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CAN THE REQUIREMENTS OF SHARIAH LAW REGARDING CRIMINAL PUNISHMENTS BE INTERPRETED IN A WAY THAT IS COMPATIBLE WITH THE ICCPR AND CAT?

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The 1982 UNCLOS, as a comprehensive regulation of the sea, provides in article 25 that a Coastal State has the right to perform any certain act to prevent non-innocent passage. Therefore, it is clear that the task of maintaining internal security is being assigned to each Coastal State. Meanwhile, in article 100, 1982 UNCLOS provides that States must cooperate to take action against piracy on the high seas, and article 108 is designed to combat drug trafficking. This means that, in order to maintain security over maritime territories bordering on the territory of other States, a State can enter into a regional cooperation agreement to be more effective and efficient.

Indonesia needs to enhance its understanding of its status as an Archipelagic States and what that entails. This Status brings responsibility to Indonesia in the form of rights and obligations. Therefore, Indonesian people need to be educated about Indonesia's status as a maritime State, so that a strong and proper maritime defense can result. The ratification of the PALERMO Convention brings about great responsibility to the Indonesian Government to cooperate with other States in combating TOC, as well as, of course, to maintain maritime security at the regional level, especially in Southeast Asia.

Arising from that issue, the Indonesian Government has to reflect that Indonesia needs a strong Naval force. It is true that Indonesia is not in good economic condition. However, a State consists of people, territory and Government. If the territory is disrupted, then the people and the government will not be able to function properly. Thus, careful steps should be taken to complete Indonesia's Naval forces, including a comprehensive maritime territory patrol program, so that Indonesia's territory and international stripe can be safe and free from Terrorism and Piracy. Then, the intervention of foreign parties can be avoided and the State's sovereignty maintained. A respectful and beneficial cooperation among States in Southeast Asia must be fostered by harmonizing perceptions, policies and strengths, and by establishing a workable extradition agreement.

Can the Requirements of Shariah Law Regarding Criminal Punishments be interpreted in a way that is Compatible with the ICCPR and CAT?

Alfitri¹

Criminal law deals with the protection of public interests and values deemed to be crucial for a particular society. In Islam, these values are ascribed to the divine commands. Thus, there will be calls from some Muslims for the implementation of Islamic criminal law by the state for they believe that this is required by Islam. Can therefore the death penalty or corporal punishments required by the Shariah law be imposed by a state while they are in conflict with the state's obligation to comply with international human rights instruments? This paper will analyze this uneasy situation faced by some Muslim countries implementing Islamic criminal law but party to the ICCPR and CAT. It aims at verifying that an extreme universalism or cultural relativism approach regarding the validity of international human rights norms on this matter is insufficient. This is because Islamic doctrines strongly influence Muslims on this matter and failure to seriously engage them will lead to rejection of international human rights instruments which are important for protecting individual rights. This paper argues that an approach that is able to reconcile the requirements of Shariah law regarding criminal punishments and those of international human rights norms is necessary.

Keywords: *Shariah Law, Criminal Punishment, ICCPR, CAT*

I. Introduction

Criminal law is a collection of laws regulating the power of the state to impose punishments on a person in order to enforce compliance with certain

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rules.² Unlike civil law which regulates legal proceedings relating to private rights and obligations, criminal law deals with the protection of public interests and values deemed to be crucial for a particular society, even if the immediate interest protected is a private interest.³

Despite this fact, the interests and values which are protected by criminal law differ from society to society. A case in point is sexual intercourse. For some societies, the involvement of two adults in a consensual sexual act is of no concern to the authorities since such an act is not deemed to be a transgression of public interests, or even public values. For other societies, however, such an act is considered illicit because the values of the society regulate that sexual contact is only allowed within a marriage. Therefore, the rules governing sexual intercourse are crucial for this society and offences against the rules are severely punished by the state in order to maintain social order.⁴

Criminal laws therefore shed light on what constitute the core values of a society and its rulers.⁵ Since protection of the core values is crucial to public interests and order which may be damaged by violations against them, meting out punishments prescribed by the core values themselves is also instrumental.

The core values of Islam, for example, are ascribed to the divine commands. Hence, by failing to implement the divine commands on criminal law, society perceives that they have denied and terribly disobeyed God,⁶ and as a consequence, the whole society will take responsibility for this failure and disobedience in the Hereafter. Hence, calls from some Muslims for the implementation of Islamic criminal law by the state in their countries can be understood. While the reasons for coming back to Islamic criminal law may be practical, namely as a panacea for the degradation of morality in society since existing criminal laws are deemed to have failed,⁷ belief in the divinity of Islamic law is

² Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (2005) 1.

³ Ibid. An example of this is theft, which is a crime against private property rights. Yet, since the protection of property is essential for securing social order, a breach against private property rights is a punishable offence in almost all societies, and is 'cured' by stronger remedies than those available under private law, namely fines and imprisonment. See Ibid.

⁴ Likewise, different societies will have different interests and values with regard to the consumption of alcoholic beverages and other psychotropic substances. This may lead to different stances with regard to regulating them in criminal law. See *ibid*.

⁵ Ibid

⁶ See e.g., Muhammad 'Ata Al-Sid Sid Ahmad, *Islamic Criminal Law: The Hudud* (1995) 8.

⁷ See e.g., for the case in Indonesia, Bahtiar Effendy, *Islam and the State in Indonesia* (2003), 209-210, 217-218.

paramount, namely Islamic criminal law must be implemented by the state because it is required by Islam.

Can therefore the death penalty or corporal punishment be imposed by a state because they are required by *Shariah*, but at the same time, they are in conflict with the state's obligation to comply with international human rights instruments? Article 6 of the International Covenant on Civil and Political Rights (ICCPR), for example, guarantees the right to life and considers the right supreme. The Human Rights Committee has therefore adopted a resolution to annul the death sentence.⁸ In addition, Article 7 of the ICCPR and Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments (CAT) prohibit corporal punishments.

This paper will thus analyze whether the requirement of *Shariah* law regarding criminal punishments can be interpreted in a way that is compatible with international human rights instruments, particularly with the prohibition against the death penalty and cruel, inhuman, and degrading treatment or punishments in the ICCPR and CAT. This is so since death by stoning or crucifixion and corporal punishment by amputation or flogging are prescribed by the *Shariah* law.

This paper argues that the problem is complex and cannot be solved simply by means of universalism or cultural relativist claims exclusively. An approach that tries to reconcile the requirement of international human rights norms and the *Shariah* law in criminal punishments is very much needed. This is because religious tenets strongly influence Muslims on this matter and failure to seriously engage Islamic doctrines, , will thus lead to the rejection of international human rights instruments which are important for protecting individual rights.⁹

II. Islamic Criminal Justice: Basic Concept and Philosophy

The requirements of *Shariah* law regarding criminal law is enshrined in the two major sources of Islamic doctrine, i.e., the Koran and the *Hadith*. Thirty

⁸ The Second Optional Protocol to the ICCPR aiming at the abolition of the death, adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989, article 1(1).

⁹ Abdullahi Ahmed An-Na'im, 'Islam and Human Rights: Beyond the Universality Debate' (2000) 94 American Society for International Law Proceedings 95.

verses out of 6,342 verses in the Koran address criminal law matters¹⁰ encompassing offences and specific types of punishment for each offence as well as some rules of evidence for each offence to be established. These verses then become foundational principles and the ends of the first category of Islamic criminal law, namely *hudud*.¹¹ (The categories of Islamic criminal law will be explained below).

Together with particular verses as such, the Koran also provides general verses which might exemplify the incumbency of Muslims to uphold the supremacy of Shariah law.¹² In chapter IV (*an-Nisa*): 59, for example, Muslims are required to obey God, the Prophet Muhammad and those who have the legal authority (*uli al-‘amr*).¹³ This requirement includes not transgressing God’s commands regarding crimes. This is so because since one has embraced Islam, one is fully bound by Shariah law and responsible for the actualization of it.¹⁴ Opting out of what God and the Prophet have decided is considered to be unfitting and disobedient; and the actors are deemed to be on a clearly wrong path.¹⁵

The Prophet Muhammad functioned as the clarifier and exemplar of the Koran. With the given authority, the Prophet explained the Koran through his words, deeds and agreements on actions conducted by his companions. This concept is known as the Prophet’s traditions (*Sunnah*), and the verbalization of his *Sunnah* is called *Hadith*. In Islamic discourse, the *Sunnah* is considered a leading legal and religious authority after the Koran.¹⁶ In one of his *Hadith*, the Prophet explained the importance of the *hudud* and the mandatory nature of its implementation.¹⁷

The parable of the people who are upholding the *hudud* and those who are disregarding them is like that of a people tossed up on a double-decker ship. Some occupy the upper deck and some occupy the lower. Those occupying

¹⁰ See Khan, ‘Juristic Classification of Islamic Law’ (1983) 6 Houston Journal of International Law 23, 27.

¹¹ Muhammad ‘Ata al-Sid Sid Ahmad, above n 5, 115.

¹² The general verses exemplifying the incumbency are contemplated by *ibid*, 104-105.

¹³ See The Holy Quran, IV: 59, text, translation and commentary by Abdullah Yusuf Ali

¹⁴ Muhammad ‘Ata al-Sid Sid Ahmad, above n 5, 104.

¹⁵ See The Holy Qur’an, XXXIII: 36.

