eastern Europe, eight from Latin America and the Carribean, and seven from western Europe and other nations. Human Rights Council, U.N. Doc. A/60/L.48 (2006). The exact relationship between the newly established Council and specialized mandates remains to be established and there is considerable question as to whether the Council will continue the mandates of country rapporteurs.

* * * * *

Preliminary Report by the Special Representative of the Commission on Human Rights on the Human Rights Situation in the Islamic Republic of Iran at 3-9, U.N. Doc. E/CN.4/1985/20 (1985) (footnotes omitted):

1. At its fortieth session, on 14 March 1984, the Commission on Human Rights adopted resolution 1984/54 on the human rights situation in the Islamic Republic of Iran. By that resolution the Commission requested the Chairman to appoint, after consultation within the Bureau, a special representative of the Commission whose mandate would be to establish contacts with the Government of the Islamic Republic of Iran and to make a thorough study of the human rights situation in that country based on such information as he might deem relevant, including comments and materials provided by the Government, containing conclusions and appropriate suggestions, to be presented to the Commission at its forty-first session. The Commission further requested the Government of the Islamic Republic of Iran to extend its co-operation to the Special Representative of the Commission and decided to continue its consideration of the situation of human rights and fundamental freedoms in the Islamic Republic of Iran at its forty-first session.

2. Pursuant to resolution 1984/54, the Chairman of the Commission on Human Rights, on 19 October 1984 designated Mr. Andrés Aguilar as Special Representative of the Commission. . . .

10. The Special Representative has received from various sources, including non-governmental organizations in consultative status with the Economic and Social Council, communications and documents containing information on alleged violations of human rights in the Islamic Republic of Iran. The Special Representative, due to his recent designation and to the lack of direct contact with the authorities of the Islamic Republic of Iran, has not yet been in a position to

evaluate the information received from these sources and the allegations contained therein. . . .

11. It may be recalled in this context that Iran, on 4 April 1968, signed the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It ratified both Covenants on 24 June 1975. . . .

12. In its resolution 1984/54 which established the mandate of the Special Representative, the Commission on Human Rights was expressly guided by the principles embodied in the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenants on Human Rights. The Commission further reaffirmed that all Member States had an obligation to promote and protect human rights and fundamental freedoms and to fulfill the obligations they had undertaken under the various international instruments in that field.

13. This position of principle, as expressed in the above-mentioned resolution, is in line with the Charter of the United Nations of which Iran is an original member. The purposes of the United Nations as spelled out in Article 1, paragraph 3, of the Charter expressly include the achievement of international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. Moreover, under Article 56 of the Charter all Member States pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55 which in turn includes the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

14. The Universal Declaration of Human Rights gave expression to the human rights principles contained in the Charter of the United Nations. The Universal Declaration is thus an emanation of the Charter providing as it does common standards of achievement for all peoples and all nations. Through practice over the years, the basic provisions of the Universal Declaration of Human Rights can be regarded as having attained the status of international customary law and in many instances they have the character of jus cogens. This is, for example, the case with the right to life, freedom from torture, freedom of thought, conscience and religion and the right to a fair trial.

15. Such fundamental guarantees of the Universal Declaration of Human Rights cannot be open to challenge by any State as they are indispensable for the functioning or an international community based on the rule of law and respect for human rights and fundamental freedoms.

16. States of all political, economic, social, cultural and religious persuasions participated in the drafting of the Charter, the Universal Declaration of Human Rights and the International Covenants on Human Rights. The Universal Declaration of Human Rights and the International Covenants thus contain norms which, distilled from the collective experience and the common heritage of the world's peoples, represent universal standards of conduct for all peoples and all nations.

17. Within the framework of the International Covenants on Human Rights, States of all religious, cultural or ideological persuasions co-operate in the implementation of universal standards of human rights in their respective countries. The General Assembly has repeatedly emphasized the importance of the strictest compliance by States parties with their obligations under the International Covenants and has further stressed the importance of uniform standards of implementation of the International Covenants.

18. Therefore it must be concluded that no State can claim to be allowed to disrespect basic, entrenched rights such as the right to life, freedom from torture, freedom of thought, conscience and religion, and the right to a fair trial which are provided for under the Universal Declaration and the International Covenants on Human Rights, on the ground that departure from these standards might be permitted under national or religious law.

19. It is the firm conviction of the Special Representative that the following fundamental principles are applicable to the situation in the Islamic Republic of Iran as indeed to the situation, present or future, in any other country:

(a) States members of the United Nations are bound to abide by universally accepted standards of conduct in so far as the treatment of their population is concerned, particularly as regards the protection of human life, freedom from torture and other cruel, inhuman or degrading treatment or punishment, freedom of thought, conscience and religion and the right to a fair trial;

(b) In so far as the basic rights and freedoms of the individual are concerned, the Universal Declaration of Human Rights gives expression to the human rights principles of the Charter of the United Nations and essential provisions such as those referred to above represent not only rules of international customary law but rules which also have the character of jus cogens;

(c) The International Covenants on Human Rights give added conventional force to those provisions of the Universal Declaration of Human Rights which already reflect international customary law. Since the Islamic Republic of Iran is a party to the International Covenants on Human Rights, the latter's provisions in their entirety are legally binding upon the Government of the Islamic Republic of Iran. They must be complied with in good faith.

NOTES AND QUESTIONS

1. Following Mr. Aguilar's submission of the preliminary report, the Commission on Human Rights extended his mandate for one year and requested a final report to be presented at the Commission's forty-second session in 1986. See CHR res. 1985/39, at 81, U.N. Doc. E/CN.4/1985/66 (1985). Mr. Aguilar resigned in January 1986, however, and was not able to complete the final report. See U.N. Doc. E/CN.4/1986/25 (1986).

In July 1986, the Commission appointed Mr. Reynaldo Galindo Pohl, a lawyer from El Salvador, as Special Representative to Iran and he submitted his first report to the Commission at its forty-third session in January 1987. See Commission on Human Rights, Report on the Human Rights Situation in the Islamic Republic of Iran by the Special Representative of the Commission, Mr. Reynaldo Galindo Pohl, U.N. Doc. E/CN.4/1987/23 (1987). His report detailed allegations of human rights violations, but did not reach any significant conclusions regarding either those allegations or the overall situation in Iran because the Iranian Government refused to allow an on-site visit or even reply to Mr. Pohl's requests for information.

Mr. Pohl was able to visit Iran for the first time in January 1990 and subsequently submitted reports to the Commission in 1989, 1991, 1992, 1993, 1994, and 1995. See U.N. Doc. E/CN.4/1989/26 (1989); U.N. Doc. E/CN.4/1991/35 (1991); U.N. Doc. E/CN.4/1992/34 (1992); U.N. Doc. E/CN.4/1993/41 (1993); U.N. Doc. E/CN.4/1994/50 (1994); U.N. Doc. A/49/514 and Add.1-2 (1994); U.N. Doc. E/CN.4/1995/55 (1995). The Commission continued to extend the Special Representative's mandate on a yearly basis through 2002. In 1995, Mr. Maurice Copithorne of Canada was selected as the Special Representative to Iran. He was able to visit Iran only once -- in February 1996. Some of Mr. Copithorne's findings are discussed in the following section.

2. The Special Representative to Iran, in the preceding excerpt, stresses the legal obligation of Iran to observe the provisions of the Covenant on Civil and Political Rights in good faith. The concept that states have an obligation to observe treaties to which they are parties is based on the doctrine of pacta sunt servanda (treaties are to be observed). The doctrine is a norm of customary international law that developed as the growing intercourse among nations necessitated respect for international agreements.

Modern formulations of the doctrine add the element of good faith. One example can be found in Article 26 of the Vienna Convention on the Law of Treaties. "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, Art. 26, 1155 U.N.T.S. 331, T.S. No. 58, 8 I.L.M. 679 (1969), entered into force Jan. 27, 1980. The Restatement (Third) of the Foreign Relations Law of the United States follows

the language of the Vienna Convention, substituting the phrase “international agreement” for the word “treaty.” Restatement (Third) of the Foreign Relations Law of the United States § 321 (1987). The U.N. Charter imposes a similar obligation of good faith in Article 2(2). “All members . . . shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”

3. The issue of cultural relativism arose consistently during the Committee’s discussion of Iran’s second periodic report. The issue also was addressed by the Special Representative in his 1985 report, as seen in the excerpt from that report. In addition, he discussed relativism in his 1993 report, stating:

319. On the question of the structure and organization of the systems for supervision of compliance with the international human rights instruments, the Special Representative again feels obliged to point out that regional and national developments must be fully consistent, and maintain continuity, with the system lawfully established by the United Nations, and that no such development is admissible if it runs counter to, or deviates from the international order. In the event of such a discrepancy, the regional and national systems must conform to the international system. . . .

Final Report on the Situation of Human Rights in the Islamic Republic of Iran by the Special Representative of the Commission on Human Rights, Mr. Reynaldo Galindo Pohl at 56-57, U.N. Doc. E/CN.4/1993/41 (1993) [hereinafter 1993 Report on Iran].

4. Iranian Violations of International Law

The Iranian penal sanctions discussed in this chapter provide a useful basis for an exploration of relativism in the application of human rights norms. Iran’s policies and practices during the period from the institution of the Islamic Republic of Iran to the publication of this book raise other human rights issues.

Reynaldo Galindo Pohl’s first report in 1987, for example, contained allegations of numerous violations, including summary executions; torture and other ill-treatment; warrantless arrests; lengthy detentions without formal charge or trial; expedited trials with no access to counsel or right to call witnesses, to testify, or to appeal; and harassment, discrimination, and persecution of religious minorities, especially members of the Baha’i faith. Commission on Human Rights, Report on the Human Rights Situation in the Islamic Republic of Iran by the Special Representative of the Commission, Mr. Reynaldo Galindo Pohl, U.N. Doc. E/CN.4/1987/23 (1987).
Mr. Copithorne further outlined human rights violations in Iran:

40. The reform of the legal system and of the judiciary has been long outstanding and in the view of the Special Representative, the failure of the government to

address it seriously before now has been a major impediment to the introduction of a culture of human rights in the Islamic Republic.

41. There are references in other parts of this report to the shortcomings of the legal system. These include such critical matters as treatment in pretrial detention, forced confessions, the overcrowding in the prison system, the continuing existence of detention centres outside the official prison system, and not least the denial of fair trial. . . .

In this same report, the Special Representative outlined cases of torture, explaining that torture "in all its forms is still not an unusual event in Iran."

Commission of Human Rights, Report of the Special Representative, Maurice Danby Copithorne (situation of human rights in the Islamic Republic of Iran), U.N. Doc. E/CN.4/2000/35 (2000). Mr. Copithorne summarized the situation of human rights in Iran regarding:

* Enforced or involuntary disappearances
* Torture as a means of punishment
* Obstacles to a free press
* Systematic persecution, harassment and discrimination against members of the Baha'i faith
* Discrimination against women
*Harassment of members of the Protestant faith
*Injustices in the legal system
*Disregard for human rights of Shia dissidents
*Overcrowding of Iranian prisons

In his 2001 report, Mr. Copithorne described the struggle between moderate and conservative elements, stressed violations of free expression and fair trial, and noted the official tolerance of fundamentalist vigilantes who use violence against students and others favoring moderation. Mr. Copithorne did not discuss penalties for crimes, but he noted efforts by high judicial authorities to reduce the frequency of torture for purposes of interrogation and other ill-treatment of persons subjected to the judicial process. Commission on Human Rights, Report on the Situation of Human Rights in Islamic Republic of Iran, U.N. Doc. E/CN.4/2001/39 (2001).

Many human rights organizations have focused on the human rights situation for women in Iran. In February 1994, several NGOs circulated a statement discussing what they described as the "despicable condition of women in Iran," and urging the Commission on Human Rights to "adopt more effective measures to force the Iranian regime to end the brutal persecution of women in that country." U.N. Doc. E/CN.4/1994/NGO/40, at 1-3 (1994). For additional reading on the human rights situation for women in Iran, see DOCUMENTATION, INFORMATION AND RESEARCH BRANCH, IMMIGRATION AND REFUGE BOARD OF

CANADA, HUMAN RIGHTS BRIEFS: WOMEN IN THE ISLAMIC REPUBLIC OF IRAN (1994); Faith and Freedom: Women's Human Rights in the Muslim World (Mahknaz Afkhami ed. 1995); Maulana Nahiduddin Khan, Women in Islamic Shari'ah (1995); Ann Elizabeth Mayer, Cultural Pluralism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience; On Shifting Ground: Muslim Women in the Global Era (Fereshteh Nouraie-Simone ed. 2005); Religious Fundamentalism and the Human Rights of Women (Courtney W. Howland, ed. 1999); Unicef, The State of Women: Islamic Republic of Iran (1998); Maryam Javaherian, Women's Human Rights in Iran: What can the International Human Rights System do?, 40 Santa Clara L. Rev. 819 (2000).