¹⁶ See Irshad Abdal-Haqq, ‘Islamic Law: An Overview of Its Origin and Elements’, (Spring/Summer 1996) 1 The Journal of Islamic Law

¹⁷ Muhammad ‘Ata al-Sid Sid Ahmad, above n 5, 115.

the lower deck have to go up to bring drinking water down. Perceiving this practice as arduous and disturbing, they decide to make an opening in their part (as a short cut to water). If the occupants of the upper tier allow them to go ahead, they will all, certainly, drown. But if they forbid them, they will all certainly, reach safety.¹⁸

From the two major sources of Islamic doctrines and the consensus of the first generations of the Muslim scholars, Islamic criminal law then was theorized and formularized by Islamic jurists within the first three centuries since the birth of Islam.¹⁹ Islamic criminal law became established and classic with the emergence of four *Sunni* legal schools of thought (*madhhab*) in the tenth century. They are the *madhhab* of Maliki (Malikiyyah), Hanafi (Hanafiyyah), Shafi‘i (Shafi‘iyyah), and Hanbali (Hanabilah).²⁰ There are some differences of doctrinal penal law among the four *madhhab*. Furthermore, the four *madhhab* spread across Muslim countries influencing, to some extent, the content of Islamic criminal law in each area. Analyzing the implementation of Islamic criminal law thus must also consider the *madhhab* adhered to by states enforcing it.

There are three categories of crimes and punishments under Islamic criminal law: *hudud*; *qisas*; and *ta‘zir*. *Hudud* is crimes against the claims of God whose punishments are specified in the Koran and the *Hadith*.²¹ There are seven offences under the auspices of *hudud*:²² theft (*sariqah*) punishable with amputation of a hand;²³ banditry (*hirabah*) punishable with death, crucifixion, cross-amputation of the hand and foot or banishment;²⁴ rising against the legitimate leader by use of force (*baghy*) punishable with being fought until they

¹⁸ The Hadith is from Sahih al-Bukhari as quoted and translated by Muhammad ‘Ata al-Sid Sid Ahmad, above n 5, 115-116.

¹⁹ See about the development of Islamic law in general in Noel J. Coulson, ‘The State and Individual in Islamic Law’ (1957) 6 International and Comparative Law Quarterly 75.

²⁰ See about the formation of legal schools in Islamic law in e.g., Wael B. Hallaq, The Origins and Evolution of Islamic Law (2005) chapter 7.

²¹ Aly Mansour, ‘Hudud Crimes’, in M. Cherif Bassiouni (ed.), The Islamic Criminal Justice System (1982) 195, 195-201.

²² See *ibid*, 197-200; Muhammad ‘Ata al-Sid Sid Ahmad, above n 5, 58-71.

²³ See the Holy Koran, V: 41 ‘As to the thief, male or female, Cut off his or her hands: A punishment by way of example, from God, for their crime: and God is Exalted in Power’, translation by Abdullah Yusuf Ali.

²⁴ See the Holy Koran, V: 36 ‘The punishment of those who wage war against God and His Apostle, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land ...’, translation by Abdullah Yusuf Ali.

comply with the command of God;²⁵ unlawful sexual intercourse (*zina*) punishable with stoning to death for married persons (adultery) or one hundred lashes for unmarried persons (fornication);²⁶ false accusation of unchastity (*qadhf*) punishable with eighty lashes;²⁷ apostasy (*riddah*) punishable with death;²⁸ intoxication (*sharb al-khamr*) punishable with forty or eighty lashes.²⁹

Qisas are offences against persons in the form of physical assault and murder punishable with retaliation (the return of life for a life in case of murder, or the same wound in case of physical assault).³⁰ The punishments for *qisas* crimes may be waived by the victim or the surviving heirs and they can ask for financial compensation (*diya* or blood-money) or pardon the offender. This is because *qisas* is crimes related to the claims of human beings as opposed to the claims of God in *hudud* crimes.³¹

Ta'zir is offences the punishments for which are not fixed by the Koran and the *Hadith*.³²

It covers provisions relating to discretionary punishment of sinful behavior which imperils state security or public order.³³ Hence, most Islamic jurists agree that it is a state responsibility to initiate prosecution of *ta'zir* crimes pursuant to its duty to maintain public order and welfare.³⁴ Akin to *qisas* crimes, *ta'zir* are

²⁵ See the Holy Koran, XLIX: 9.

²⁶ See the Holy Koran, XXIV: 2 'The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by God, if ye believe in God and the Last Day', translation by Abdullah Yusuf Ali; the *Hadith* '... the muhsans [married persons] are liable to hundred lashes and stoning, and ghair al muhsans [unmarried persons] are liable to hundred lashes and banishment for one year' as quoted by Muhammad 'Ata al-Sid Sid Ahmad, above n , 68.

²⁷ See the Holy Koran, XXIV: 4 'And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes ...', translation by Abdullah Yusuf Ali.

²⁸ The *Hadith* 'No Muslim witnessing that there is no God but [Allah] and that Muhammad is His messenger is to be killed except in three cases: a self for a self [murder], the married adulterer, and the one who departs from the religion [Islam] and abandons the jama'ah (bond of believers)' as quoted by Muhammad 'Ata al-Sid Sid Ahmad, above n 5, 58.

²⁹ See Aly Mansour, above n 20, 200.

³⁰ See Rudolph Peters, above n 1, 7; Matthew Lippman, 'Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law' (1989) 12 Boston College International and Comparative Law Review 38.

³¹ See M. Cherif Bassiouni, 'Qesas Crimes', in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (1982) 203, 203-205.

³² See Ghaouti Benmelha, 'Ta'azir Crimes', in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (1982) 211, 211-225.

³³ Rudolph Peters, above n 1, 7.

³⁴ Matthew Lippman, above n 29, 39.

also related to the claims of human beings; thus, the victim may ask the ruler to pardon the offender, and the ruler may discretionally choose not to punish the offender.³⁵ Being residual but comprehensive, *ta'zir* may sanction the state to punish all other types of sinful or socially and politically displeasing behaviors. Since the punitive powers of the state are hardly restricted under the doctrine of *ta'zir*, the accused may only enjoy little protection.³⁶

As mentioned earlier, the doctrine of Islamic criminal law may vary pursuant to each *madhhab* in Islamic law. Cases in point are intoxication and apostasy. While the majority of jurists founding the *madhhab* agree that intoxication is a *hudud* crime, other jurists consider it to be *ta'zir*. Regarding its punishment, the *Hanafiyyah*, the *Malikiyyah*, and the *Hanabilah* maintain that convicted intoxication is to be punished with eight lashes whilst al-Shafi'i (the founder the *Shafi'iyyah*) and few other jurists hold forty lashes.³⁷ Apostasy as a *hudud* crime punishable by death is also contested by some contemporary Muslim Scholars and jurists. According to them, apostasy may only become a *hudud* crime punishable by death if it involves acts of rebellion against the state.³⁸

Despite this fact, classical and contemporary Muslim jurists (*fuqaha*) do not deny the severity of *hudud* punishments. To them, the harsh punishments of *hudud* can be justified from their purpose, i.e., *hudud* punishments are meant to, and actually do, deter similar offences prescribed by the Koran and the *Hadith* in the future.³⁹

In addition, the *fuqaha* further argue that the *hudud* punishments can only be imposed after rigorous proceedings have taken place. This is because the *fuqaha* have laid down an extremely meticulous standard of proof for all the *hudud* offences that must stand beyond 'any atom of doubt' (*shubha*)⁴⁰ pursuant to the Prophet *Hadith* 'avert the *hudud* punishment in case of doubt ... for error in clemency is better than error in imposing punishment'.⁴¹ For example the rule of evidence for unlawful sexual intercourse (*zina*), four trustworthy witnesses witnessing the actual act of sexual penetration are required by the

³⁵ See Ibid.

³⁶ Rudolph Peters, above n 1, 7.

³⁷ See Mashood A. Baderin, *International Human Rights and Islamic Law* (2003) 79.

³⁸ See *ibid*.

³⁹ See Mashood A. Baderin, above n 36, 80.

⁴⁰ *Ibid*

⁴¹ The *Hadith* quoted by Wahbah al-Zuhayli, *al-Fiqh al-Islami wa Adillatuh* vol. 7 (1997) 5307, translation by Mashood A. Baderin, above n 39, 80.

Shariah law. Failure to do so will prompt the accuser and the witnesses to be charged and punished for the *qadhif* (false accusation of unchastity) punishable by eighty lashes.⁴²

Given its arduous standard, it is believed that the imposition of *hudud* punishment for the *zina* is almost impossible since it is only applicable to those committing such an act openly without due regard for public morality at all.⁴³ In the *hudud* crime of theft likewise, the *fuqaha* have narrowly defined it as: 'sur-reptitiously taking away (movable) property of a certain minimum value (*nisab*)⁴⁴ which is not partially owned by the perpetrator nor entrusted to him from a place which is locked or under guard (*hirz*)'.⁴⁵ Any act of stealing that does not meet the above elements is not charged under the *hudud* crime of theft punishable with amputation, but it may be charged under the *ta'zir* crimes.

Besides the principle of uncertainty (*shubha*), the principle of repentance (*tawba*) also precludes the imposition of the *hudud* punishments in Islamic criminal law. This can be explained from another end of punishment in Islamic criminal law, i.e., the rehabilitation of the offender. By showing his repentance, the offender is deemed to have proved that he/she has been reformed and, thus, punishment is considered unnecessary. The liability of offences against the claims of human beings such as homicide, wounding or false accusation of unchastity, however, does not lapse with the offender's repentance.⁴⁶ Considering its sophisticated concept, some Muslims jurists and scholars endorse the implementation of Islamic criminal law and maintain the compatibility of Islamic criminal law with human rights.⁴⁷

III. (In) Compatibility of Islamic Criminal Law with ICCPR and CAT

A. The Requirements of Islamic Criminal Law and the Right of Self-

⁴² See Muhammad 'Ata al-Sid Sid Ahmad, above n 5, 69; Rudolph Peters, above n 1, 61; Matthew Lippman, above n 29, 40.

⁴³ See Mashood. A Baderin, above n 36, 80.

⁴⁴ The value of stolen goods must be at least 8.91 grams of silver or 1.06 grams of gold pursuant to the Malikiyyah and the Shafi'iyyah; or 29.7 grams of silver according to the Hanafiyyah, see Rudolph Peters, above n 1, 56.

⁴⁵ See *ibid*.

⁴⁶ See *ibid*, 27.

⁴⁷ See e.g., Muhammad 'Ata al-Sid Sid Ahmad, above n 5; M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (1982).

Determination

Article 1(1) of the ICCPR guarantees the right of self-determination of all people. People are free to determine their political status and to pursue their economic, social and cultural development.⁴⁸ The Human Rights Committee, however, has not given a clear definition of self-determination for the purposes of the ICCPR. Meanwhile, the right of self-determination is important for achieving all civil, political, economic, social and cultural rights.⁴⁹ According to Joseph, Schultz and Castan, self-determination is the collective right of peoples⁵⁰ characterized as having a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, common economic life and comprising a certain minimum number.⁵¹

The question is whether the requirements of *Shariah* regarding criminal punishment can be counted the right of self-determination. The special rights of Muslims to implement their religious laws may also be understood as an International community respecting the internal right of self-determination of the Muslims which is required under Article 1 of the ICCPR. This includes determining their cultural development without outside interference.⁵² Historically, Islamic criminal punishment was a part of the culture of Muslim countries and it was effective in their legal systems. The situation changed when most Muslim countries were colonized by European countries. European (Continental or Anglo-Saxon) criminal laws were introduced and Islamic laws were systematically replaced by colonial laws, except for Islamic family law.⁵³

The ICCPR protects the right to freedom of religion. Article 18(1) of the ICCPR stipulates that:

'Everyone shall have the right to freedom of thought, conscience and reli-

⁴⁸ International Covenant on Civil and Political Rights (ICCPR),

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, article 1(1).

⁴⁹ Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed, 2004) 141-142.

⁵⁰ *Ibid*, 142.

⁵¹ Robert McCorquodale, 'Self-Determination: a Human Rights Approach' (1994) 43 *International and Comparative Law Quarterly* 857, 856.

⁵² General Recommendation No. 21: Right to self-determination: 23/08/96. Gen. Rec. No. 21. (General Comments), para 4, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/dc598941c9e68a1a8025651e004d31d0?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/dc598941c9e68a1a8025651e004d31d0?OpenDocument)> at 7 August 2006.

⁵³ See about this e.g., Mathew Lippman, above n 29, 34-37.

gion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'.⁵⁴

Manifestation of a religion may cover a broad range of acts since the concept of worship in the ICCPR includes not only ritual and ceremonial acts giving direct expression to belief, but also a range of practices integral to such acts.⁵⁵ It is conceived that the manifestation of a religion is an active element of one's religious freedom per contra a passive element of one's religious freedom which only comprises adherence to certain beliefs.⁵⁶ This is because having a religion or belief, one manifests it in worship, the teaching of the particular beliefs, and observance of specified canons of conduct or religious rituals.⁵⁷

However, the manifestation of a religion may interfere with other people's rights or cause harm to a society. The freedom to manifest religion, therefore, is not an absolute right. Article 18(3) of the ICCPR, in fact, provides a limitation clause which allows religious expression to be restricted in certain circumstances '... as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.⁵⁸ Accordingly, the freedom to manifest religion can be legitimately limited as long as the limitation is clearly stipulated in a legal instrument or decision accessible by the public.⁵⁹

In addition, the limitation is set up within the context of realizing one of the objectives of Article 18(3), namely the protection of public safety, order, health, or morals or the fundamental rights and freedoms of others.

General Comment No. 22 of article 18(3) insists that the limitation or restriction on the manifestation of religion should not be undertaken for discriminatory purposes or be applied in a discriminatory manner. Even a prisoner or a

⁵⁴ ICCPR, article 18(1).

⁵⁵ General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 30/07/93. CCPR/C/21/Rev.1/Add.4, General Comment No. 22. (General Comments), para 4, <http://www.unhcr.ch/tbs/docs/sf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument> at 7 August 2006.

⁵⁶ Joseph, Schultz and Castan, above n 48, 506.

⁵⁷ Ibid.

⁵⁸ ICCPR, article 18(3).

person already subject to certain legitimate constraints, can still exercise his/her right to manifest his/her religion 'to the fullest extent compatible with the specific nature of the constraint'.⁶⁰ A case in point is *Boodoo v Trinidad and Tobago* (721/96). In the author's individual complaint to the Human Rights Committee, it is revealed that the author had been prohibited from wearing a beard and from worshipping at religious service. His prayer books were also taken from him. With regard to the allegation, Trinidad and Tobago did not give any explanation. The Human Rights Committee concluded that a breach of Article 18 of the ICCPR had occurred. In this case, the Committee reaffirmed the broad range of acts covered by the freedom to manifest religion or belief in worship, observance, practice and teaching.⁶¹

Given the above, limitations on the freedom to manifest religion or belief are illegitimate; *inter alia*, if they are designed to prevent a religious adherent from performing his/her religious rituals as well as practices integral to such acts. The problem is whether the ban on Islamic criminal punishment in Muslim countries, therefore, falls within the purposes enumerated in Article 18(3). Some individual complaints under Article 18 of the ICCPR to the Human Rights Committee may give some perspectives in answering the question, namely *Singh Bhinder v Canada* (208/86) and *Coeriel and Aurik v The Netherlands* (453/91).⁶²

Neither complaint, however, provides a precedent for the possibility of complaints about the restriction on manifesting religion in the form of the requirements of Islamic criminal law. Furthermore, conclusions yielded by the Human Rights Committee are criticized for falling short. In *Singh Bhinder v Canada* (208/86) for example, the conclusion did not spell out how the restriction on wearing a turban, as obliged by the author's religion (Sikh), conformed to Article 18(3).

In this regard, Joseph, Schultz and Castan conclude that the Human Rights Committee had not issued much consensus jurisprudence on the rights enshrined in Article 18. The committee, nevertheless, has comprehensively stated on the

⁵⁹ Joseph, Schultz and Castan, above n 48, 507.

⁶⁰ General Comment No 22, above n 54, para 8.

⁶¹ Joseph, Schultz and Castan, above n 48, 506.

⁶² See *ibid*, 508-510.

topic in General Comment No. 22 of the ICCPR. As a result, a more vigorous approach to the protection of one's religion and belief is provided by the General Comment than that displayed in the relevant Optional Protocol cases. This is so since the latter tend to show a relatively conservative approach being employed by the Human Rights Committee with regard to the right to life.⁶³

B. *Islamic Criminal Punishments and the Right to Life*

Since the requirement of *Shariah* law regarding criminal punishments may involve types of capital punishment or corporal punishment, it is also relevant to analyze the requirements of Articles 6 and 7 of the ICCPR as well as Article 16(1) of the CAT. General Comments from the Human Rights Committee related to the Articles will further explain whether Islamic criminal punishments are compatible with international human rights law, in particular with the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.

Article 6 of the ICCPR concerns the right to life. The right has been described by the Human Rights Committee as the supreme right.⁶⁴ Six paragraphs of Article 6 provide negative and positive components of the right to life that must be undertaken by the State. Negative components deal with the duty of the state to prevent arbitrary and unlawful deprivation of life not only committed by criminals but also by the state or its agents.⁶⁵ Article 6(1), for example, stipulates '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

Positive components oblige the state to adopt measures that are conducive to allowing one to live.⁶⁶ The positive components closely relate to controversy over the abolition of the death penalty and its practice in some municipal legal systems. In Article 6(2) of the ICCPR, it is mentioned that countries which have not abolished the death penalty, may only impose a sentence of death for 'the most serious crimes' pursuant to the law in force at the time of the indictment of the crime. The law used as the basis for death penalty must not be contrary to

⁶³ Ibid, 516.

⁶⁴ General Comment No. 06: The right to life (art. 6):. 30/04/82. CCPR General Comment No. 6. (General Comments), para 1, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument)> at 7 August 2006.

⁶⁵ Joseph, Schultz and Castan, above n 48, 155.

⁶⁶ Ibid.

the provisions of the ICCPR and to the Convention on the Prevention and Punishment of the Crime of Genocide.⁶⁷ Further, the death penalty can only be carried out in accordance with a final judgment rendered by a competent court.⁶⁸

Article 6(2), therefore, provides an exception to the right to life, that is a sentence of death may still be imposed by a state as long as the state has not ratified the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty pursuant to Article 1(1), '[no] one within the jurisdiction of a State Party to the present Protocol shall be executed'.⁶⁹ Despite the permissibility of the judicial imposition of the death penalty, the ICCPR strongly urge state parties to abolish capital punishment in their legal system. This is pursuant to Article 6(6) '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant'.⁷⁰

In addition, notwithstanding the loose obligation to totally abolish the death penalty in Article 6(2) to 6(6); state parties to the Covenant are obliged to limit its use and to abolish it for other than the 'most serious crimes' pursuant to General Comment 6 of the ICCPR. Furthermore, the Committee comments that the paragraphs of Article 6 strongly suggest that abolition is desirable.⁷¹ All measures of abolition of the death penalty by state parties will thus be considered progress in the enjoyment of the right to life.⁷²

In addition, given the supremacy of the right to life, Article 6 thus cannot be derogated from state parties' obligation under the ICCPR, even in times of public emergency which threaten the life of the nation.⁷³ (Except if the death penalty has already existed in a state and it does not ratify the Second Optional Protocol to the ICCPR).

⁶⁷ The Convention on the Prevention and Punishment of the Crime of Genocide was approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948.

⁶⁸ See ICCPR, article 6(2).

⁶⁹ The Second Optional Protocol to the ICCPR aiming at the abolition of the death, article 1(1).

⁷⁰ ICCPR, article 6(1), (2), (6).

⁷¹ General Comment No. 6, above n 63, para 6-7; see also Preamble of the Second Optional Protocol to the ICCPR.

⁷² General Comment No. 6, above n 78, para 6; see also Preamble of the Second Optional Protocol to the ICCPR.

⁷³ ICCPR, article 4(2); see also General Comment No 6, above n 63, para 1.