For further reading on human rights in Iran, see Reza Afshari, Human Rights in Iran: The Abuse of Cultural Relativism (2001); Shirin 'Ibadi, History and Documentation of Human Rights in Iran (1999); Amnesty International, Iran, New Government Fails to Address Dire Human Rights Situation 25-26, 27-28, 33, AI Index: MDE 13/010/2006 (2006); Human Rights Watch, Like the Dead in Their Coffins (2004).

E. THE INTERNATIONAL LAW PROHIBITION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The following readings concern the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. The selections should be useful in interpreting the prohibition, ascertaining whether a consensus exists as to its scope, and determining whether Iran's actions have violated the prohibition, as it is embodied in Article 7 of the Covenant.

1. International Documents Limiting the use of Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment

Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/6/1, Annex I, A (1956); adopted July 31, 1957, by Economic and Social Council, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977) (adding Article 95):

31. Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.

32. (1) Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.

(2) The same shall apply to any other punishment that may be prejudicial to the physical or mental health of a prisoner. In no case may such punishment be contrary to or depart from the principle stated in rule 31.

(3) The medical officer shall visit daily prisoners undergoing such punishments and shall advise the director if he considers the termination or alteration of the punishment necessary on grounds of physical or mental health.

NOTES

The Standard Minimum Rules also contain specific protections for insane and mentally abnormal prisoners (Rule 82), prisoners under arrest or awaiting trial (Rules 84-93), civil prisoners (Rule 94), and persons arrested or detained without charge (Rule 95).

For further reading about the Standard Minimum Rules and other U.N. standards in the area of crime prevention and criminal justice, see Nigel Rodley, The Treatment of Prisoners under International Law (2d ed. 1999); United Nations, Human Rights and Pre-Trial Detention, U.N. Doc. HR/P/PT/3 (1994).

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1976):

Article 1

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

* * * * *

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1985), entered into force June 26, 1987:

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application. . . .

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. . . .

NOTES

1. The Convention Against Torture created the Committee Against Torture to advance and ensure implementation of the Convention's provisions. Established in 1987, the Committee:

consists of 10 experts of high moral standing and recognized competence in the field of human rights, elected by States parties to the Convention from among their nationals. Members are elected for a four-year term by secret ballot at a meeting of States parties, and serve in their personal capacity.

The tasks of the Committee, as set out in articles 19 to 24 of the Convention, are: to study reports on the measures taken by States parties to give effect to their undertakings under the Convention; to make confidential inquiries, if it decides that this is warranted, concerning well-founded indications that torture is being systematically practised in the territory of a State party; to perform certain functions with a view to settling disputes among States parties concerning the application of the Convention, providing that those States parties have recognized the competence of the Committee [A]gainst Torture to undertake such functions; to establish when necessary ad hoc conciliation commissions to make available its good offices to the States parties concerned with a view to a friendly solution of inter-State disputes; to consider communications from or on behalf of individuals subject to the jurisdiction of States parties concerned who claim to be victims of a violation of the provisions of the Convention, provided that those States parties

have recognized the competence of the Committee to that effect; and to submit annual reports on its activities to the States parties and to the General Assembly of the United Nations. . . .

By [September 2006], there were [141] States parties to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [58] of which had accepted the competence of the Committee against Torture under article 21 and 57 had accepted the competence of the Committee under article 22] to consider matters relating to inter-State disputes and communication from or on behalf of individuals. [Three States parties had recognized the competence under only article 22.] [10] of the States Parties [including Afghanistan, China, Cuba, Equatorial Guinea, Israel, Kuwait, Morocco, Poland, Saudi Arabia, and Syria] have [current and effective declarations] that they do not recognize the competence of the Committee under article 20 of the Convention to undertake confidential inquiries or fact-finding missions on their territories. [Furthermore, 22 nations have accepted the Optional Protocol to the Convention Against Torture establishing a system of regular visits undertaken by independent international and national bodies to places of detention.]

United Nations Centre for Human Rights, Human Rights Machinery, Fact Sheet No. 1, at 15-16 (1988) (updated to September 2006).

2. As of September 2006, Iran had not ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and so the Committee Against Torture has no power to consider complaints from individuals who claim to be victims in that country. The Special Rapporteur on torture, however, investigated such claims within his mandate from the U.N. Commission on Human Rights.

In his January 1999 report, for example, Special Rapporteur Nigel Rodley outlined complaints received about Iran, stating:

. . . A variety of methods of corporal punishment are reported to be imposed on a systematic basis by the judicial authorities, including amputation, lashing, flogging and stoning. In addition, other forms of punishment are handed down under Islamic Laws of Quesas (retribution), whereby an offender is sentenced to the same type of bodily harm s/he is convicted of having caused someone else. Amputation is most frequently included in the sentences of individuals convicted of theft. Most often the individual's right hand is cut off, or four fingers, leaving only the thumb. Flogging is reported to be regularly inflicted as a form of punishment for a variety of offences . . .. Stoning is usually inflicted upon an individual who has been convicted of having engaged in sexual activity outside of his or her marriage.

Report of the Special Rapporteur [on torture], Mr. Nigel Rodley U.N. Doc. E/CN.4/1999/61 at ¶ 361 (1999).

In the 2004 and 2005 reports of Special Rapporteur on Torture Theo van Boven noted numerous reports of Quesas punishments. See Report of Special Rapporteur [on torture], Theo van Boven, U.N. Doc. E/CN.4/2005/62/Add.1 at ¶ 818-53 (2005); Report of Special Rapporteur [on torture], Theo van BovenU.N. Doc. E/CN.4/2004/56/Add.1 at ¶ 806-34 (2004).

Unlike the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the following instrument applies to "all persons within the territory of any given State . . .." Therefore, the protections available under the Body of Principles should be available without regard to ratification.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, 43 U.N. GAOR Supp. (No. 49) at 297, U.N. Doc. A/43/49 (1988):

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person. . . .

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[] No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

* * * * *

2. Human Rights Committee Consideration of Communications Under the First Optional Protocol

In addition to the reporting and examination mechanism through which the Human Rights Committee implements the Civil and Political Covenant, the First Optional Protocol to the Covenant contains a mechanism whereby the Committee considers communications from individuals alleging Covenant violations by States parties. The Protocol grants authority to reach views on the merits, but the Committee does not issue binding judgments. Rather, it forwards its views to the individual and State party concerned. The Committee has, however, published views on some of the communications it has evaluated. The Optional Protocol is reproduced in Selected International Human Rights Instruments at 50. The following materials discuss the Committee's procedures under the Optional Protocol and examine its interpretation of Article 7's prohibition of torture and cruel, inhuman or degrading treatment or punishment.

a. Committee Procedures

Report of the Human Rights Committee, U.N. Doc. A/60/40 (2005):

CONSIDERATION OF COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL

96. Individuals who claim that any of their rights under the International Covenant on Civil and Political Rights have been violated by a State party, and who have exhausted all available domestic remedies, may submit written communications to the Human Rights Committee for consideration under the Optional Protocol. No communication can be considered unless it concerns a State party to the Covenant that has recognized the competence of the Committee by becoming a party to the Optional Protocol. Of the 155 States that have ratified, acceded or succeeded to the Covenant, 105 have accepted the Committee's competence to deal with individual complaints by becoming parties to the Optional Protocol . . ..
97. Consideration of communications under the Optional Protocol is confidential and takes place in closed meetings . . .. Under rule 102 of the Committee's rules of procedure, all working documents issued for the Committee are confidential unless the Committee decides otherwise. However, the author of the communication and the State party concerned may make public any submissions or information bearing on the proceedings, unless the Committee has requested the parties respect confidentiality. The Committee's final decisions (Views, decisions declaring a communication inadmissible, decisions to discontinue a communication) are made public; the names of the authors are disclosed unless the Committee decides otherwise.

A. Progress of work

99. The Committee started its work under the Optional Protocol at its second session in 1977. Since then, 1,414 communications concerning 78 States parties have been registered for consideration by the Committee, including 112 registered during the period covered by the present report. The status of the 1,414 communications registered is as follows:
(a) Concluded by Views under article 5, paragraph 4 of the Optional Protocol: 500, including 392 in which violations of the Covenant were found;
(b) Declared inadmissible: 394;
(c) Discontinued or withdrawn: 193;
(d) Not yet concluded: 327.

103. Under the Committee's rules of procedure, the Committee will normally decide on the admissibility and merits of a communication together. Only in exceptional circumstances will the Committee request a State party to address admissibility only. . . .

104. During the period under review, three communications were declared inadmissible separately, as above, for examination on the merits. Decisions declaring communications admissible are not normally published by the Committee. . . .

C. Approaches to considering communications under the Optional Protocol

1. Special Rapporteur on new communications

107. At its thirty-fifth session, in March 1989, the Committee decided to designate a special rapporteur authorized to process new communications as they were received, i.e. between sessions of the Committee. At the Committee's eighty-second session, in October 2004, Mr. Kälin was designated as the new Special Rapporteur. In the period covered by the present report, the Special Rapporteur transmitted 112 new communications to the States parties concerned under rule 97 of the Committee's rules of procedure, requesting information or observations relevant to the questiosn of admissibility and merits. In 17 cases, the Special Rapporteur issued requests for interim measures of protection pursuant to rule 92 of the Committee's rules of procedure. The competence of the Special Rapporteur to issue and, if necessary, to withdraw, requests for interim measures under rule 92 of the rules of procedure is described in the annual report for 1997.

2. Competence of the Working Group

108. At its thirty-sixth session, in July 1989, the Committee decided to authorize the Working Group on Communications to adopt decisions declaring communications admissible when all members of the Group so agreed. Failing such agreement, the Working Group refers the matter to the Committee. It also does so whenever it believes that the Committee itself should decide the question of admissibility. . . .

D. Individual opinions

111. In its work under the Optional Protocol, the Committee seeks to adopt decisions by consensus. However, pursuant to rule 104 of the Committee's rules of procedure, members can add their individual (concurring or dissenting) opinions to the Committee's Views. Under this rule, members can also append their individual opinions to the Committee's decisions declaring communications admissible or inadmissible.

F. Remedies called for under the Committee's Views

205. After the Committee has made a finding of a violation of a provisions of the Covenant in its Views under article 5, paragraph 4, of the Optional Protocol, it proceeds to ask the State party to take appropriate steps to remedy the violation, such as commutation of sentence, release, or providing adequate compensation for

the violation suffered. Often, it also reminds the State party of its obligation to prevent similar violations in the future.

FOLLOW-UP ACTIVITIES UNDER THE OPTIONAL PROTOCOL

224. In July 1990, the Committee established a procedure for the monitoring of follow-up to its Views under article 5, paragraph 4, of the Optional Protocol, and created the mandate of the Special Rapporteur for the follow-up on Views to this effect. Mr. Ando has been the Special Rapporteur since March 2001 (seventy-first session).

225. In 1991, the Special Rapporteur began to request follow-up information from States parties. Such information has been systematically requested in respect to all Views with a finding of a violation of Covenant rights. A total of 391 Views out of the 503 Views adopted since 1979 concluded that there had been a violation of the Covenant.

226. All attempts to categorize follow-up replies by States parties are inherently imprecise and subjective; it is therefore not possible to provide a neat statistical breakdown of the follow-up replies. Many follow-up replies received may be considered satisfactory, in that they display the willingness of the State party to implement the Committee's recommendations or to offer the complainant an appropriate remedy. Other replies cannot be considered satisfactory because they either do not address the Committee's Views at all, or only relate to certain aspects of them. Certain replies simply note that the victim has filed a claim for compensation outside the statutory deadlines and that no compensation can therefore be paid. Still other replies indicate that there is no legal obligation on the State party to provide a remedy, but that a remedy will be afforded to the complainant on an ex gratia basis.

* * * * *

As mentioned above in its 2005 report, the Human Rights Committee created a formal follow-up procedure in 1990 to urge compliance with its decisions adopted under the Optional Protocol. It appointed Dr. Janos Fodor as the first Special Rapporteur for the Follow-Up on Views with responsibility for communicating with States parties and victims and monitoring compliance with its decisions. In 1993, Dr. Fodor was succeeded by Mr. Andreas Mavrommatis. In 1999, Mr. Fausto Pocar was designated as Special Rapporteur for the follow-up on views and in March 2000 Ms. Christine Chanet was asked to take that role. One year later, in March 2001, Mr. Nisuke Ando took on the role of Special Rapporteur.

In 1994, the Committee sought to increase the effectiveness of the follow-up procedure by endowing the Special Rapporteur with authority to conduct on-site fact-finding missions and, in 1995, the first on-site investigative mission took place

in Jamaica. Following the Special Rapporteur's visit, the Jamaican Government agreed to comply with several Committee rulings that called for criminal sentences other than the death penalty. Beginning in 1995, the Committee sought to increase awareness of its follow-up efforts by including in its Annual Report a "black list" identifying all States parties that fail to cooperate with follow-up activities. See Markus G. Schmidt, Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform, 41 Int'l Comp. L. Q. 645, 650-53 (1992); Markus G. Schmidt, Portée et suivi des constatations du Comité des droits de l'homme, Remarks at the Colloquium of the Faculty of Law at the University of Montpellier (Mar. 6-7, 1995).

b. Committee Jurisprudence

Although adjudicative remedies are treated extensively in chapters 11-14, infra, this subsection discusses the Human Rights Committee's adjudicative functions as an important component of implementing the Civil and Political Covenant. The following materials focus on the Committee's interpretation of Article 7 of the Covenant.

Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 160-68 (2005) (footnotes omitted):

II. Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment . . .

2. Delineation of the Individual Offences

. . . Art[icle] 7 . . . prohibit[s] not only torture, inhuman and degrading punishment and treatment but also cruel treatment and punishment. Insofar as the various terms are used in a particular order, a certain classification as to the kind and purpose of treatment can be seen, especially as regards the intensity of the suffering imposed: this runs from "mere" degrading treatment or punishment, to that which is inhuman and cruel, up to torture as the most reprehensible form. The Committee has correctly pointed out that it is unnecessary to draw sharp distinctions between these various categories with respect to whether Art. 7 has been violated. Thus, in its holdings in individual communications, it has usually avoided qualifying the attacked actions in detail. Only in recent years can a greater willingness to differentiate be seen.

With respect to the (at least moral) impropriety of an action of its organs, it is however not irrelevant for the State party concerned whether it is charged with torture or "mere" degrading treatment. . . .

3. Torture

Most individual cases, in which the Committee has explicitly established that torture had been committed, relate to the former military dictatorship in Uruguay. The facts of these cases disclose that the victims, usually during interrogations in the initial period of "incommunicado" detention, had been subjected to a variety of the most brutal torture methods, such as: systematic beatings, electric shocks to fingers, eyelids, nose and genitals when tied naked to a metal bedframe ("picana eléctrica") or in coiling wire around fingers and genitals ("magneto"), burnings with cigarettes, extended hangings from hand and/or leg chains, often combined with electric shocks, repeated immersion in a mixture of blood, urine, vomit and excrement ("submarineo"), standing naked and handcuffed for great lengths, threats, simulated executions or amputations. . . .

4. Inhuman and/or Cruel Treatment

These two terms include all forms of imposition of severe suffering that are unable to be qualified as torture for lack of one of its essential elements. They also cover those practices imposing suffering that does not reach the necessary intensity. . . . In [Viana Acosta v. Uruguay], the Committee expressly deemed forced psychiatric experiments, such as injections against the will of the imprisoned victim, to be inhuman treatment. . . . In the case of Tshisekedi v. Zaire, and Mika Miha v. Equatorial Guinea, deprivation of food and drink for four days after arrest was considered inhuman treatment. . . .

5. Degrading Treatment

Degrading treatment is the weakest level of a violation of Art. 7. The severity of the suffering imposed is of less importance here than the humiliation of the victim, regardless of whether this is in the eyes of others or those of the victim himself or herself. . . . In Conteris v. Uruguay, the Committee expressly designated as degrading treatment within the meaning of Art. 7 certain arbitrary prison practices in the "Libertad" Prison in Montevideo aimed at humiliating prisoners and making them feel insecure (repeated solitary confinement, subjection to cold, persistent relocation to a different cell). . . .

6. Cruel, Inhuman or Degrading Punishment

Since all punishment contains an element of humiliation and perhaps also inhumanity, an additional element of reprehensibleness must also be present in order for it to qualify as a violation of Art. 7. . . .

7. Corporal Punishment

The Committee, by a unanimous decision [in Osbourne v. Jamaica], took a very clear position: "Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal

punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to Article 7 of the Covenant." . . .

* * * * *

Following is an excerpt, from an opinion that the Committee issued that illustrates how the Committee considers individual communications.

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (Seventy-seventh session) concerning Communication No. 887/1999, U.N. Doc. CCPR/C/77/D/887/1999 at 1-7 (2003) (made public by decision of the Human Rights Committee):

Submitted by: Mariya Staselovich (represented by counsel . . .)
Victim: The author and her son Igor Lyashkevich
State party: Belarus
Date of communication: 26 November 1998 (initial submission)
Meeting on: 3 April 2003 . . .

Adopts the following:

1.1 The author of the communication is Mrs. Mariya Staselovich, a Belarusian national. She acts on behalf of herself and her son, Mr. Igor Lyashkevich, also of Belarusian nationality, who at the time of the submission of the communication, 26 November 1998, was detained on death row, having been convicted of murder and sentenced to death. . . .

1.2 On 28 October 1999, in accordance with rule 86 of its rules of procedure, the Human Rights Committee, acting through its Special Rapporteur on New Communications requested the State party not to execute the death sentence against Mr. Lyashkevich, pending the determination of the case by the Committee. . . .

1.3 The Committee notes with regret that by the time it was in a position to submit its Rule 86 request, the death sentence had already been carried out. The Committee understands and will ensure that cases susceptible to being subject to Rule 86 requests will be processed with the expedition necessary to enable its request to be complied with.

The facts as submitted by the author

2.1 The author states that Mr. Lyashkevich was on 15 July 1997 sentenced by the Minsk City Court to death by firing squad. He was found guilty, along with four other co-defendants, of illegally depriving one Mr. A. Vassiliev of his liberty,

causing him physical suffering, and thereafter intentionally killing him on 25 June 1996. The Supreme Court upheld the judgment on 15 November 1997.

The complaint

3.1 The author argues that the death sentence against her son was passed on the basis of purely circumstantial evidence. The Court had no clear and unambiguous proof that her son was guilty of the murder. In her opinion, this constitutes a violation of article 6 of the Covenant, but the context of her submission indicates that this allegation must be read in conjunction with article 14 of the Covenant.

3.2 From the file, and although the author has not directly invoked these provisions, it also transpires that the communication may raise issues under article 7 of the Covenant, in relation to the lack of information provided to the author concerning the date of her son's execution and the place of his burial.

The State party's observations

4.5 According to the State party, the Court considered all aspects of the case and reviewed them objectively. . . . The Supreme Court of the Republic of Belarus upheld the Minsk City Court's judgment on 14 November 1997. For the State party, there is no reason to question these judgments.

Author's comments

5.1 . . . Counsel further declares that the death sentences are executed in secret in Belarus. Neither the condemned prisoner nor his family are informed of the date of the execution. All those sentenced to capital punishment are transferred to the Minsk Detention Centre No. 1 (SIZO - 1), where they are confined to separate "death cells" and are given (striped) clothes, different from other detainees.

5.3 Counsel further notes that the body of the executed prisoner is transferred at night-time to one of the Minsk cemeteries and buried there by soldiers, without leaving any recognizable sign of name of the prisoner nor the exact location of his burial site.

Issues and proceedings before the Committee

Determination of admissibility

8.3 The Committee has noted the author's allegation that the fact that her son's conviction and death sentence was based purely on circumstantial evidence . . . amounts to a violation of article 14 of the Covenant read in conjunction with article 6. [The Committee dismissed these complaints.]

8.4 The Committee considers that the author's remaining allegation, namely that the authorities' failure to inform, either through the condemned prisoner or directly, his family of the date of execution as well as the authorities' failure to inform her of the exact location of the burial site of her son, amounts to a violation of the Covenant, is admissible insofar as it appears to raise an issue under article 7 of the Covenant.

Consideration on the merits

9.2 The Committee notes that the author's claim that her family was informed neither the date, nor the hour, nor the place of her son's execution, nor of the exact place of her son's subsequent burial, has remained unchallenged. In the absence of any challenge to this claim by the State party, and any other pertinent information from the State party on the practice of execution of capital sentences, due weight must be given to the author's allegations. . . . The Committee considers that the authorities' failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of article 7 of the Covenant.

11. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including information on the location where her son is buried, and compensation for the anguish suffered. The State party is also under an obligation to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

NOTES AND QUESTIONS

1. Do you think the Optional Protocol provides an adequate procedure for implementing rights prescribed in the Covenant?

2. How effective do you think the Committee's decision under the Optional Protocol will be in enabling Ms. Mariya Staselovich to obtain remedies for actions of the Government of the Republic of Belarus?

3. How can a body such as the Committee get governments to adhere to its requirements and decisions? The Human Rights Committee has adopted measures to follow up compliance by states with its views on individual communications, in recognition that compliance has been a problem. What further efforts would you suggest?

4. As of September 2006, 156 states had ratified the Covenant on Civil and Political Rights but only 105 had also ratified the First Optional Protocol.

5. As of April 2006, neither Iran nor the United States had ratified the First Optional Protocol. What would be the ramifications for each state individually and for the Covenant as a whole if they had?

6. Article 12 of the First Optional Protocol to the Civil and Political Covenant permits a government to withdraw from the application of the Optional Protocol as to communications submitted three months after the date the U.N. receives notification. Similarly, Article 41(2) of the Covenant permits a government to withdraw authorization from the Human Rights Committee to consider future complaints by other governments. There is no provision, however, in the Covenant for withdrawal or denunciation of the entire treaty. The Human Rights Committee has determined that once a government has ratified the Covenant it may not denounce or withdraw its obligations under the treaty. Human Rights Committee, General Comment 26 (61), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 61st session, 1997). (Effective June 27, 2000, the Government of Trinidad and Tobago withdrew from its obligations to be subject to individual complaints under the Optional Protocol, apparently because of Human Rights Committee decisions limiting the application of the death penalty. In re-acceding to the Optional Protocol Trinidad and Tobago restricted the authority of the Human Rights Committee to receive and consider communications relating to any prisoner who is under sentence of death. At the same time, however, the Government of Trinidad and Tobago acknowledged its continued obligations under the Covenant in all respects, including capital punishment.
6. For additional reading, see Fionnuala Ni Aolain, The Emergence of Diversity, 19 Fordham Int’l L.J. 101 (1995); The UN Human Rights Treaty System in the 21st Century (Anne F. Bayefsky ed., 2001); Alfred de Zayas, Petitioning the United Nations (remarks to a panel of the ASIL, April 2001); Alfred de Zayas, Jacob Th. Möller, & Torkel Opsahl, U.N. Centre for Human Rights Geneva, Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee (1990 ed.). The Human Rights Committee also publishes selected decisions issued under the Optional Protocol. The most recent volume is Human Rights Committee, Selected Decisions under the Optional Protocol -- Volume 6 (Fifty-sixth to sixty-fifth sessions), U.N. Doc. CCPR/C/OP/6 (2005).

3. European System

European human rights bodies produce a substantial and sophisticated body of jurisprudence on many issues, and in particular have expended considerable jurisprudential energy on the meaning of torture and inhuman or degrading treatment or punishment. Hence, victims and their advocates often refer to the European jurisprudence within other regional and international systems as a means to give greater clarity to the legal issues that arise as to torture and ill-treatment even if the issues do not arise directly in a European context. The readings below are excerpts of decisions of the European Commission and Court of Human Rights. They interpret and apply Article 3 of the European Convention on Human Rights which states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." While Article 3 of the European Convention is similar to Article 7 of the Civil and Political Covenant, the two provisions are not identical. Chapter 12, infra, discusses the structure and jurisprudence of the European system in a bit more detail. For further reading, see Nigel Rodley, The Treatment of Prisoners under International Law (1999).

Ireland v. United Kingdom, 1976 Y.B. Eur. Conv. on Hum. Rts. 512, 748, 788-94 (Eur. Comm'n of Hum. Rts.) (extracts from commission's report) (citations omitted):

[Ed. Note: This case involved the detention without trial and interrogation of persons taken into custody Northern Ireland by British authorities. The authorities used a combination of five techniques including: forcing detainees to stand for periods of several hours leaning against a wall, keeping black hoods over the detainees' heads at all times except during interrogation, holding detainees pending interrogation in a room where there was a continuous loud hissing noise, depriving detainees of sleep pending interrogation, and depriving detainees of adequate food and drink during the period of detention. The Government of Ireland lodged an inter-state application with the European Commission, alleging that these interrogation practices violated Article 3 of the European Convention.]

2. The interpretation of Art. 3

The ordinary meaning and purpose of Art. 3 of the Convention which provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment" does not seem difficult to assess.