For state parties which still impose capital punishment, offences subject to the death penalty must be contemplated in light of ‘the most serious crimes’. According to the Committee, the expression must be read restrictively under the aegis of conditions enshrined in Article 6(2), namely the judicial imposition of the death penalty must be: a quite exceptional measure; pursuant to effective law; compatible with the Covenant. A case in point is in *Lubuto v Zambia* (390/90). In this case, the Human Rights Committee is of the view that the judicial imposition of the death penalty upon the author in Zambia breaches Article 6(2). This is because the use of firearms for aggravated robbery by the author did not cause the death or wounding of any person. This circumstance, then, was neglected by the court when imposing the sentence.⁷⁴ Meanwhile, in *Brown v Jamaica* (775/97), the Committee found that the mandatory imposition of a death sentence upon the author for ‘murder in aggravated circumstances’ did not violate Article 6(2). This is because law in Jamaica distinguishes between non-capital and capital murder. Capital murder is defined as murder committed under aggravated circumstances. In the court, the author was found guilty of capital murder.⁷⁵

It appears from the above that homicide falls within the category of ‘the most serious crimes’, especially when committed under aggravated circumstances. For other crimes, the Human Rights Committee has confirmed that the following crimes are not included in the notion of ‘most serious crimes’, namely: treason; piracy;⁷⁶ robbery;⁷⁷ traffic in toxic or dangerous wastes;⁷⁸ abetting suicide; drug-related offences; property offences;⁷⁹ multiple evasion of military

services which can be charged retroactively;⁸⁰ apostasy; committing a third homosexual act; embezzlement by officials; theft by force;⁸¹ ‘abduction not resulting in death’;⁸² crimes of an economic nature; adultery; corruption; crimes that do not result in the loss of life;⁸³ non-violent infringement;⁸⁴ ‘a person whose life endangers or corrupts society’ such as in the case of political and economic offences.⁸⁵

The judicial imposition of the death penalty for these crimes thus violates Article 6 of the ICCPR, whilst intentional killings or attempted killings, and the intentional infliction of grievous bodily harm may still be punished by the death sentence under Article 6(2).⁸⁶ However, when a state party applies the death penalty for ‘the most serious crime’, the Committee emphasizes that ‘it must be carried out in such a way as to cause the least possible physical and mental suffering’.⁸⁷ Thus, the method of execution is also a matter for the death penalty; otherwise, it will be considered a breach of Article 7 of the ICCPR. A case in point is *Ng v Canada* (469/91). The Human Rights Committee agrees with the author’s argument that gas asphyxiation is a method of execution that breaches Article 7. This is because it may cause prolonged suffering and agony lasting for more than ten minutes before the person sentenced-to-death dies.⁸⁸

⁷⁴ *Lubuto v Zambia* (390/90) para 7.2., as quoted by Joseph, Schultz and Castan, above n 48, 166-167.

⁷⁵ *Brown v Jamaica* (775/97) para 6.14., as quoted by Joseph, Schultz and Castan, above n 48, 169.

⁷⁶ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. 06/12/2001. CCPR/CO/73/UK; CCPR/CO/73/UKOT. (Concluding Observations/Comments), para 37, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/2153823041947eae1256afb00323ee7?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2153823041947eae1256afb00323ee7?Opendocument)> at 7 August 2006.

⁷⁷ Concluding Observations of the Human Rights Committee: Republic Korea, (1992) UN doc. A/47/40, pp. 122-124, para 9, as quoted by Joseph, Schultz and Castan, above n 48, 167.

⁷⁸ Concluding Observations of the Human Rights Committee: Cameroon. 18/04/94. CCPR/CO/79/Add.33. (Concluding Observations/Comments), para 9, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/c76b4d85fe0cf84241256324003d7550?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c76b4d85fe0cf84241256324003d7550?Opendocument)> at 7 August 2006.

⁷⁹ Concluding Observations of the Human Rights Committee: Sri Lanka, (1996) UN doc. CCPR/CO/79/Add. 56. (Concluding Observations/Comments), para 14, as quoted by Joseph, Schultz and Castan, above n 48, 167.

⁸¹ Concluding Observations of the Human Rights Committee: Sudan. 19/11/1997. CCPR/CO/79/Add.85. (Concluding Observations/Comments), para 8, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/bc310a747155dff88025655300537fae?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bc310a747155dff88025655300537fae?Opendocument)> at 7 August 2006.

⁸² Concluding Observations of the Human Rights Committee: Guatemala. 27/08/2001. CCPR/CO/72/GTM. (Concluding Observations/Comments), para 17, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/2aa3ab87740322a8c1256af100362440?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2aa3ab87740322a8c1256af100362440?Opendocument)> at 7 August 2006.

⁸³ Concluding Observations of the Human Rights Committee: The Islamic Republic of Iran, (1995) UN doc. CCPR/CO/79/Add.25. (Concluding Observations/Comments), para 8, as quoted by Joseph, Schultz and Castan, above n 48, 167.

⁸⁴ Concluding Observations of the Human Rights Committee: Iraq. 19/11/1997. CCPR/CO/79/Add.84. (Concluding Observations/Comments), para 10, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4c6e0bf385b5c8f6802565530050e6b5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4c6e0bf385b5c8f6802565530050e6b5?Opendocument)> at 7 August 2006.

⁸⁵ Concluding Observations of the Human Rights Committee: Libyan Arab Jamahiriya. 06/11/1998. CCPR/CO/79/Add.101. (Concluding Observations/Comments), para 8, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/de8b82142ebec610802566db00574644?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/de8b82142ebec610802566db00574644?Opendocument)> at 7 August 2006.

⁸⁶ Joseph, Schultz and Castan, above n 48, 167.

⁸⁷ General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (art. 7): 10/03/92. CCPR General Comment No. 20 (General Comments), para 6, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)> at 7 August 2006.

⁸⁸ Joseph, Schultz and Castan, above n 48, 229.

The method of execution in Islamic criminal law may be stoning, crucifixion or beheading carried out in public. These methods of execution may then breach Article 7 since they are intended to and actually inflict prolonged pain and suffering. In addition, the minority of the Committee requires that for a method of execution to breach Article 7, it must be intentionally brutal pursuant to Article 1 of the CAT.⁸⁹ All methods of execution for the death penalty under Islamic criminal law, may thus amount to torture, cruel, inhuman, and degrading treatment or punishment as far as the ICCPR and CAT provisions are concerned.

C. Islamic Criminal Punishments and the Prohibition against Heinous Punishments

Article 7 of the ICCPR prohibits torture or cruel, inhuman and degrading treatment or punishment.⁹⁰ Freedom from torture and the right to humane treatment is one of the few absolute rights in the Covenant which is not permitted to be applied restrictively. Similar to Article 6, Article 7 it is a non-derogatory right.⁹¹ The Human Rights Committee also reaffirms its non-derogatory status in public emergency situations such as those referred to in Article 4 of the ICCPR. Thus, the provision of Article 7 must remain in force even though the emergency situation might threaten the life and existence of the nation. No justification or mitigating circumstances may be invoked, the Committee emphasizes, to excuse a violation of Article 7 for any reason, including an order from a superior officer or public authority.⁹²

The prohibition against heinous punishments is closely related to the types of punishment under Islamic criminal law. Amputation, flogging or stoning, technically, are among types of punishment which exist in Islamic criminal law literature. This thus becomes the most striking aspect of the conflict between Islamic criminal law and international human rights law. The requirements of Islamic criminal law sit uneasily with the obligation of Muslim countries to comply with international human rights laws to which they are parties, when these types of punishment are a concern.

The status of ratifications and reservations of the ICCPR and the CAT

⁸⁹ Ibid, 230.

⁹⁰ ICCPR, Article 7.

⁹¹ Joseph, Schultz and Castan, above n 48, 195.

⁹² General Comment No. 20, above n 101, para 3.

reveal that some states enforcing Islamic criminal law are not parties to the covenants. Even if they are parties, however, they have not ratified or acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. This situation exemplifies the uneasiness faced by Muslim countries enforcing Islamic criminal law in balancing the requirements of their religious and international human rights norms. Iran, for example, signed the International Covenant on Civil and Political Rights on 4 April 1968 and ratified it on 24 June 1975. Sudan ratified it on 18 March 1986 whilst Libya and Nigeria acceded to it on 15 May 1970 and 28 July 1993, subsequently. Pakistan and Saudi Arabia have not ratified or acceded to the ICCPR yet.⁹³

With regard to the Second Optional Protocol to the ICCPR, none of the above states enforcing Islamic criminal law participated in the Forty-fourth session of the General Assembly of the United Nations whereby the Second Optional Protocol was adopted by Resolutions 44-128 of 15 December 1989. Based on data in the Office of the United Nations High Commissioner for Human Rights per 8 May 2006, ratifications or accessions to the protocol have not been adopted by these states.⁹⁴

Akin to the ICCPR, the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984 also varies among states enforcing Islamic criminal punishments. Iran and Pakistan have not ratified or acceded to it yet. Libya acceded to it on 16 May 1989. Nigeria signed it on 28 July 1988 and ratified it on 28 June 2001. Saudi Arabia acceded to it on 23 September 1997, and Sudan signed it on 4 June 1986.⁹⁵ Interestingly, Libya, Sudan, and Saudi Arabia have acceded to the CAT without reserving articles relating to cruel, inhuman or degrading punishments. Meanwhile, these countries have implemented Islamic criminal law which allows severe corporal punishments for some offences in their legal system.

⁹³ Office of the United Nations High Commissioner for Human Rights, 'Ratifications and Reservations of the ICCPR 1966', <<http://www.ohchr.org/english/countries/ratification/4.htm>> last update 8 May 2006, at 2 August 2006.

⁹⁴ Ibid, 'Ratifications and Reservations of the Second Optional Protocol to the ICCPR', <<http://www.ohchr.org/english/countries/ratification/12.htm>> last update 8 May 2006, at 2 August 2006.

⁹⁵ Ibid, 'Ratifications and Reservations of the Second Optional Protocol to the ICCPR', <<http://www.ohchr.org/english/countries/ratification/9.htm>> last update 8 May 2006, at 2 August 2006.

The question then arises whether there are loopholes in the provisions of the ICCPR and CAT which might allow state parties to impose heinous corporal punishments. This might be because the covenants do not specifically define what constitutes cruel, inhuman or degrading punishment. The ICCPR, in fact, generally does not provide any definition of the concepts covered by Article 7. The Human Rights Committee itself seems to believe that it is unnecessary to list prohibited acts or to establish distinctions between various types of punishment or treatment as they will depend on 'the nature, purpose and severity of the treatment applied'.⁹⁶

Likewise, the CAT, which expands on the scope of the obligation under Article 7 of the ICCPR, merely states that state parties to the covenant are obliged to prevent acts of cruel, inhuman or degrading treatment or punishment which do not fall under the category 'torture' as defined in Article 1 of the CAT. The preventive acts must be undertaken in any territory under each state party's jurisdiction and must be upheld by public officials or other persons acting in an official capacity in carrying out their duties.⁹⁷

Given the absence of a specific definition, Joseph, Schulzt and Castan, conclude that the requirements of severity, intention, and purpose are thus applied more leniently in determining whether cruel, inhuman, or degrading treatment or punishment has occurred.⁹⁸ Hence, the relativism of human rights values may prevail since Muslim countries implementing Islamic criminal law can argue that Islamic criminal law punishments cannot be regarded as cruel, inhuman or degrading because they are based on God's law.⁹⁹

IV. ICCPR and CAT Ratification and Their Implementation in Some Muslim Countries

A. Saudi Arabia

From 16 May 1981 to 18 April 1992, for example, there were more than two-hundred *hudud* penalty occurrences in Saudi Arabia. Forty-five occurrences were penalties for theft (*sariqa*) by amputation of the right hand. Four

occurrences were penalties for adultery by stoning, while the other form of adultery punishment for offenders never married, flogging, was not recorded during the period. A hundred and seventy-seven occurrences were penalties for offences categorized as brigandage including court convictions for brigandage (*hiraba*), killing *ghilatan* (heinous murder), and *ta'zir* by the death penalty, and execution *siyasatan* on the King's authority.¹⁰⁰ All penalties for this category are by beheading, except one by shooting in 1984, four by cross-amputations in 1985, two by crucifixion after stoning in 1990 and 1991. All offenders stoned for adultery were Muslims, while the other penalties were enforced both on Muslims and non-Muslims.¹⁰¹

Since acceding to the CAT in 1997, however, Saudi Arabia's courts have continued to prescribe corporal punishments and bodily mutilations for a wide range of offences and they are even imposed on children. This is so because three categories of crimes and punishments under Islamic criminal law are applied in Saudi Arabia, namely *hudud* (fixed punishments), *qisas* (retaliation) and *ta'zir* (discretionary punishments for all other offences not covered under *hudud* and *qisas*).

Thus, when flogging is imposed as a *hudud* punishment, the maximum number of lashes is 100; yet, when it is imposed as a *ta'zir* punishment, flogging has no upper limit. Amnesty International reports that the highest number of lashes recorded to have been imposed on a prisoner was 4,750 lashes.¹⁰² Another example of excessive flogging under *ta'zir* punishment is sentences for three people convicted on drug charges in June 2001. Each of them got 1,500 lashes in addition to fifteen years' imprisonment to be carried out during the whole period of imprisonment at a rate of fifty lashes every six months.¹⁰³

As a consequence of *ta'zir*, flogging is also imposed as an extra-judicial punishment for traffic offences and anyone suspected of harassing women. Both crimes, in fact, are not prescribed in the main sources of Islamic laws (the Koran and the *Hadith*) and traditional concept of Islamic criminal law. Flog-

¹⁰⁰ Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (2000) Appendix B p. 370.

¹⁰¹ Ibid.

¹⁰² Amnesty International, 'Saudi Arabia: Remains a Fertile Ground for Torture with Impunity', AI Index: MDE 23/004/2002 (1 May 2002) 17, <[http://web.amnesty.org/library/pdf/MDE230042002ENGLISH/\\$File/MDE2300402.pdf](http://web.amnesty.org/library/pdf/MDE230042002ENGLISH/$File/MDE2300402.pdf)> at 7 August 2006.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

⁹⁶ General Comment No. 20, above n 86, para 4.

⁹⁷ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, article 16(1).

⁹⁸ Joseph, Schulzt, and Castan, above n 48, 209.

⁹⁹ Peters, above n 1, 175.

ging for these offences is carried out by the *Mutawa'een* in a number of provinces based on orders from the Emir of the province to arrest and flog suspects without due process of justice.¹⁰⁴

Expanding *ta'zir* punishment for harassing women, as a consequence, has a great impact on the extra-judicial imposition of flogging. Hundreds of people, many of them youths, have been subjected to immediate flogging in Saudi Arabia. By September 2001, as reported by al-Riyadh Arabic daily newspaper, 172 youths in Riyadh alone had been flogged a total of 2,560 lashes in the wake of the campaign to stop the harassment of girls.¹⁰⁵

This situation has led to strong criticisms from the Committee on the Rights of the Child, given that Saudi Arabia acceded to the Convention on the Rights of the Child (CRC) on 26 January 1996.¹⁰⁶ In March 2000, Saudi Arabia then assured the Committee that corporal punishment of children was prohibited. Considering the implementation of Islamic criminal law in Saudi Arabia, however, the Committee felt it necessary to recommend that Saudi Arabia:

[t]ake all necessary steps to end the imposition of corporal punishment, including flogging and other forms of cruel, inhuman or degrading treatment and punishment, on persons who may have committed crimes when they were under 18 ...¹⁰⁷

With regard to amputation which is prescribed under both *hudud* (for theft and brigandage) and *qisas*, Amnesty International recorded that there had been thirty-three amputations and nine cross-amputations since 1997 which was when the Convention came into force in Saudi Arabia.¹⁰⁸ An example of *qisas* punishment is the case of Abdel Moti Abdel Rahman Mohammad. He was a 37-year-old-Egyptian national who faced a judicial punishment of *qisas* after the court found him guilty of disfiguring Shahata Ajami Mahmoud, a 53-year-old Egyptian, by throwing acid at his face and damaging his left eye. The culprit was then subjected to forcible surgical removal of his left eye at King Fahd Hospital

¹⁰⁵ Ibid.

¹⁰⁶ Office of the United Nations High Commissioner for Human Rights, 'Ratification and Reservation of the Convention on the Rights of the Child', <<http://www.ohchr.org/english/countries/ratification/11.htm#N16>> last update 8 May 2006, at 7 August 2006.

¹⁰⁷ See Concluding observations of the Committee on the Rights of the Child: Saudi Arabia. 22/02/2001.CRC/C/15/Add.148, para 34, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/83d5295595532530c12569ed00585df4?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/83d5295595532530c12569ed00585df4?Opendocument)> at 7 August 2006.

¹⁰⁸ Amnesty International, above n 101, 18.

in Medina in August 2001.¹⁰⁹ This was so since *qisas* punishment means causing injury to the offender similar to the injury caused to the victim.

B. Sudan

Sudan's experience with the implementation of Islamic criminal law is closely akin to that of Saudi Arabia. The 1983 Sudanese Penal Code regulated both *hudud* and *ta'zir* crimes. Offences fall under category *hudud* crimes thus were punishable by amputation, public flogging or capital punishment pursuant to the classical doctrine of Islamic criminal law. *Ta'zir* crimes in the Code, however, were problematic as far as the traditional *hudud* crimes were concerned. The Code wanted to extend the scope of *hudud* but it was not done in accordance with rigorous standards of the traditional *hudud* crimes such as by broadening the definition and by relaxing the rule of evidence.¹¹⁰

Article 458(3) of the Code, in fact, laid down a rule that 'if a defendant cannot be sentenced to a fixed punishment [*hudud*] because of uncertainty (*shubha*), the court may impose any punishment that it sees fit, even if the act as such is not mentioned in the code'.¹¹¹ Article 3 of the 1983 Judgments (Basic Rules) Act gives further discretionary powers to judges in the absence of an applicable legislative provision since the judges are required to apply Islamic law.¹¹² As a consequence, any offence might be penalized under the Code and any punishment might be imposed by the courts despite the lack of a provision regulating it.

A case in point is theft. Article 320 of the 1983 Sudanese Penal Code provided wider criteria than those required by the tradition since the Code did not require that 'the theft be surreptitious or that the thief takes the stolen object from a safe place'.¹¹³ There was a case when a bookkeeper of a state school was punished with amputation on grounds that the bookkeeper had pocketed money by falsifying the record of the list of the school's employees. The sentence was executed immediately without giving the bookkeeper a chance to appeal.¹¹⁴

¹⁰⁹ Ibid.

¹¹⁰ See Peters, above n 1, 165.

¹¹¹ The wording of article 458(3) Sudanese Penal Code is from Peters, above n 1, 165.

¹¹² See Peters, above n 1, 165.

¹¹³ The wording of article 320 Sudanese Penal Code is from Peters, above n 1, 166.

¹¹⁴ See Peters, above n 1, 166.

Given the classical doctrine on theft, according to Rudolph Peters, such a sentence contradicts it in two points: first, 'the bookkeeper did not take the money surreptitiously from a safe place';¹¹⁵ second, the bookkeeper took state money: a circumstance which is typically regarded as *shubha* hindering the application of a *hudud* crime because 'the thief might have believed that [he/she] was entitled to take [his/her] share from the common property of all Muslims'.¹¹⁶

The 1983 Evidence Act relaxed the rules for *hudud* crimes, including the high standard of evidence provided under Shariah law, to be established in the courts' decisions. Two Muslim male witnesses of good reputation (four in the case of unlawful sex), for example, can be replaced simply by the testimony of other witnesses at the discretion of the court.¹¹⁷ The 1983 Evidence Act, article 77, 78, as quoted by Safia Safwat, 'Sudan', in Eugene Cotran and Chibli Mallat (eds.), *Yearbook of Islamic and Middle Eastern Law* Volume 1 (1995) 243.