Difficulties arise, however, when it comes to defining the scope of the terms concerned and to applying them to the circumstances of particular acts purported to be in breach of that provision.

In the First Greek Case the Commission considered the notions of "torture," "inhuman treatment" and "degrading treatment" first in relation to each other and found that "all torture must be inhuman and degrading treatment and inhuman

treatment also degrading." Describing each notion separately, it started from the notion of "inhuman treatment" which covered "at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable." As regards "torture" the Commission considered that it was "often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment." Finally, "[t]reatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience."

The Commission also explained further what constituted nonphysical torture, namely "the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault."

Finally, the Commission distinguished in the Greek Case between acts prohibited by Art. 3 and what it called "a certain roughness of treatment." The Commission considered that such roughness was tolerated by most detainees and even taken for granted. It "may take the form of slaps or blows of the hand on the head or face. This underlines the fact that the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive varies between different societies and even between different sections of them."

Concerning the five techniques in the present case, the Commission considers that it should express an opinion only as to whether or not the way in which they were applied here, namely in combination with each other, was in breach of Art. 3. It observes that, if they were considered separately deprivation of sleep or restrictions on diet might not as such be regarded as constituting treatment prohibited by Art. 3. It would rather depend on the circumstances and the purpose and would largely be a question of degree.

In the present case, the five techniques applied together were designed to put severe mental and physical stress, causing severe suffering, on a person in order to obtain information from him. It is true that all methods of interrogation which go beyond the mere asking of questions may bring some pressure on the person concerned, but they cannot, by that very fact, be called inhuman. The five techniques are to be distinguished from those methods.

Compared with inhuman treatment [as defined in the Greek Case] the stress caused by the application of the five techniques is not only different in degree. The combined application of methods which prevent the use of the senses, especially the eyes and the ears, directly affects the personality physically and mentally. The will to resist or to give in cannot, under such conditions, be formed with any degree of independence. Those most firmly resistant might give in at an early stage when subjected to this sophisticated method to break or even eliminate the will.

It is this character of the combined use of the five techniques which, in the opinion of the Commission, renders them in breach of Art. 3 of the Convention in the form not only of inhuman and degrading treatment, but also of torture within the meaning of that provision. . . .

* * * * *

Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 65-67 (1978):

[Ed. Note: After the Commission delivered its report in Ireland v. United Kingdom, the Irish Government referred the case to the European Court of Human Rights. The following is an excerpt from the Court's decision.]

162. As was emphasized by the Commission, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc. . . .

164. In the instant case, the only relevant concepts are "torture" and "inhuman or degrading treatment", to the exclusion of "inhuman or degrading punishment". . . .

167. The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

On these two points, the Court is of the same view as the Commission.

In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment.

In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted.

The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading

treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

Moreover, this seems to be the thinking lying behind Article I in fine of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.

168. The Court concludes that recourse to the five techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of Article 3.

* * * * *

Tyrer Case, 26 Eur. Ct. H.R. (ser. A) 14-17 (1978) (citations omitted):

[Ed. Note: This case involved a 15-year-old citizen of the United Kingdom and a resident of the Isle of Man. He assaulted a schoolmate and was sentenced to three strokes of a birch in accordance with Manx law. He appealed his case, but the appeal was dismissed. Subsequently, police officers birched him at a police station in accordance with his sentence. They forced him to take down his trousers and underwear and bend over a table in preparation for the birching. Two officers held him while another officer administered the punishment. The birching raised his skin but did not cut it. He was sore for approximately 10 days after the birching. He then lodged an application with the European Commission, claiming a violation of Article 3 and other articles of the European Convention. The Commission concluded that the corporal punishment inflicted was degrading and violated Article 3. The Commission then referred the case to the Court of Human Rights.]

29. The Court shares the Commission's view that Mr. Tyrer's punishment did not amount to "torture" within the meaning of Article 3. The Court does not consider that the facts of this particular case reveal that the applicant underwent suffering of the level inherent in this notion as it was interpreted and applied by the Court in its judgment of 18 January 1978 (Ireland v. the United Kingdom, Series A no. 25, pp. 66-67 and 68, §§ 167 and 174).

That judgment also contains various indications concerning the notions of "inhuman treatment" and "degrading treatment" but it deliberately left aside the notions of "inhuman punishment" and "degrading punishment" which alone are

relevant in the present case (ibid., p. 65, § 164). Those indications accordingly cannot as such, serve here. Nevertheless, it remains true that the suffering occasioned must attain a particular level before a punishment can be classified as "inhuman" within the meaning of Article 3. Here again, the Court does not consider on the facts of the case that that level was attained and it therefore concurs with the Commission that the penalty imposed on Mr. Tyrer was not "inhuman punishment" within the meaning of Article 3. Accordingly, the only question for decision is whether he was subjected to a "degrading punishment" contrary to that Article.

30. The Court notes first of all that a person may be humiliated by the mere fact of being criminally convicted. However, what is relevant for the purposes of Article 3 is that he should be humiliated not simply by his conviction but by the execution of the punishment which is imposed on him. In fact, in most if not all cases this may be one of the effects of judicial punishment, involving as it does unwilling subjection to the demands of the penal system.

. . . It would be absurd to hold that judicial punishment generally, by reason of its usual and perhaps almost inevitable element of humiliation, is "degrading" within the meaning of Article 3. Some further criterion must be read into the text. Indeed, Article 3, by expressly prohibiting "inhuman" and "degrading" punishment, implies that there is a distinction between such punishment and punishment in general.

In the Court's view, in order for a punishment to be "degrading" and in breach of Article 3, the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation referred to in the preceding subparagraph. The assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution.

31. The Attorney-General for the Isle of Man argued that the judicial corporal punishment at issue in this case was not in breach of the Convention since it did not outrage public opinion in the Island. However, even assuming that local public opinion can have an incidence on the interpretation of the concept of "degrading punishment" appearing in Article 3, the Court does not regard it as established that judicial corporal punishment is not considered degrading by those members of the Manx population who favour its retention: it might well be that one of the reasons why they view the penalty as an effective deterrent is precisely the element of degradation which it involves. As regards their belief that judicial corporal punishment deters criminals, it must be pointed out that a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control. Above all, as the Court must emphasise, it is never permissible to have recourse to punishments which are contrary to Article 3, whatever their deterrent effect may be.

The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in [abolishing corporal punishment]. Indeed, the Attorney-General for the Isle of Man mentioned that, for many years, the provisions of Manx legislation concerning judicial corporal punishment had been under review.

32. As regards the manner and method of execution of the birching inflicted on Mr. Tyrer, the Attorney-General for the Isle of Man drew particular attention to the fact that the punishment was carried out in private and without publication of the name of the offender.

Publicity may be a relevant factor in assessing whether a punishment is "degrading" within the meaning of Article 3, but the Court does not consider that absence of publicity will necessarily prevent a given punishment from falling into that category: it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others. . . .

33. Nevertheless, the Court must consider whether the other circumstances of the applicant's punishment were such as to make it "degrading" within the meaning of Article 3.

The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment -- whereby he was treated as an object in the power of the authorities -- constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

The institutionalized character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.

Admittedly, the relevant legislation provides that in any event birching shall not take place later than six months after the passing of sentence. However, this does not alter the fact that there had been an interval of several weeks since the applicant's conviction by the juvenile court and a considerable delay in the police station where the punishment was carried out. Accordingly, in addition to the

physical pain he experienced, Mr. Tyrer was subjected to the mental anguish of anticipating the violence he was to have inflicted on him. . . .

35. Accordingly, viewing these circumstances as a whole, the Court finds that the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of "degrading punishment" as explained at paragraph 30 above. The indignity of having the punishment administered over the bare posterior aggravated to some extent the degrading character of the applicant's punishment but it was not the only or determining factor.

The Court therefore concludes that the judicial corporal punishment inflicted on the applicant amounted to degrading punishment within the meaning of Article 3 of the Convention.

NOTES AND QUESTIONS

1. In the Tyrer case the European Court of Human Rights stated that for corporal punishment to be degrading, it must "attain a particular level" of severity. The Court found that the punishment at issue did attain this "particular level" but otherwise gave little guidance regarding the definition of "degrading."

In 1993, the Court again examined a case of corporal punishment alleged to have been degrading. See Case of Costello-Roberts v. the United Kingdom, 247-C Eur. Ct. H.R. (ser. A), No. 89/1991/341/414 (1993). The Court held that the corporal punishment inflicted in that case did not constitute "degrading punishment" because it did not reach the required "minimum threshold of severity." Slip op. at 11.

In Costello-Roberts, the punishment at issue occurred in October 1985. Jeremy Costello-Roberts, then seven years old, was a student at a private boarding school. At the school, students receive demerit marks for misbehavior. Upon receiving five demerit marks, they are "slippered," whereby the school's headmaster "whacks" them on the bottom three times with a rubber-soled gym shoe. Jeremy received his fifth demerit mark for talking in the hall. About a week later the headmaster "slippered" him. Id. at 3.

Jeremy wrote to his mother about the slippering. Id. She then contacted the school to express disapproval. She also complained to the police, and to the National Society for the Prevention of Cruelty to Children, but was told no action could be taken without any visible bruising on the child. She then lodged a complaint with the European Commission of Human Rights.

The Commission referred the case to the Court. By 5-4 vote, the Court decided that the school's actions did not constitute degrading punishment. The Court discussed Tyrer's "minimum level of severity," then stated:

The assessment of this minimum level of severity depends on all the circumstances of the case. Factors such as the nature and context of the punishment, the manner and method of its execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim must all be taken into account.

Applying this standard to Jeremy, the Court found that he "adduced no evidence of any severe or long-lasting effects as a result of the treatment complained of." Therefore, though the Court disapproved of the "automatic nature of the punishment," the Court found that the punishment did not violate Article 3. Id.

2. In Tyrer, the Court found that punishment could be degrading even when the recipient does not suffer "severe or long-lasting physical effects." Tyrer, at para. 33 (emphasis added). Did the Court step away from this standard in Costello-Roberts? What do you suppose the Court there meant by "severe or long-lasting effects"? Was there a crucial difference between Tyrer and Costello-Roberts?

3. Should the European interpretation of degrading treatment be applied elsewhere? In the United States, Congressman Major Owens (D-NY) introduced a bill, in January 1996, that would deny federal funding to schools and other educational programs that allow corporal punishment. H.R. 2918 would allow school personnel to use reasonable physical restraint in order to prevent injury to themselves or others, to obtain possession of a weapon or dangerous object from a child, or to protect property from serious damage. Owens previously introduced similar bills, but they were not enacted.

Case of Selmouni v. France, Judgment of 28 July 1999 (Application No, 25803/94):

[Ed. Note: Mr. Selmouni was a national of Morocco and the Netherlands. He was arrested on drug trafficking charges by French authorities in Paris in November 1991 and was held for three days for questioning. He complained during that period that interrogating police has repeatedly beaten him on his head, his eyes, his trunk, his arms, and legs. These injuries were noted several times by doctors at the detention facility, but no treatment was provided and the beatings continued even after examinations. When questioned in prison a year later, he also alleged that one of the officers attempted to place his penis in his mouth, urinated on him and then inserted a truncheon in his anus. The sexual assault could not be corroborated by medical evidence due to the passage of time. In February 1993 he filed a criminal complaint against the police officers. He alleged that the sight in his left eye

remained impaired as a result of the assaults. The French courts in 1999 acquitted the officers of indecent assault but convicted them of assault, noting the progression of injuries documented by medical records during the three days of interrogation. The explanations of the police defendants were found to lack credibility, but their sentences were nonetheless reduced. Selmouni filed an application alleging that he had been a victim of torture in violation of Article 3 of the European Convention and that the domestic proceedings had been unduly prolonged in violation of Article 6 §1. France argued that the offenses could not be classified as "torture" but conceded that the proceedings had been excessively lengthy.]

87. The Court considers that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention. . . . Whatever the outcome of the domestic proceedings, the police officers' conviction or acquittal does not absolve the respondent State from its responsibility under the Convention . . . .

90. The Court considers . . . that it has not been proved that Mr. Selmouni was raped, as the allegation was made too late for it to be proved or disproved by medical evidence . . . . Likewise, a causal link could not be established on the basis of the medical report between the applicant's alleged loss of visual acuity and the events which occurred during police custody . . . .

91. The applicant submitted that the threshold of severity required for the application of Article 3 has been attained in the present case [arguing that confession has been the objective, that he had no police record, and that the interrogation had been prolonged because of his refusal to confess].

The applicant submitted that he had been subjected to both physical and mental ill-treatment. . . . He argued that . . . the severity and cruelty of the suffering inflicted on him justified classifying the acts as torture within the meaning of Article 3 of the Convention.