Circumstantial evidence is admitted in many cases: the pregnancy of an unmarried woman may thus become evidence used to penalize her under unlawful sex provision;¹¹⁸ or, possession of stolen goods may be evidence of theft.¹¹⁹

It is reported that between 92 and 120 judicial amputations were carried out in the aftermath of the promulgation of the 1983 Sudanese Penal Code to April 1985. Along with the catchall nature of the Code's provisions and the lower standard of evidence rules, many acts resembling *hudud* offences are then made punishable as *ta'zir* crimes. Flogging, often combined with imprisonment, was thus extensively applied.¹²⁰

¹¹⁵ Ibid.

¹¹⁶ Ibid, 55-57, 166.

¹¹⁸ Ibid, article 77.

¹¹⁹ Peters, above n 1, 166; see also Amnesty International, 'Sudan: Empty Promises? Human Rights Violations in Government-Controlled Areas', in AI Index: AFR 54/036/2003 (16 July 2003) 20, <[http://web.amnesty.org/library/pdf/AFR540362003ENGLISH/\\$File/AFR5403603.pdf](http://web.amnesty.org/library/pdf/AFR540362003ENGLISH/$File/AFR5403603.pdf)> at 7 August 2006.

¹²⁰ Ibid; see also Amnesty International, Annual Report 1985, Sudan, p. 98.

¹²¹ The 1991 Sudanese Penal Code, article 5(3) as quoted by Safwat, above n 116, 253; see also Peters, above n 1, 168.

Facing serious criticisms against the 1983 Sudanese Penal Code being enforced, the government enacted a new penal code together with its criminal procedure in 1991. This was done after Sudan acceded to the CAT in 1986. *Hudud* crimes in the Code now only prevail for those who live in northern Sudan. People living in southern Sudan are exempt from the Code unless they want to be tried under Shariah law.¹²¹

The new penal code, however, still prescribes corporal punishments such as flogging or a variety of offences and limb amputations for robbery of more than 4.25 grams of gold in a guarded place.¹²² Criminal liability begins with, but not before, the age of fifteen and no later than the age of eighteen.¹²³ This provision is thus still in conflict with the CRC since corporal punishment may still be imposed on children convicted of, for example, drinking alcohol, causing annoyance, behaving in a public place contrary to public morality, or wearing indecent or immoral clothing in an indecent manner or contrary to public morality.¹²⁴

Compared to the old Code, the 1991 Sudanese Penal Code is generally viewed as more in agreement with the traditional doctrine definition of *hudud* offences. Since the 1983 Judgment (Basic Rules) Act is still effective and the 1983 Evidence Act remains in force, however, a court can still sentence perpetrators of acts that do not fall under the wording of the 1991 Penal Code because such acts can be established as *hudud* crimes in the courts quite easily.¹²⁵

As a result, the situation in Sudan before and after acceding to the Covenant may not significantly differ in terms of freedom from cruel, inhuman or degrading punishment. Amnesty International recorded that five men were sentenced to cross-amputation after being convicted of brigandage during January 25-27, 2001.¹²⁶

¹²² Amnesty International, above n 118, 19.

¹²³ The 1991 Sudanese Penal Code, article 3 and 9, as quoted by Peters, above n 1, 168.

¹²⁴ See *ibid*, article 78(1), 78(2) and 152 as quoted by Peters, above n 1, 168.

¹²⁵ Peters, above n 1, 168-169.

¹²⁶ Amnesty International, Annual Report 2002, Sudan. <<http://web.amnesty.org/report2002/afr/sudan>> at 8 August 2006.

C. Nigeria

Human Rights Watch reports that since early 2002, no executions or amputations have taken place in Nigeria and death penalties have generally been overturned by the court of appeal. However, the Shariah courts continuously pronounce capital punishments. This is so because the jurisdiction of Shariah courts in twelve out of thirty-six states of Nigeria has been extended to hearing criminal cases since 2000.¹²⁷

The introduction of Islamic criminal law in Nigeria happened after Nigeria ratified the CAT in 2001. Because Nigeria is a federal republic, the obligation of Nigeria to comply with the Covenant becomes more complex. This is because legislation in the domain of criminal law may be enacted by individual states of the Federal Republic of Nigeria. Thus, it is a matter for the separate state federation to introduce the *Shariah* penal code.¹²⁸ Zamfara was the first state in Nigeria to promulgate the *Shariah* penal code on 27 January 2005. Previously, Zamfara had established *Shariah* courts to implement Islamic law. Niger state then followed Zamfara's lead to re-Islamize its legal system.¹²⁹

Unlike Zamfara's and Niger's governments which fully support the program, other states' steps to introduce Islamic criminal law were prompted by popular pressure. Geographically, Nigeria is divided into northern and southern Nigeria and predominant Muslim populations live in the northern part. Triggered by the re-Islamization of the legal system in Zamfara and Niger, large sections of the Muslims of the North put pressure on their governments, which were not too enthusiastic about the program, to promulgate Islamic criminal law.¹³⁰

According to Rudolph Peters, while religious zeal plays a role in these demands, social and political factors are far outweighed. First, many Muslims in northern Nigeria believe that Islamic criminal law would be able to overcome criminality and government corruption rampant in their areas. Second, the call for Islamic criminal law is purported to be a protest against federal politics. This is so because after the demise of the military dictatorship in 1997, the political centre of gravity moved to Southern Nigeria, which is predominantly non-Mus-

lim. Hence, the Islamization movement has become a reaction to challenge the federal government and a momentum to reassert Muslim political power. There is also widespread belief among northern Nigeria Muslims that for them to be stronger politically, Islamic norms for public life should be imposed so that God will help them to realize their goals. Lastly, like in other states enforcing *Shariah* law, the introduction of Islamic criminal law is considered 'a conscious reassertion of cultural roots against Western political and cultural dominance'.¹³¹

Given the above factors, twelve Northern states had extended the jurisdiction of the *Shariah* courts to try crimes charged under the *Shariah* penal code by April 2002. On the strength of the above factors, and facilitated by the *Shariah* courts laws, it was declared that the provisions of the Koran and the *Hadith* and the legal opinions of the *Malikite* school of law had to be applied by the courts. Katsina and Sokoto states even pronounced and executed cross-amputation before a *Shariah* criminal code came into force.¹³² Thus, despite having acceded to the CAT, corporal and capital punishments are still imposed in Nigeria.

D. Lack of a Specific Definition and Relativism of Human Rights

The prevailing interpretation of cruel, inhuman or degrading treatment or punishment has included all forms of corporal punishment as heinous. The Human Rights Committee expounds that any act causing the victim physical pain as well as mental suffering amounts to cruel, inhuman, degrading treatment or punishment prohibited by Article 7. Corporal punishment thus cannot be imposed by states ratifying or acceding to the Covenants. According to the Committee, even excessive chastisement ordered as an educational or disciplinary measure is equivalent to that imposed on a criminal. This is so because Article 7 also purportedly protects, in particular, children, pupils and patients in teaching and medical institutions.¹³³

For example in *Higginson v Jamaica* (792/98), the Human Rights Committee confirms that a breach of Article 7 stands simply with the execution and the mere imposition of a sentence of corporal punishment. Corporal punishment in this case was the use of the tamarind switch for whipping. Whipping

¹²⁷ Human Rights Watch, 'Nigeria' in World Report 2006 Event of 2005 (2006) 121.

¹²⁸ Peters, above n 1, 169.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid, 170.

¹³² Ibid.

¹³³ General Comment No 20, above n 86, para 5.

with the birch imposed on the culprit in the case *Sooklal v Trinidad and Tobago* (928/00) also constitutes a breach.¹³⁴ In addition, there are several concluding observations from the Committee affirming the incompatibility of corporal punishment with Article 7, despite the supervision of a medical doctor during execution.¹³⁵

Having investigated corporal punishments in state parties, including in states enforcing Islamic criminal law, the Special Rapporteur on Torture and Cruel, Degrading and Inhuman Treatment or Punishment to the UN Commission on Human Rights states that corporal punishment is inconsistent with the prohibition against torture and other cruel, inhuman, and degrading treatment or punishment documented in the Universal Declaration of Human Rights, the ICCPR, the Declaration on the Protection of All persons against Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the CAT.¹³⁶ Further, the Commission on Human Rights adopted a resolution in 2003 whereby a slightly less categorical principle was formulated. The Commission reminds state parties' governments that corporal punishment, whether imposed on adults or children, can amount to cruel, inhuman or degrading punishment or even to torture.¹³⁷

The above stance concurs with some studies which analyze the compatibility of the traditional concept of Islamic criminal law with human rights. Katerina Dalacoura, for example, argues that in its traditional understandings, the *Shariah* law does not contain or uphold the concept of human rights. This is because submission to God and duty are emphasized more in the heart of Islamic justice than the notion of human rights itself.¹³⁸ Specifically analyzing *hudud* punishments, Ann Elizabeth Mayer points out that they are inconsistent 'with modern

penological principles and modern human rights norms'.¹³⁹

The above arguments, however, are rebutted by Muslim scholars who define human rights in an exclusively Islamic framework by making the *Shariah* superior to other norms.¹⁴⁰ They strongly reject the categorization of *hudud* punishments as 'cruel and inhuman'. To them, the *hudud* punishments cannot be compared to the man-made cruel and inhuman categorization since they are based on the divine revelation contained in the Koran and the *Hadith*; thus, they are not subject to change or alteration.¹⁴¹ Believing in the superiority of *Shariah* over any other man-made laws, Muslim countries pronounced their own human rights treaty in the Cairo Declaration on Human Rights in Islam.¹⁴² By adopting this treaty, Muslim countries joined under the Organization of the Islamic Conference (OIC) wish '... to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah'.¹⁴³ As far as the *Shariah* is concerned, Muslim countries therefore maintain the imposition of capital punishment in their legal systems for '[l]ife is a God-given gift and the right to life is guaranteed to every human being ... and it is prohibited to take away life except for a Shari'ah prescribed reason'.¹⁴⁴

Yet, Muslim countries' enthusiasm for the observance of the requirements of *Shariah* law regarding criminal punishment is often not followed by implementing its meticulous procedures. The judicial process in some states enforcing Islamic criminal law is far below the standards of a fair trial. There is no equality before the courts and tribunals; lack of time and facilities for the prepa-

¹³⁹ Ann Elizabeth Mayer, 'A Critique of An-Na'im's Assessment of Islamic Criminal Justice', in T. Lindholm and K. Vogt (eds.), *Islamic Law Reform and Human Rights: Challenges and Rejoinders* (1993)

¹⁴⁰ See Heiner Bielefeldt, '“Western” Versus “Islamic” Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights', (February 2000) 28 *Political Theory* [1] 103-106.