92. The Commission considered that . . . such treatment, inflicted by one or more State officials and to which medical certificates bore testimony, was of such a serious and cruel nature that it could only be described as torture, without it being necessary to give an opinion regarding the other offences, in particular the rape, alleged by the applicant.

93. In their memorial the Netherlands Government [which had referred the case to the Court along with the Commission] agreed with the Commission's assessment of the facts in the light of the provisions of the Convention, and with its conclusion.

94. The French Government . . . contended in the light of the Court's case-law . . . and the circumstances of the case that the ill-treatment allegedly inflicted by the police officers did not amount to "torture" within the meaning of Article 3 of the Convention.

95. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most [of the other substantive provisions], Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 §2 even in th event of a public emergency threatening the life of the nation . . . .

96. In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. . . .

97. The [Convention Against Torture] also makes such a distinction [citing Articles 1 and 16].

100. [I]t remains to establish in the instant case whether the "pain and suffering" inflicted on Mr. Selmouni can be defined as "severe" within the meaning of Article 1 of the [Convention Against Torture]. The Court considers that this "severity" is, like the "minimum severity" required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.

101. The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture . . . . However, having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" [citing inter alia Tyrer], the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

102. The Court is satisfied that a large number of blows were inflicted on Mr. Selmouni. Whatever a person's state of health, it can be presumed that such intensity of blows will cause substantial pain. Moreover, a blow does not automatically leave a visible mark on the body. However, it can be seen [from the medical reports] that the marks of the violence Mr. Selmouni had endured covered almost all of his body.

103. The Court also notes that the applicant was dragged along by his hair; that he was made to run along a corridor with police officers positioned on either side to trip him up; that he was made to kneel down in front of a young woman to whom someone said "Look, you're going to hear someone sing"; that one police officer then showed him his penis, saying "Look, suck this", before urinating over him; and that he was threatened with a blowlamp and then a syringe. . . . Besides the violent nature of the above acts, the Court is bound to observe that they would be heinous and humiliating for anyone, irrespective of their condition.

104. The Court notes, lastly, that the above events were not confined to any one period of police custody during which – without this in any way justifying them – heightened tension and emotions might have lead to such excesses. It has been clearly established that Mr. Selmouni endured repeated and sustained assaults over a number of days of questioning . . . .

105. Under these circumstances, the Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant's person caused "severe" pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.

3. Conclusion

106. There has therefore been a violation of Article 3.
* * * * *

Geneva Conventions for the Protection of Victims of Armed Conflict, 75 U.N.T.S. 31, 85, 135, 287, Common Article 3, entered into force Oct. 21, 1950:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment. . . .

*   *   *   *   *

Notes

1. Article 17 of the Third Geneva Convention on the Protection of Prisoners of War declares as to international conflicts, “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.” Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950. The Fourth Geneva Convention on the Protection of Civilian Persons in Article 32 declares that State parties are:

prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950. The International Committee of the Red Cross’s authoritative commentary to the Geneva Conventions holds that the Geneva Conventions cover all armed conflicts whether international or national. Jean S. Pictet, Geneva Conventions of 12 August 1949: Commentary 36 (1958).

Restatement (Third) of the Foreign Relations Law of the United States (1987):

§ 702. Customary International Law of Human Rights

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.

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Notes

1. The recent debate in the U.S. regarding the treatment of detainees from the wars in Afghanistan and Iraq has raised the issue of the universality of the prohibition on torture or other cruel or degrading treatment or punishment. A memo signed by Defense Secretary Donald Rumsfeld on December 2, 2002, authorizes interrogation techniques including: (1) identifying the interrogator as coming from a country with a reputation for harsh treatment of detainees; (2) the use of stress positions (like standing), for a maximum of four hours (in approving the document Secretary Rumsfeld handwrote, "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?"); (3) use of isolation facility for up to 30 days with extensions to be approved by the Commanding General; (4) deprivation of light and auditory stimuli; (5) hooding); (6) use of 20-hour interrogations; (7) removal of all comfort items (including religious items); (8) removal of clothing; (9) forced grooming (shaving of facial hair, etc.); (9) use of detainees individual phobias (such as fear of dogs) to induce stress; (10) in some cases, use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family; (11) exposure to cold weather or water; (12) use of a wet towel and dripping water to induce the misperception of suffocation; etc. William J. Haynes II, General Council of the Department of Defense, Action Memo for Secretary of Defense (November 27, 2002), Approved by Secretary of Defense (December 2, 2002).

Sections 2340-2340A of title 18 of the United States Code makes the provisions of the Convention Against Torture applicable in U.S. law. In interpreting these provisions the Office of Legal Counsel stated

We conclude that for an act to constitute torture as defined in Section 2340 it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g. lasting for months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individuals personality; or threatening to do any of these things to a third party.

Memorandum from the U.S. Department of Justice Office of Legal Counsel (Jay S. Bybee, Assistant Attorney General) to Alberto R. Gonzales, Counsel to the

President, Standards for Interrogation under 18. U.S.C. Sec. 2340-2340A (August 1, 2002).

President Bush accepted the conclusions of the Department of Justice and the Attorney General that, “none of the provisions of the Geneva Convention apply to our current conflict with al Qaeda in Afghanistan or elsewhere throughout the world because among other reasons, al Qaeda is not a High Contracting Party to Geneva.” President George W. Bush, Humane Treatment of al Qaeda and Taliban Detainees, (February 7, 2002).

2. In response to these restrictive interpretations of the U.S.’s obligations under international law then Secretary of State Colin Powell outlined several concerns about to the then proposed treatment of detainees. Secretary Powell wrote:

It will reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general. It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy. It will undermine public support among critical allies, making military cooperation more difficult to sustain. Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice. It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops. . . .

Memorandum from Secretary of State Colin L. Powell to Counsel to the President and Assistant to the President for National Security Affairs, Draft Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (initialed January 26, 2002). The August 2002 memo was at least partly withdrawn by the Justice Department in 2004.

3. Senator John McCain introduced an amendment to the 2006 Defense Appropriation Bill which states, “No individual in the custody or physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment of punishment.” The amendment states that “cruel, inhuman, or degrading treatment or punishment” means only conduct prohibited by the Fifth, Eighth, or Fourteenth Amendment. The McCain amendment further limited interrogation techniques used on any person under the custody of the Department of Defense to those in the United States Army Field Manual.

The McCain amendment, which in its final form became known as the Detainee Treatment Act, 42 U.S.C. 2000dd, may have stripped the federal courts of jurisdiction to hear the cases of certain detainees. The issue was raised before the Supreme Court in Hamden v. Rumsfeld (Docket No. 05-184) which was argued on

March 28, 2006. At the time of this writing the Supreme Court has not ruled in the case.

4. Have the U.S. efforts to narrow the definition of torture to avoid the application of the prohibition of "cruel, inhuman, or degrading treatment" had the impact of rendering the prohibition of torture and ill-treatment less binding on other nations?

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3. U.N. Response to Amputations in Other Contexts

The penal code of Sudan has prescribed the amputation (right hand or right hand and left foot) for offenses of theft and persistent or armed robbery. The penal sanctions are based on Islamic law (Shari'a). Over 120 such amputations were carried out in a two-year period by the previous government which was overthrown in 1985. The code was not changed by the new government and offenders continued to be sentenced to amputation although the sentences were not carried out. Amnesty International, Amputation Sentences (1987) (AI Index: AFR 54/01/87); International Comm'n Jurists, The Return of Democracy in Sudan 72-73 (1986). Sudanese courts continue to issue amputation sentences. See Amnesty International, Sudan: Fear of Amputation Mohamed Hassan Hamdan (2003) (AI Index: AFR 54/092/2003); Human Rights Watch, Sudan Justice: Stonings, Amputations (February 1, 2002).

In response to this situation, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted a resolution in 1984 which recommended that the Commission on Human Rights urge governments to abolish amputation as a penal sanction. The Sub-Commission recalled Article 5 of the Universal Declaration of Human Rights as the basis for the resolution. Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 37th Session at 95, U.N. Doc. E/CN.4/1985/3; E/CN.4/Sub.2/1984/43 (1985).

The original draft of the resolution called directly on Sudan to abolish the infliction of amputation as a penalty. A number of Sub-Commission members, however, questioned the appropriateness of challenging Islamic law, judging internal penal policies, or singling out Sudan for condemnation. The revised text omitted references to Islamic law and Sudan and was readily adopted. Nigel Rodley, The Treatment of Prisoners Under International Law 246 (1987). The Sub-Commission's parent body, the Commission on Human Rights, took no action, however, in response to this resolution.

The Human Rights Committee expressed concern about amputations in its concluding observations to Iraq's fourth periodic report. Further, the Committee called for the repeal of Revolutionary Command Council Directive No. 109. Directive 109 dictated branding of any person who committed a crime resulting in

the punishment of amputation including those who had suffered an amputation prior to the enactment of the Directive. Concluding Observations of the Human Rights Committee, Iraq, U.N. Doc. CCPR/C/79/Add.84 (1997).

In the Committee's concluding observations to Libya's second periodic report the committee expressed concern about the introduction of amputation. Concluding Observations of the Human Rights Committee, Libya Arab Jamahiriya, U.N. Doc. CCPR/C/79/Add.45 (1994). In its concluding observation to Libya's third periodic report, the Committee called for the formal abolition of amputation. Concluding Observations of the Human Rights Committee, Libya Arab Jamahiriya, U.N. Doc. CCPR/C/79/Add.101 (1998).

F. THEORETICAL FOUNDATIONS OF HUMAN RIGHTS: NATURAL LAW, POSITIVISM, AND ISLAMIC PRINCIPLES

Several theoretical bases of human rights are examined further in chapter 15, infra at xx - xx. Before proceeding, students should read carefully those materials. The following excerpt supplements them by discussing natural law, positivist, and Islamic approaches.

Myres S. McDougal, Harold D. Lasswell, & Lung-Chu Chen, Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity 68-71, 73-75 (1980) (footnotes omitted):

The Natural Law Approach

The natural law approach begins with the assumption that there are natural laws, both theological and metaphysical, which confer certain particular rights upon individual human beings. These rights find their authority either in divine will or in specified metaphysical absolutes. The natural law constitutes a "higher law" which is "the ultimate standard of fitness of all . . . national or international [law]; decisions by state elites which are taken contrary to this law are regarded as mere exercises of naked power.

The great historic contribution of the natural law emphasis has been in the affording of this appeal from the realities of naked power to a higher authority which is asserted to require the protection of individual rights. The observational standpoint assumed by those who take this approach has commonly been that of identification with the whole of humanity. A principal emphasis has been upon a common human nature that implies comparable rights and equality for all. For many centuries this approach has been an unfailing source of articulated demand and of theoretical justification for human rights. . . .

The principal inadequacies of the natural law approach stem from its conception of authority. When authority is conceived in terms of divine will or metaphysical

absolutes, little encouragement is given to that comprehensive and selective inquiry about empirical processes which is indispensable to the management of the variables that in fact affect decision. It is not to be expected, further, that scholars and decision makers, whose primary concern is to put into effect on earth either divine will or the import of transcendental essences, will devote much attention to the formulation of human rights problems in terms of the shaping and sharing of values or to the location of such problems in the larger community processes which affect their solution. Similarly, the establishment of the most basic, overriding, and abstract goals of the community by the use of exercises in faith, rather than by the empirical exploration of common interest, can only provoke the assertion of different, and perhaps opposing, goals by those who profess a different faith.

The intellectual task most relied upon in the natural law approach is syntactic derivation. Though appropriate concern is exhibited for the establishment and clarification of goals, the method by which clarification is sought for decision in particular instances is not by the disciplined, systematic employment of a variety of relevant intellectual skills, but rather by derivation from postulated norms achieved by techniques such as the revelation of divine will, messages obtained by consultation of oracles or entrails, transcendental cognition of absolutes, and participation in natural reason. . . . The abiding difficulty with the natural law approach is that its assumptions, intellectual procedures, and modalities of justification can be employed equally by the proponents of human dignity and the proponents of human indignity in support of diametrically opposed empirical specifications of rights, and neither set of proponents has at its disposal any means of confirming the one claim or of disconfirming the other. . . .

The Positivist Approach

The positivist approach assumes that the most important measure of human rights is to be found in the authoritative enactment of a system of law sustained by organized community coercion. Within this approach authority is found in the perspectives of established officials, and any appeal to a "higher law" for the protection of individual rights is regarded as utopian or at least as a meta-legal aspiration. . . .

The great contribution of the positivists has been in recognizing the importance of bringing organized community coercion, the state's established processes of authoritative decision, to bear upon the protection of human rights. By focusing upon deprivations in concrete situations and by stressing the importance of structures and procedures, as well as prescriptions, at phases of implementation, the positivists have enhanced the protection of many particular rights and strengthened explicit concern for more comprehensive means of fulfillment.

The fatal weakness of the positivist approach is in its location of authority in the perspective of established officials. The rules of law expressing these perspectives

are commonly assumed to have a largely autonomous reference, different from community policy in context. . . . Actually, in the positivist approach the task of specifying the detailed content of the human rights protected in a community goes forward very much as in the natural law approach -- by logical, syntactic derivation. The difference is that, while the natural lawyer takes off from theological or metaphysical absolutes, the positivist takes off from assumptions about the empirical reference of traditional legal concepts.

The difficulties inherent in clarifying the content of human rights, either as a whole or in particular, by relying on logical derivation from highly abstract and traditional legal concepts are multiple. The most obvious difficulty is that the inherited concepts may embody not the values of human dignity, but those of human indignity.

* * * * *

S. Farooq A. Hassan, The Islamic Republic: Politics, Law and Economy 106-21 (1984) (footnotes and citations omitted):

Shariah: Basic Constitutional Concepts

Prophet Mohammed showed a path to mankind, the path of a universal law, i.e. the Shariah. Contrary to the rigid limitations of race, national frontiers, language, and geographical configuration, it contains many commandments about the political setup of an ideal Islamic community. . . .

The Shariah contains many principles for public, private, social, national, and international conduct; these principles govern all human action for life in this world and also for life hereafter. . . . Shariah is . . . a complete science which is not specialized for a particular period of time, but is meant for all periods and times. It cannot be amended or modified . . . for it is given by God, who is Perfect and Creator of the universe and all things. The principles laid down by the Shariah are above every man-made society and, being perennial, are adoptable for every new situation. . . .

The system of the Shariah is based upon divine principles and its institutions are sacred. The infringement of the moral rules of the system, as opposed to secular rules, includes unlawful conduct, and it is also a sin against religion and God. There is a double protection of human rights. The rules of law work not only for the prevention of injurious conduct towards others, but they also go deeper than other systems through internal conscience. It is not only an offense but is also a sin to injure or damage the rights of other individuals.

The basic and most fundamental right is the protection of life. (Article 3 of the Universal Declaration of Human Rights, 1948). The Quran declares: “If anyone slew a person unless it be for murder or for preventing mischief in the land, it

would be as if he slew the whole people; and if anyone saved a life, it would be as if he saved the life of the whole people”. Moreover, the Quran declares: “And slay not the life which Allah hath forbidden save with right”. Apart from this right, Constitutional laws and various international documents attempt to guarantee other rights, like that of property, reputation or family. The provisions of the Quran are more clear on this subject. Thus, dishonoring others, hoarding, smuggling, defamation, back biting, and destroying others’ property are declared offenses and sins.

The conception of freedom recognized by the Shariah is much wider than is commonly perceived. The rules of Shariah provide for the freedom of religion, conscience, expression, speech, avocation, movement, education, assembly, etc. . . . The freedom given to man is related to the establishment of right and justice. The Quran makes it the duty of every individual to speak the truth without any fear. . . . This freedom is given through limitations set up in public interest, and anything which disturbs the public in general is not permitted. All possible methods of demonstration against evil by expression are possible, but they must be under the limits of the rules of morality. Freedom of speech must observe the constitutional means for expression. It should not be violent and injurious and should not give rise to other evils or wrongs. Nevertheless, the Shariah makes provision for rising against authority when there is a violation of the sacred principles on its part. The traditions of the Prophet make it clear that orders or directions to do what is sinful are not to be obeyed. . . .

The conception of pacta sunt servanda [treaties are to be observed] has a special place in any law, so the Muslims are bound by their stipulations. . . . The social and economic rights of the community are safeguarded by the particular guarantee of freedom of contract. In addition to the secular operation of contracts between the parties, it is a divine institution. . . . The moral sanctity in Islam of contracts makes redundant the modern international law recourse to the doctrine of pacta sunt servanda. Thus treaties, like contracts, are binding because Providence has commanded in His law to make all agreements binding.

The contemporary declarations on human rights especially provide and preach for the right to equality and equal protection of the law. In addition to Article 1 of the Universal Declaration (also Article 2), similar elements are contained in most modern constitutions. To what extent these declarations are implemented is another question. The principles of justice in the Shariah incorporate perfect observation of equality before law and equal protection thereof without any kind of discrimination whatsoever. . . . The exercise of justice and its principles is a vital rule of religion, and it is a duty of every Muslim to abide by these principles. The Quran further says that there is to be no discrimination between the sexes; that man is one nation and no discrimination is allowed on the basis of race, region, caste, color, religion, etc. The traditions of the Prophet contain many principles of justice and equality in treatment of men and women. The notion of justice in the Shariah binds a Muslim

not only to God but also to his fellow men including the non-Muslims. This principle is applied not only to private matters but also in public transactions and even in international relations. There is a sacred duty to administer justice without any fear or prejudice, and the history of Islam has many remarkable examples in the dispensation of justice.

The modern approaches, in protecting human rights, operate upon the principles of rights of the people. The concept of democracy which establishes a State by the people, must work for the betterment of human life. The Shariah's conception of Umma is a system which has the same goals for an Islamic State. But it was centuries before the modern notions came to be established. . . . The principles of the Shariah lay down the limitations of any ruler. When the ruler violates the rules of the Shariah, particularly those dealing with human rights, it is a person's duty to disobey such ruler's authority. The concepts of imamate and caliphate are based upon the theory of the trust of the public. The moment the ruler or the government violates the mandate of God and His book, the change of government is essential. . . . It leads to the natural result that the Shariah principles imply the protection of human rights in a most comprehensive manner. Only some of them have been reproduced in the above pages. They are enough to show the vast field covered by the list of human rights of the Shariah.

NOTES

1. Farooq Hassan, author of the preceding excerpt, is a professor of law, a member of the International Institute of Strategic Studies in London, and a member of the bar of the United Kingdom, Pakistan, and the United States. In his preface, the author states that he prepared the text in part to respond to interest in the concept of an ideal Islamic state generated by the emergence of the Islamic Republic of Iran. He bases his work in the primary sources for Islamic jurisprudence -- the Qur'an and the Sunnah -- and avoids citing post-tenth-century authors. Yet, he states that his interpretations fall in the Sunni school of Islamic law. The Islamic Republic of Iran, however, is founded on the views of the Shi'a school.

2. For further reading on the theoretical basis of human rights in Islam, see:
Shaheen Sardar Ali, The Conceptual Foundations of Human Rights: A Comparative Perspective, 3 Eur. Pub. L. 261 (1997);
Shaheen Sardar Ali, Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man? (2000);
Muhammad Ali Alkhuli, Human Rights in Islam (2000);
Abdullahi A. An-Na'im, The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts, 11 Emory Int'l L. Rev. 29 (1997);
Abdullahi A. An-Na'im, Islam and Human Rights: Beyond the Universality Debate 94 Am. Soc'y Int'l L. Proc. 95 (2000);
Abdur Rahman Assheha, Islamic Concepts of Human Rights (2004);

Mashood A. Baderin, International Human Rights and Islamic Law (2003);
Mashood a Baderin, Identifying Possible Mechanisms within Islamic Law for the Promotion and Protection of Human Rights in Muslim States, 22 Neth. Q. Hum. Rts. 329 (2004);
Karima Bennoune, As-Salamu ‘Alaykum? -- Humanitarian Law in Islamic Jurisprudence, 15 Mich. J. Int’l L. 605 (1994);
Akhtar Khalid Bhatti & Gul-e Jannat, The Holy Quran on Human Rights (1996);
Heiner Bielefeldt, Muslim Voices in the Human Rights Debate, 17 Hum. Rts. Q. 587 (1995);
Edna Boyle-Lewicki, Need Worlds Collide: The Crimes of Islamic Law and International Human Rights, 13 N.Y. Int’l L. Rev. 43 (2000);
Nathan J. Brown, The Rule of Law in the Arab World (1997);
Eugene Cotran & Mai Yamani, The Rule of Law in the Middle East and the Islamic World: Human Rights and the Judicial Process (2000);
Eugene Cotran & Adel Omar Sherif, Democracy, the Rule of Law and Islam (1999);
Katerina Dalacoura, Islam, Liberalism and Human Rights: Implications for International Relations (1998);
The East Asian Challenge for Human Rights (Joanne R. Bauer & Daniel A. Bell eds., 1999);
Mohamed S. M. Eltayeb, A Human Rights Approach to Combating Religious Persecution: Cases from Pakistan, Saudi Arabia, and Sudan (2001);
The Encounter: Islam, the West and Human Rights (Mazen Armouti ed., 1996);
Bernard K. Freamon, Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence, 11 Harv. Hum. Rts. J. 1 (1998);
Lenn Evan Goodman, Islamic Humanism (2003);
Riffat Hassan, Religious Human Rights and the Qur’an, 10 Emory Int’l L. Rev. 85 (1996);
Abu Al-fazl `Izzati, Islam and Natural Law (2002);
David A. Jordan, The Dark Ages of Islam: Ijtihad, Apostacy, and Human Rights in Contemporary Islamic Jurisprudence, 9 Wash. & Lee Race & Ethnic Ancestry L.J. 55 (2003);
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G. CULTURAL RELATIVISM AND INTERNATIONAL HUMAN RIGHTS LAW

Summary Record of the 65th Meeting, U.N. Doc A/C.3/39/SR.65 at ¶ 95 (1984):

[Summary of the comments of Sa'id Raja'i Khorasani, Iran's Ambassador to the U.N.] The new political order was not simply a democracy, a theocracy, a socialist regime, an autocracy or anarchy, but a monocracy in full accordance and harmony with the deepest moral and religious convictions of the people and therefore most representative of the traditional, cultural, moral and religious beliefs of Iranian society. It recognized no authority or power but that of Almighty God and no legal tradition apart from Islamic law. As his delegation had already stated at the thirty-sixth session of the General Assembly, conventions, declarations and resolutions or decisions of international organizations, which were contrary to Islam, had no validity in the Islamic Republic of Iran. If secular States decided, for example, to produce a convention abolishing capital punishment, his country has no obligation because it would not be bound at all by such a convention. The Universal

Declaration of Human Rights, which represented secular understanding of the [Judeao-Christian] tradition, could not be implemented by Muslims and did not accord with the system of values recognized by the Islamic Republic of Iran; his country would therefore not hesitate to violate its provisions, since it had to choose between violating the divine law of the country and violating secular conventions. That did not mean that the allegations made against Iran were true, or that there were no elements in the Universal Declaration of Human Rights that accorded with Islam. His country was convinced that the Declaration must be respected by all secular and non-Muslim States because the inhuman treatment and degrading practices often reported in El Salvador, Chile and South Africa could not be tolerated. Those who could not live up to the divine standards of Islam should at least meet the minimum [requirements] established by international organizations, if they did not wish to become [centers] of corruption, torture, injustice, oppression and tyranny. The Islamic Republic of Iran, which strongly condemned torture, believed that corporal punishment and the death penalty did not fall within the category of torture when carried out on the basis of Islam, in accordance with a sentence by an Islamic court.

NOTES AND QUESTIONS

1. To what extent do the comments of Sa'id Raja'i Khorasani move beyond an argument for cultural relativism and towards an argument for the superiority of Islamic law? See Ann Elizabeth Mayer, Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash Without a Construct?, 15 Mich. J. Int'l. L. 307, 315-16 (1994).

2. Iranian scholars have suggested that international human rights represent only a regional understanding of rights whereas religion represents a universal standard. Ayatullah Abdullah Javadi Amuli argues that Islam applies to the soul and therefore applies universally. Human rights, Amuli argues, relate to the physical body and are therefore regional in nature. Sources of Human Rights, in Islamic Views on Human Rights 1 (2003).

Jack Donnelly, Cultural Relativism and Universal Human Rights, 6 Hum. Rts. Q. 400, 410-19 (1984) (footnotes omitted):

CULTURE AND RELATIVISM . . .

In the Third World today, more often than not we see dual societies and patchwork practices that seek to accommodate seemingly irreconcilable old and new ways. Rather than the persistence of traditional culture in the face of modern intrusions, or even the development of syncretic cultures and values, we usually see instead a disruptive and incomplete westernization, cultural confusion, or the enthusiastic embrace of "modern" practices and values. In other words, the traditional culture

advanced to justify cultural relativism far too often no longer exists.

Therefore, while recognizing the legitimate claims of self-determination and cultural relativism, we must be alert to cynical manipulations of a dying, lost, or even mythical cultural past. We must not be misled by complaints of the inappropriateness of "western" human rights made by repressive regimes whose practices have at best only the most tenuous connection to the indigenous culture. . . .