¹⁴¹ See Muhammad 'Ata al-Sid Sid Ahmad, above n 5, 72; Mashood A. Baderin, above n 36, 81.

¹⁴² The Cairo Declaration on Human Rights in Islam, Annex to Resolution No. 49/19-P, adopted during The Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), The Organization of the Islamic Conference, held in Cairo, Arab Republic of Egypt, from 31 July to 5 August 1990.

¹⁴³ Ibid.

¹⁴⁴ Ibid, article 2 paragraph a.

¹³⁴ Joseph, Schulzt, and Castan, above n 48, 248-249.

¹³⁵ See *ibid*.

¹³⁶ Report of the Special Rapporteur, Mr. Nigel S. Rodley, to Commission on Human Rights, 53rd Session, Item 8(a) of the provisional agenda, E/CN.4/1997/7 (10 January 1997), para 6, <<http://daccessdds.un.org/doc/UNDOC/GEN/G97/101/13/PDF/G9710113.pdf?OpenElement>> at 7 August 2006.

¹³⁷ Commission on Human Rights Resolution 2003/32 of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, para 5, <ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2003-32.doc> at 7 August 2006.

¹³⁸ Katerina Dalacoura, *Islam, Liberalism and Human Rights: Implication for International Relations* (2003) 48.

ration of the accused's defence and for communication with his/her counsel are among poor standards found by human rights organizations. Amnesty International, for example, reported the situation with the *Shariah* courts in Sudan in 2003:

In the public order courts, the defendants - usually the poor, including many living in displaced camps and a large number of women - rarely or ever have lawyers, and trials may take only a few minutes. Defendants are gathered in groups of around 10 according to their offence ... Conviction is almost invariable on the simple word of a police officer and hardly ever in the presence of defence counsel ... The presumption is one of guilt, not innocence and evidence to corroborate police statements is completely absent ... It is widely said that someone from a rich family, who has a mobile telephone and has connections, may get a lawyer and be acquitted; the poor are invariably convicted.¹⁴⁵ Amnesty International, above n 118, 20.

Another example is in Saudi Arab. Amnesty International reported that unfair trials and arbitrary detention were still to be found in 2007. The court proceedings for crimes subject to the death penalty are even worse so far as the international standards for a fair trial are concerned. It is reported that the defendants are often not formally represented by a lawyer, and the courts simply mete out sentences based on the defendants' confession acquired under duress, torture or deception.¹⁴⁶ A case in point is the capital case of Ma'idh Al-Saleem. Amnesty International reported that he was arrested in 2001 when aged 16. During his detention, it is reported that he was tortured for several days until he confessed to having stated something against the *Shar'iah*. The court then sentenced him to death. Yet, he got a reduction in the appeals court to 14 years' imprisonment and 4,000 lashes. He was then acquitted owing to King Abdullah's pardon in November 2007.¹⁴⁷

V. Concluding Remarks : Negotiating the Requirements of Islamic Criminal Law and International Human Rights Instruments

¹⁴⁵ Amnesty International, above n 118, 20.

¹⁴⁶ Amnesty International, 'News: Arab Saudi', <http://www.amnesty.org.uk/news_details_p.asp?NewsID=17502> at November 10, 2007.

¹⁴⁷ See *ibid*.

Whether rights enshrined in the core international human rights instruments should prevail in all nations around the world has become a very contentious issue since the very beginning of their formulation. There are at least two major schools of thought with regard to the validity of international human rights norms when applied in diverse cultures, namely universalism and cultural relativism.¹⁴⁸ Each pole claims that its arguments on the issue are sounder than those of the other, which makes the effort to reconcile both claims, seem to be impossible.

Advocates of universalism, for example, maintain that international human rights norms can be applied in all cultural contexts. Everyone has these rights owing to his or her status as a human being regardless of his or her race, gender, class, religion, or ethnic origin. Thus, what a culture perceives regarding the right to equal protection, physical security, free speech or freedom of religion must be the same however other cultures perceive them. Universalists claim that such rights are natural and inalienable to protect an individual from any oppression and violations by the state and society.¹⁴⁹ In contrast, advocates of cultural relativism object to the application of universal standards of human rights equally to all cultures and societies without due regard the traditional and cultural differences. For the cultural relativists, the application might imply a Western cultural imposition.¹⁵⁰ See *ibid*, 366-367. Ruth Benedict points out that for cultural relativism there is infinite cultural variability and there are no absolutes; see Ruth Benedict, *Patterns of Culture* (1934) 45-46.

From the Anthropological perspective, it is believed that all societies have some form of moral system since the practice of evaluating their experiences as virtuous or unworthy exists everywhere. It is the omnipresence of behavioral moral evaluation which makes human beings different from other organisms.¹⁵¹ Given different cultures, the values adopted by a society may differ from one another. As it has been argued by Hatch, '[i]t is the content of moral principles, not their existence, that is variable among human beings'.¹⁵²

When moral principles are documented into an international normative framework, the moral principles are then universalized. The General Assembly, for example, proclaims that the 1948 Universal Declaration of Human Right is the

¹⁴⁸ Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed., 2000) 366.

¹⁴⁹ *Ibid*.

¹⁵¹ Elvin Hatch, *Culture and Morality: The Relativity of Values in Anthropology* (1983) 8.

¹⁵² *Ibid*.

common standard of achievement for all peoples and all nations. The UDHR itself also employs such generalizing terms in its provision. The problem is, the Declaration is criticized as a document which is based simply on Western political philosophies and, therefore, does not address non-Western aspirations and priorities.¹⁵³ Given the differences, cultural relativists call on societies to refer to their own cultures as the source of the validity of a moral right or rule.

However, the cultural relativist's stance is criticized as based merely on utter confusion regarding human rights and human dignity, and between rights and duties. Based on the analysis of the political culture of human rights in Islam, traditional Africa, Confucian China, Hindu India, and in the Soviet Union, Jack Donnelly argues that the practice of human rights, including the very concept, are absent in most non-Western cultural and political traditions.¹⁵⁴ Furthermore, the critical character of human rights, namely that rights are inalienable, would be threatened by the incorporation of third world views, such as valuing the group or the community over individuals. As a consequence, human rights may be denied, which would then justify their violation by the state.¹⁵⁵

Given the above, the answer to the question 'can the requirements of *Shariah* law regarding criminal punishments be interpreted in a way that is compatible with the ICCPR and CAT?' is complex. The answer will very much depend on which perspective of the validity of international human rights norms is employed, i.e., universalism versus cultural relativism. Favouring one particular perspective or the other will not resolve the problem of how to balance the

¹⁵³ See e.g., Adamantia Pollis and Peter Schwab, 'Human Rights: A Western Construct with Limited Applicability', in Adamantia Pollis and Peter Schwab(eds.), *Human Rights: Cultural and Ideological Perspectives*(1979). They, for example, point out that the Declaration merely reflects a Western cultural and ideological ethnocentrism disregarding ideological and cultural differences that may become obstacles when implementing such a lack of representative legal norms in non-Western countries. The cultural differences lie in the fact that Western societies give high priority to individual civil and political rights whilst non-Western societies highly prioritize economic rights as a starting point to enforce human rights. Meanwhile, the ideological differences are in the variety of the philosophical bases shaping human nature and relationship between individuals and society, and among individuals themselves. See *ibid*, 1.

¹⁵⁴ For example in Islam, according to Donnelly there is no such human rights concept since so called Islamic human rights emphasize duties more than rights. Such rights do exist because of one's status or actions, not due to the simple fact that one is a human being. See Jack Donnelly, 'Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights' (1982)76 *American Political Science Review* 303, 306.

¹⁵⁵ *Ibid*,312

requirements of Islamic criminal law and international human rights instruments. This is because universalism may promote a moral vision in protecting individual rights from violations perpetrated by the state; yet, too much emphasis on universalism without due regard for the values of the *Shariah* law may lead to the rejection of international human rights instruments. This is so since religious tenets strongly influence Muslims on matters related to criminal law.¹⁵⁶ Hence, an approach which tries to reconcile the claims of universality and cultural relativity on international human rights norms is desirable.

There have been some attempts by scholars to mediate between Universalists and Cultural Relativists. Employing Rawls's concept of overlapping consensus, Heiner Bielefeldt suggests a cross-cultural overlapping consensus on human rights. This is purported to be a method able to bridge the gap created between universalists and cultural relativists regarding the applicability of international human rights norms in other cultures. This method might be effective, especially where there exist a complex relationship between the idea of political justice in a modern liberal society and the multiplicity of religious or philosophical convictions on human rights embraced by the members of that society.¹⁵⁷

An Islamic scholar on human rights, Abdullah Ahmad An-Na'im, has also tried to reconcile Universalism with Cultural Relativism in the context of human rights in Islam by proposing the formalization of a cross-cultural approach to human rights. To An-Na'im, the current and foreseeable new human rights cannot be seen as truly universal unless they are conceived and articulated within the widest possible range of cultural traditions. As a normative propositions, An-Na'im further argues, international human rights norms are much more credible and thereby are likely to be implemented since various cultural traditions in the world will perceive them as legitimate.¹⁵⁸

For this mediating approach to be successful in Islam, new interpretations of the Koranic verses relating to *hudud* punishments employing an ample methodology of Islamic legal theory is also instrumental. There are enormous challenges, however, to reinterpreting *hudud*-related verses in the Koran in light of international human rights norms which prohibit cruel, inhuman, or degrading

¹⁵⁶ See Abdullahi A. An-Na'im, above n 8,95.