In traditional cultures -- at least the sorts of traditional cultures that would readily justify cultural deviations from international human rights standards -- people are not victims of the arbitrary decisions of rulers whose principal claim to power is their control of modern instruments of force and administration. In traditional cultures, communal customs and practices usually provide each person with a place in society and a certain amount of dignity and protection.

Furthermore, there usually are well-established reciprocal bonds between rulers and ruled, and between rich and poor. . . .

[In addition,] there are substantive human rights limits on even well-established cultural practices, however difficult it may be to specify and defend a particular account of what those practices are. For example, while slavery has been customary in numerous societies, today it is a practice that no custom can justify. Likewise, sexual, racial, ethnic, and religious discrimination have been widely practiced, but are indefensible today; the depth of the tradition of anti-Semitism in the West, for example, simply is no defense for the maintenance of the practice. . . .

RESOLVING THE CLAIMS OF RELATIVISM AND UNIVERSALISM

Despite striking and profound international differences in ideology, levels and styles of economic development, and patterns of political evolution, virtually all states today have embraced -- in speech if not in deed -- the human rights standards enunciated in the Universal Declaration of Human Rights and the International Human Rights Covenants. . . .

While human rights -- inalienable entitlements of individuals held in relation to state and society -- have not been a part of most cultural traditions, or even the western tradition until rather recently, there is a striking similarity in many of the basic values that today we seek to protect through human rights. This is particularly true when these values are expressed in relatively general terms. Life, social order, protection from arbitrary rule, prohibition of inhuman and degrading treatment, the guarantee of a place in the life of the community, and access to an equitable share of the means of subsistence are central moral aspirations in nearly

all cultures.

This fundamental unity in the midst of otherwise bewildering diversity suggests a certain core of "human nature" -- for all its undeniable variability, and despite our inability to express that core in the language of science. And if human nature is relatively universal, then basic human rights must at least initially be assumed to be similarly universal. . . .

ASSESSING CLAIMS OF CULTURAL RELATIVISM

Rights are formulated with certain basic violations, or threats to human dignity, in mind. Therefore, the easiest way to overcome the presumption of universality for a widely recognized human right is to demonstrate either that the anticipated violation is not standard in that society, that the value is (justifiably) not considered basic in that society, or that it is protected by an alternative mechanism. . . . I would argue that such a test can be met only rarely today, and that permissible exceptions usually are relatively minor and generally consistent with the basic thrust of the Universal Declaration.

For example, it is hard to imagine cultural arguments against recognition of the basic personal rights of Articles 3 through 11 [of the Universal Declaration of Human Rights]. . . . In fact, I am tempted to say that conceptions of human nature or society incompatible with such rights would be almost by definition indefensible; at the very least, such rights come very close to being fully universal.

Civil rights such as freedom of conscience, speech, and association would be a bit more relative; as they assume the existence and a positive evaluation of relatively autonomous individuals, they are of questionable applicability in strong traditional communities. In such communities, however, they would rarely be at issue. If traditional practices truly are based on and protect culturally accepted conceptions of human dignity, then members of such a community simply will not have the desire or need to claim such civil rights. But in the more typical contemporary case, in which the relatively autonomous individual faces the modern state, they would seem to be close to universal rights; it is hard to imagine a defensible modern conception of human dignity that did not include at least most of these rights. . . .

The Declaration does list some rights that are best viewed as "interpretations," subject to much greater cultural relativity. For example, the already mentioned right of free and full consent of intending spouses not only reflects a specific cultural interpretation of marriage, but an interpretation that is of relatively recent origin and by no means universal today even in the West. Notice, however, that the right, as Section 2 of Article 16, is subordinate to the basic right to marry and found a family. Furthermore, some traditional customs, such as bride price, provide

alternative protections for women, and a sort of indirect conditionality to marriage that addresses at least some of the underlying concerns of Article 16(2). Such factors make it much easier to accept cultural relativity with regard to this right. . . .

Such cases, however, are the exception rather than the rule. And if my arguments above are correct, we can justifiably insist on some form of weak cultural relativism; that is, on a fundamental universality of basic human rights, tempered by a recognition of the possible need for limited cultural variations. Basic human rights are, to use an appropriately paradoxical phrase, relatively universal.

NOTES AND QUESTIONS

1. Do you agree with Donnelly that the content of some human rights may vary with the cultural context? Compare his view with some early interpretations of the U.S. 14th Amendment, under which the content of rights to racial equality varied from state to state and allowed substantial discrimination in some states. Do you think that permitting cultural relativism in international human rights law would achieve parallel results?

2. Cultural relativity advocates argue that traditional cultures often justify deviations from international human rights standards. This position and several counter-arguments are discussed further in chapter 15.

The issue of cultural relativism arises in many contexts. For example, the Ayatollah Khomeini, leader of Iran, in 1989 issued an order for followers to kill a British author, Salman Rushdie, for writing a book called The Satanic Verses. Rushdie had been raised in the Islamic faith, but Khomeini found parts of the book heretical. In the faith as it is practiced in Iran the killing of heretics presumably was acceptable.

In a similar case in Bangladesh, fundamentalist Islamic groups called for the death of Taslima Nasrin for her publication of Lajja, a novel criticizing Islam. Authorities issued a warrant for her arrest on charges of blasphemy. See Mary Anne Weaver, A Fugitive from Injustice, New Yorker, Sept. 12, 1994, at 48. For additional reading on the rise in threats and violence against Arab artists and performers, see S.L. Bachman, Women Lessen Impact of Muslim Conservatives, New Orleans Times-Picayune, July 30, 1995, at A38; Yasmine Bahrani, The Rushdie Specter: For Muslim Intellectuals the Danger Deepens, Wash. Post, Aug. 14, 1994, at C1; Kim Murphy, Islamic Militants Target Arab Intellectuals, Artists, Los Angeles Times, Nov. 28, 1994, at A1.

In 1994, Michael Fay, an 18-year-old U.S. citizen, received four lashes with a rattan cane as punishment for vandalism in Singapore. The government reduced

the punishment from six lashes to four in a gesture of goodwill toward the U.S. but refused to commute the sentence. Fay originally confessed to vandalism but later recanted, claiming that the confession was coerced and that he had been subjected to ill-treatment by the police.

Should the argument for cultural relativism in human rights extend to the killing of heretics? To other extreme forms of punishment? Where would you draw the line? What kind of standard might keep cultural variations within limits? Might additional arguments be raised when the victim is not a member of the culture condoning the practice?

Nigel Purvis, Critical Legal Studies in Public International Law, 32 Harv. Int'l L.J. 81, 88-110, 113-14 (1991) (footnotes omitted):
Over the last decade, a "New Stream" of international legal scholarship has emerged. One of its most distinguishing features has been its hostility toward conceptual pragmatism. . . .

. . . [T]he New Stream has imported into international law tremendously diverse methodological approaches. These contemporary international legal theorists have incorporated insights from normative philosophy, critical theory, structuralism, anthropology, prepositional logic, literature, sociology, politics, and psychiatry. . . .
The New Stream in international legal theory stands as part of a broader movement in contemporary legal theory commonly known as Critical Legal Studies (CLS) or critical jurisprudence.

The CLS movement has brought the radical insights of modernism into law. . . .
Critical jurisprudence has sought to expose political choice, discredit the "rights" discourse of liberal legalism, demonstrate the indeterminacy of law, and reveal the bias of liberal ideology. It has aimed to demonstrate how law, through its capacity for "reification," "mystification," "legitimation," and "obfuscation," reinforces social injustice. To the extent that they have been articulated, CLS's visions about the ideal condition of law require a transformation of law that would eliminate all forms of "alienation," "domination," and "subjugation" from social life. . . .
. . . CLS ANALYSIS OF INTERNATIONAL LAW

According to its own adherents, the insights of New Stream scholarship have been directed against "the tragic voice of post-war public law liberalism." . . .
The critical attack on liberalism has advanced on four principal fronts. Contemporary international law scholars have maintained (1) that the logic of liberalism in international law is internally incoherent; (2) that international legal discourse operates within a constrained structure; (3) that international legal analysis is indeterminate; and (4) that whatever authority international law may have is self-validated. These criticisms parallel claims made by CLS scholars outside the area of international law, but only rarely have they been systematically

discussed as a unified theory of international legal analysis. . . .

A. The Logic of Liberal Ethics and International Law

1. The Incoherence of Liberalism in International Law

Critical jurisprudence in international law has sought to demonstrate that the dominant conception of international social life -- based on liberal ethics -- is internally incoherent. . . .

Liberalism . . . conceives of sovereignty as being the foundation of international life. . . . Sovereigns are both the subjects and objects of international life. No “natural” world order pre-exists the sovereigns’ appearance. Social ends are merely objectives that sovereigns hold in common, and world order represents nothing more than a social contract among sovereigns. Sovereignty also assumes an indivisible quality. Put another way, sovereignty is atomistic; it is international life’s unencumbered basic unit. Liberalism’s metaphoric expression of this concept equates sovereigns to individuals. In sum, the liberal psychology about our world portrays sovereignty as being all there is to international life. Sovereignty claims for itself a transcendent quality, as would an objective truth or an unexamined first principle.

The second premise of liberalism is the principle of subjective value. This radical epistemology emphasizes that moral truth and moral worth are subjective, because as an epistemological matter universal morality is unknowable. . . .

The two primary assumptions of liberalism inevitably lead to a few additional propositions. In particular, liberalism must claim that decisions about morality can only be made by . . . sovereigns. Subjectivity requires that, at the level of the sovereign, all moral choice is equally valid. . . . States must be equal in the moral sense, because no pre-existing objective morality can judge their conduct. . . .

Together, these fundamental assumptions of liberalism compel a particular vision of politics and law. As for politics, the atomistic existence of sovereigns and the principle of subjective value require liberals to believe that the only legitimate system of governance is one based on liberty and with liberty as its only substantive commitment. A world order based on liberty is said to free sovereigns to determine value in the market place of ideas. In fact, the pursuit of a world order (or lack thereof) that maximizes sovereign liberty is the only legitimate goal of international relations: a substantive notion of justice would introduce objective value and deny the primacy of sovereignty.

At a sufficiently elevated level of abstraction, liberal political theory seems logical. But as one makes concrete the meaning of liberty, liberalism risks incoherence. In concrete terms, liberty must include not only the freedom of sovereigns to act,

individually or collectively based on consent, but also the freedom of other sovereigns to act in a manner entirely at odds with the first sovereign or sovereigns. . . .

Liberalism leaves the challenge of defining spheres of sovereign liberty to international law, with liberal legality being based on the rule of law. In international relations the rule of law is a set of prescriptive rules governing sovereign conduct. Its principal commitment is formal equality, meaning equal treatment with respect to rules. . . . International legal principles are said to enforce those rights neutrally and objectively. International law's claimed objectivity comes then from a purported ability to apply abstract principles to concrete problems, creating legal solutions that reflect only the legitimate normative bias of international law. . . . [T]he neutrality of legal solutions relates to the purported detachment of the process from some substantive outcome other than the preservation of sovereign liberty.

. . . Herein lies the contradiction that has been the object of the critical attack on the internal logic of liberalism: liberalism cannot deny the existence of objective value and at the same time claim to resolve international conflicts through an appeal to rules of objective neutrality. . . .

[A] common method of giving liberty meaning involves following rules built on distinctions between domestic jurisdiction and international concerns. Liberalism describes the world in dichotomies between sovereignty and world order, the domestic and the international, the private and the public. The priority of competing rights switches as one passes from one realm of the distinction to another. Yet what is it about international life that makes these distinctions natural, objective, or intelligible? The answer is simply nothing. The principle of subjective value precludes the existence of natural and objective distinctions. . . . [N]either rules nor distinctions can resolve disputes between conflicting sources of liberty in international life. . . .

2. Liberalism in International Law and Justice

The CLS analysis of international law has relied on a critique of the internal logic of international law to suggest the inadequacy of liberalism's explanation of international life. In a culture dominated by liberalism, rational argument cannot lead to moral consensus about what constitutes a just order. The principle of subjective value precludes the possibility of an objective truth from which a theory of justice can be derived. Moral consensus, to the degree it exists, is only the sum of moral decisions made by sovereigns. Given moral disagreement between them, logic cannot reconcile their positions. International society cannot come to have a theory of justice by creating a democratic or pluralist theory of justice from the competing theories because we possess no rational way of weighing the claims of one against another. . . . Any

system of deciding or acting must rest on a political theory, like majority rule, which by itself embodies a substantive commitment of the type subjective value precludes. Any program for action must accept some first principle as essential to the correct method of proceeding. The validity of that principle conflicts with liberalism's fundamental belief in the lack of intelligible essences. Liberalism itself makes no room for a theory of material justice in the world because it imagines the pursuit of liberty as the only legitimate substantive objective. And yet, as we have seen, liberty itself cannot stand as the liberal theory of justice because the commitment to liberty itself conflicts with the principle of subjective value. The impossibility of sustaining a compelling vision of world justice consistent with liberalism has led New Stream scholars to characterize liberalism as an inadequate explanatory theory of international social life. . . .

B. The Structure of International Law

In their second critique of liberalism, CLS scholars contend that traditional international legal reasoning operates within a restricted intellectual structure. This structure makes international law narrowminded. International law accepts only some goals and values. Some arguments qualify as international legal arguments but others do not, and international law rules out some conceptions of international life altogether. The implications New Stream scholars have derived from the exposure of international law's structure have been threefold. They have maintained that: (1) the presence of structure reveals the existence of political choice within international law, (2) the existence of structure demonstrates the bias of international law, while simultaneously denying its claims of objectivity and neutrality, and (3) international law's denial or ignorance of its own structure serves to obscure the existence of that structure, which seems intolerable in light of the first two points. Critical scholars . . . maintain that legal reasoning in international law is constrained by the ideological underpinnings and patterns of legal argument inherent in liberalism. . . .

C. The Indeterminacy of International Legalism

1. Determinacy Under the Rule of Law

The third claim of critical jurisprudence in international law is that traditional international legal discourse is indeterminate. . . .
Liberalism conceives of the rule of law as a process that relates neutral principles to concrete occurrences. . . . [A]s a general matter most traditional academics would agree that liberal legality requires legal decisionmakers to resolve concrete issues by applying the theory of the law that they have before them. . . . When the correct theory is applied to the facts, the theory should determine a particular substantive outcome.
To be determinate, therefore, the rule of law must be capable of two processes.

Because it needs to construct some grander abstraction or higher-level theory before it can resolve a case, liberal legality must allow for determinate theorizing. Because it must apply abstractions to concrete factual materials in such a way as to produce legal outcomes, liberal legality must achieve determinate application. . . .

2. The Indeterminacy of Theorizing: Fundamental Contradictions

New Stream scholars have denied the possibility of determinate theorizing. Their basic claim is that the abstractions of liberalism are contradictory. As one moves to higher levels of abstraction in search of a controlling principle, liberalism constantly offers inconsistent theories about the nature of international law. . . . . . . Perhaps some higher-level abstraction or lower-level application could reconcile these dilemmas. . . . To answer this challenge, New Stream scholars have argued that international legal doctrines have inherited liberalism's contradictions. . . . Given the presence of competing theories at all levels of abstraction, the selection of one theory over the others involves political choice. Legal reasoning as it relates to theorizing is correctly described as the process of choosing between theories, rather than a process of logical determinacy.

3. The Indeterminacy of Application: The Reversibility of International Legal Argument

The indeterminacy of public international law is also illustrated by the drive for the concrete application of doctrines. Understood in this manner, the indeterminacy thesis reveals itself as a radical claim about the reversibility of international legal argument. By reversibility, New Stream scholars mean that any international legal doctrine can justify multiple and competing outcomes in any legal debate. . . . For the rule of law to determine the result of a dispute, legal doctrines must justify one outcome above others. But when legal analysts try to descend from a conceptual abstraction, they find that for each pro argument there is a con argument about why one result is desirable instead of another. Each result is equally valid as a logical matter. So, it becomes impossible to deduce implications from concepts and consequently, abstractions cannot "compel" any decision. . . .

D. International Law's Self-Validation . . .

CLS's analysis of international law has concluded that international law is ethically incoherent, intellectually constrained, and logically indeterminate. Nevertheless, quite importantly, international law seems to have some experiential authority. Its authority operates on two levels. On the most basic level, sovereigns seem to take for granted the propriety of engaging in international legal discourse (instead of some other type of discourse) when they seek to resolve international issues. Moreover, international law operates as though it makes a difference. Sovereigns seem to debate international legal principles as though they were determinate and coherent. On occasion, states seem to act if they actually were "complying" with

international law. Sovereign acceptance of the rule of law as the appropriate mechanism for structuring intentional state life represents the second source of international law's authority. . . .

E. Summary of CLS Analysis . . .

A common theme emerges from these insights. Both focus on the normative and political choices in international legal reasoning. The selection of values, ideologies, arguments, and applications provide points of political choice from which no neutral and objective decision can emerge. These political decisions permeate the legal texts of international organization -- its ideology, rules, and doctrine. Under the assumptions of liberalism, international law must collapse into political choice, for no neutral system can exist in a sovereign-centric world of subjective value.

NOTES AND QUESTIONS

1. Human rights theorists often attempt now to address liberty-equality tensions and create a system of rights. Their theories borrow concepts from earlier theories to achieve synthesis. For further reading, see:

Zuhtu Arslan, Taking Rights Less Seriously: Postmodernism and Human Rights, 5 Res Publica 195 (1999);

Alan. M. Dershowitz, Rights from Wrongs: A Secular Theory of the Origins of Rights (2004);

Mark R. Discher, A New Natural Law Theory as a Ground for Human Rights?, 9 Kan. J. L. & Pub. Pol'y 267 (1999);

Costas Douzinas, the End of Human Rights: Critical Legal Thought at the Turn of the Century (2000);

Ronald M. Dworkin, Taking Rights Seriously (1977);

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Jens David Ohlin, Is the Concept of the Person Necessary for Human Rights?, 105 Colum. L. Rev. 209 (2005);

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Richard H. Pildes, Dworkin's Two Conceptions of Rights: Discussion of Pildes on Dworkin's Theory of Rights, 29 J. Legal Stud. 309 (2000);

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John Rawls, A Theory of Justice (1971);

Luis Rodriguez-Abascal, On the Admissibility of Group Rights, 9 Ann. Survey Int'l & Comp. L. 101 (2003);

Jerome J. Shestack, The Philosophic Foundations of Human Rights, 20 Hum. Rts Q. 201 (1998);

Jerome J. Shestack, The Jurisprudence of Human Rights, in Human Rights in International Law: Legal and Policy Issues 70 (Theodor Meron ed., 1984).

William Sweet, Philosophical Theory and the Universal Declaration of Human Rights (2003);

William J. Talbott, Which Rights Should Be Universal? (2005);

Celia R. Taylor, Justifying Ethics: Human Rights and Human Nature, 25 Denv. J. Int'l L. & Pol'y 199 (1996);

Jeremy Waldron, Pildes on Dworkin's Theory of Rights, Discussion of Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J. Legal Stud. 301 (1998);

Morton Winston, The Philosophy of Human Rights (1989).

2. Some theorists assert a "natural rights" formulation of human rights, and point to several Universal Declaration provisions as reflecting their approach. The preamble uses phrases such as "inherent dignity" and "equal and inalienable rights", and Article 1 asserts that "[a]ll human beings are born free and equal in dignity and rights." See Johannes Morsink, The Philosophy of the Universal Declaration, 6 Hum. Rts. Q. 309 (1984).

3. One noted theorist -- Hans Kelsen – developed a theory of law based on a hierarchy of legal norms. According to his view, legal systems are founded on one basic norm from which further norms are created and validated. See Albert A. Ehrenzweig, Law: A Personal View 27-67 (1977); Hans Kelsen, General Theory of

Law and State 3-161 (Anders Wedberg trans. 1945).

4. H.L.A. Hart, a leading jurisprudential theorist in the area of positivism, developed a theory based on primary and secondary rules. Primary rules are those that create obligations. Secondary rules govern recognition of primary rules and create power to modify, adjudge, create, or destroy primary rules. See Herbert L.A. Hart, The Concept of Law (1981).

5. The Critical Legal Studies ("CLS") movement came into existence at the first conference on Critical Legal Studies in 1977. As with any new movement, its jurisprudence has yet to be codified, and there is no unified CLS theory of rights. The thrust of CLS rights-analysis seems to be criticizing the legitimacy of labeling as rights what are in fact concepts. One underlying tenet is that rights are bestowed by ruling powers to disguise and legitimate their control without providing entitlements. See Michael Freeman, Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay, 23 Harv. C.R.-C.L. L. Rev. 295 (1988); cf. Katherine Van Wenzel Stone, The Post-War Paradigm in American Labor Law, 90 Yale L.J. 1509 (1981) (critiquing the ideology which underlies the current structure of collective bargaining).

Freeman mentions two critiques focused by CLS scholars on the concept of rights -- the indeterminacy critique and the contradiction critique. Freeman, supra, at 316. Another CLS critique is that calling a concept a right divorces that it from human experience and "reifies" it into an abstract concept. One scholar has argued, building on reification and indeterminacy critiques, that a system of rights leads to individual alienation by substituting the passive possibility of possessing rights for active exercise of those rights, in concert with others, for a common good. Peter Gabel, The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves, 62 Tex. L. Rev. 1563 (1984).

6. For further reading on the CLS rights critique, see:
Andrew Altman, Critical Legal Studies: A Liberal Critique (1990);

Penelope E. Andrews, Globalization, Human Rights and Critical Race Feminism: Voices from the Margins, 3 J. Gender Race & Just. 373 (2000);

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Eric Heinze, Principles for a Meta-Discourse of Liberal Rights: The Example of the European Convention on Human Rights, 9 Ind. Int'l & Comp. L. Rev. 319 (1999);

David Ingram, Rights, Democracy, and Fulfillment in the Era of Identity Politics:

Principled Compromises in a Compromised World (2004);

International Law, Human Rights, and LatCrit Theory: Colloquium, 28 U. Miami Inter- Am. L. Rev. 177 (1996/1997);

Satvinder Juss, Response, Toward a Morally Legitimate Reform of Refugee Law: The Uses of Cultural Jurisprudence, 11 Harv. Hum. Rts. J. 311 (1998);

Sylvia R. Lazos Vargas, Globalization or Global Subordination?: How LatCrit Links the Local to Global and the Global to the Local, 33 U.C. Davis L. Rev. 1429 (Summer 2000);

Hope Lewis, Global Intersections: Critical Race Feminist Human Rights and Inter/national Black Women, 50 Maine L. Rev. 309 (1998);

Mapping Intersections of Critical Race Theory, Postcolonial Studies and International Law, 93 Am. Soc. of Int'l L. Proc. 225 (1999);

Makau Mutua, Terrorism and Human Rights: Power, Culture, and Subordination, 8 Buff. Hum. Rts. L. Rev. 1 (2002);

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Richard A Primus, The American Language of Rights (1999);

Celina Romany, Claiming a Global Identity: Latino/a Critical Scholarship and International Human Rights, 13 Geo. Immigr. L.J. 25 (1997);

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Symposium, Critical Race Theory and International Law: Convergence and Divergence, 45 Vill. L. Rev. 827 (2000);

David M. Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 Stan. L. Rev. 575 (1984);

Mark Tushnet, An Essay on Rights, 62 Tex. L. Rev. 1363 (1984);

Patricia Williams, The Alchemy of Race and Rights (1991);

Patricia Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, in Critical Race Theory: The Cutting Edge, 84, 86 (Richard Delgado ed., 1995);

Adrien K. Wing, Global Critical Race Feminism: An International Reader (2000);

Eric K. Yamamoto et al., American Racial Justice on Trial Again: African American Reparations, Human Rights, and the War on Terror, 101 Mich. L. Rev. 1269 (2003).

7. Professors Jack L. Goldsmith and Eric A. Posner argue "that customary international law can reflect genuine cooperation or coordination, though only between pairs of states or among small groups of states. Other times, customary international law may reflect self-interested state behavior that, through coercion, produces gains for one state and losses for another. Much of customary international law is simply coincidence of interest." Further Professors Goldsmith and Posner claim that treaties can aid States in overcoming the natural limits to cooperation and coordination. In their view, "Treaties do so by clarifying the nature of the moves that will count as cooperative actions in repeated prisoner's dilemmas and as coordination in games." Jack L. Goldsmith and Eric A. Posner, The Limits of International Law 225 (2005); see Oona A. Hathaway and Ariel N. Lavinbuk, Book Review, 119 Harv. L. Rev. 1404 (2006).

For further alternatives theories on international law see J. Shand Watson, Normativity and Reality in International Human Rights Law, 13 Stetson L. Rev. 221 (1984); J. Shand Watson, Theory and Reality in the International Protection of Human Rights (1999).

8. For further discussion of the binding character of international law, addressing and challenging the validity of arguments made by skeptics such as Watson, see Oscar Schachter, International Law in Theory and Practice: General Course in Public International Law, 178 Collected Courses of the Hague Acad. of Int'l Law 1, 21-39 (1982).

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