¹⁵⁷ Heiner Bielefeldt, above n 139, 114-117.

¹⁵⁸ Abdullah Ahmed An-Na'im, 'Introduction', in Abdullah Ahmed An-Na'im (ed.) *Human Rights in Cross-Cultural Perspectives* (1992).

treatment or punishment, especially in Muslim countries where a traditional-conservative approach to Islamic religious texts has been adopted. This is because technically, all *hudud*-related verses in the Koran are deemed to be definitive texts (*muhkamat*); thus, the types of punishment they prescribe must be unquestionable. The direction of Islamic law development in traditional-conservative Muslim countries tends to emphasize the strict application of the Koran and the *Sunnah*, instead. Any modern-liberal interpretations of *hudud*-related verses will thus be challenged as un-Islamic (or even heretic), for human beings with all their attendant fallibilities will not be able to receive the true messages of the Shariah law requirements regarding criminal punishments enshrined in the Koran and Hadith.¹⁵⁹

Given this, a cross-cultural approach and reinterpretation of the *hudud* will not be able to completely annul so-called cruel, inhuman or degrading treatment or punishment in Muslim countries which implement Islamic criminal law, especially if these countries adopt the traditional-conservative approach to the Islamic religious texts. Yet, there is much to be done to limit their execution from the classical theory of Islamic criminal law. Many have argued that the true implementation of Islamic criminal law requires the existence of an Ideal Islamic society; a society in which Islamic values such as justice, social responsibility and social welfare are internalized. Consequently, if a theft is a by-product of injustice and social ignorance rampant in the community, the context in which a thief commits such crime must be considered carefully prior to imposing hand mutilation.¹⁶⁰ This is in line with the true message of the Koran and the Hadith regarding Islamic criminal punishments whereby extreme caution in inflicting any punishment is strongly emphasized.¹⁶¹

¹⁵⁹ There have been some cases where liberal interpretations of legal verses in the Koran (including *hudud*-related verses) were rejected, followed by a ban against their dissemination. This was done by the Muslim countries' governments on the strength of demands from orthodox Muslim scholars. A case in point is the ban against Nasr Hamid Abu Zayd in Egypt.

¹⁶⁰ Cf. Mashood A. Baderin, above n 36, 82-83.

¹⁶¹ See Abdullahi Ahmed An-Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment' in Abdullahi Ahmed An-Na'im, above n 157, 36.

¹⁶² Muhammad S. Umar, 'Gender Issues in Application of Islamic Law in Nigeria' (2007) 45 *Al-Jami'ah – Journal of Islamic Studies* 1, 49-50;

¹⁶³ See Rudolph Peters, above n 1, 14-15.

To sum up, both the requirements of the Islamic criminal law and of the ICCPR and CAT can therefore be mediated, *inter alia*, by strictly adhering to the procedural and evidential requirements prescribed by the Koran which is then theorized by classical Islamic jurists. This method is expected to effectively pacify criticisms from both human rights advocates and from proponents of the Shariah law regarding the implementation of Islamic criminal punishments in Muslim countries which are parties to the ICCPR and CAT. This, in fact, has been practiced in Nigeria where two women, Safiyya Husaini and Amina Lawal who had been sentenced to death in 2002 and 2003 for committing adultery, were acquitted by the appeal courts of Katsina state and Sokoto state. The appeal court judges dismissed the stoning punishment on the strength of Islamic criminal law procedures, to which all Shariah court judges should be fully bound, but which had been neglected by the lower Shariah court judges. They are: first, the lack of four irreproachable eye-witnesses to the actual unlawful sexual intercourse; second, the failure of the lower Shariah court judges to advise the accused and provide a full and comprehensive explanation of the legal meaning of *zina* pursuant to the doctrine of classical *hudud* prior to imposing the stoning sentence.¹⁶² Meanwhile, both conditions are required in *zina* crime litigation by the classical doctrine of Islamic criminal law.¹⁶³

Since this solution will lead to the extensive application of *ta'zir* punishments, it is necessary for Muslim countries to elevate the standard of the *ta'zir* investigation process in accordance with international human right norms as well as to start replacing corporal punishment in *ta'zir* indictments with other punishments pursuant to ICCPR and CAT. This can be done because *ta'zir* is discretionary; the state is free to determine what kinds of remedy will restore social order.

VI. Bibliography

A. Books and Articles

Ahmad, Muhammad 'Ata Al-Sid Sid, *Islamic Criminal Law: The Hudud* (1995)

Amnesty International, 'Saudi Arabia: Remains a Fertile Ground for Torture with Impunity', *AI Index: MDE 23/004/2002* (1 May 2002), <[http://web.amnesty.org/library/pdf/MDE230042002ENGLISH/\\$File/MDE2300402.pdf](http://web.amnesty.org/library/pdf/MDE230042002ENGLISH/$File/MDE2300402.pdf)> at 7 August 2006

Amnesty International, 'Libya', in *Annual Report 2003*, <<http://>

- web.amnesty.org/report2003/Lby-summary-eng> at 7 August 2006
- Amnesty International, 'Sudan: Empty Promises? Human Rights Violations in Government-Controlled Areas', in *AI Index: AFR 54/036/2003* (16 July 2003), <[http://web.amnesty.org/library/pdf/AFR540362003ENGLISH/\\$File/AFR5403603.pdf](http://web.amnesty.org/library/pdf/AFR540362003ENGLISH/$File/AFR5403603.pdf)> at 7 August 2006
- An-Na'im, Abdullah Ahmed, 'Human Rights in the Muslim World' (1990) 3 *Harvard Human Rights*
- An-Na'im, Abdullah Ahmed, 'Islam and Human Rights: Beyond the Universality Debate' (2000) 94 *American Society for International Law Proceedings*
- An-Na'im, Abdullah Ahmed, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment', in An-Na'im, Abdullah Ahmed (ed.), *Human Rights in Cross-Cultural Perspectives* (1992)
- An-Na'im, Abdullah Ahmed, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (1990)
- Bielefeldt, Heiner, 'Muslim Voices in the Human Rights Debate' (1995) 17 *Human Rights Quarterly*
- Bielefeldt, Heiner, 'Western Versus "Islamic" Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights' (Feb., 2000) 28 *Political Theory* [1]
- Dalacoura, K., *Islam, Liberalism and Human Rights* (1998)
- Donnelly, Jack, 'Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights' (1982) 76 *American Political Science Review*
- Hallaq, Wael B., *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (1997)
- Human Rights Watch, 'Nigeria' in *World Report 2006 Event of 2005* (2006)
- Joseph, Sarah, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed, 2004)
- Lippman, Mathew, 'Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law' (1989) 12 *Boston College International and Comparative Law Review*
- Mayer, Ann Elizabeth, 'Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?' (1994) 15 *Michigan Journal of International Law*
- McCorquodale, Robert, 'Self-Determination: a Human Rights Approach'

- (1994) 43 *International and Comparative Law Quarterly*
- Peters, Rudolph, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (2005) 1
- Pollis, Adamantia and Peter Schwab, 'Human Rights: A Western Construct with Limited Applicability', in Adamantia Pollis and Peter Schwab *Human Rights: Cultural and Ideological Perspectives* (1979)
- Rhoda, Howard, 'Dignity, Community, and Human Rights', in Abdullahi An-Na'im (ed.), *Human Rights in Cross-Cultural Perspective* (1991)
- Salim, Arskal, 'Sharia from Below' in Aceh (1930s-1960s): Islamic Identity and the Right to Self Determination with Comparative Reference to the Moro Islamic Liberation Front (MILF)' (2004) 32 *Indonesia and the Malay World* [92]
- Steiner, Henry J. and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed., 2000)
- The Office of the High Commissioner for Human Rights, <<http://www.ohchr.org/english/law/index.htm>>
- Vogel, Frank E., *Islamic Law and Legal System: Studies of Saudi Arabia* (2000)

B. International Laws:

- The International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966
- The Second Optional Protocol to the ICCPR aiming at the abolition of the death*, adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984
- General Comment No. 06: The right to life (art. 6):. 30/04/82. CCPR General Comment No. 6. (General Comments), <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument)> at 7 August 2006
- General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (art. 7): 10/03/92. CCPR General Comment No. 20 (General Comments), <<http://www.unhchr.ch/>

t b s / d o c . n s f / (S y m b o l) / 6924291970754969c12563ed004c8ae5?Opendocument> at 7 August 2006

General Recommendation No. 21: Right to self-determination: 23/08/96. Gen. Rec. No. 21. (General Comments), <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/dc598941c9e68a1a8025651e004d31d0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/dc598941c9e68a1a8025651e004d31d0?Opendocument)> at 7 August 2006

General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 30/07/93. CCPR/C/21/Rev.1/Add.4, General Comment No. 22. (General Comments), <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument)> at 7 August 2006

Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. 06/12/2001. CCPR/CO/73/UK; CCPR/CO/73/UKOT. (Concluding Observations/Comments), <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/2153823041947eae1256afb00323ee7?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2153823041947eae1256afb00323ee7?Opendocument)> at 7 August 2006

Concluding Observations of the Human Rights Committee: Cameroon. 18/04/94. CCPR/C/79/Add.33. (Concluding Observations/Comments), <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/c76b4d85fe0cf84241256324003d7550?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c76b4d85fe0cf84241256324003d7550?Opendocument)> at 7 August 2006

Concluding Observations of the Human Rights Committee: Iraq. 19/11/1997. CCPR/79/Add.84. (Concluding Observations/Comments), <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4c6e0bf385b5c8f6802565530050e6b5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4c6e0bf385b5c8f6802565530050e6b5?Opendocument)> at 7 August 2006

Concluding Observations of the Human Rights Committee: Sudan. 19/11/1997. CCPR/C/79/Add.85. (Concluding Observations/Comments), <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/bc310a747155dff88025655300537fae?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bc310a747155dff88025655300537fae?Opendocument)> at 7 August 2006

Concluding Observations of the Human Rights Committee: Guatemala. 27/08/2001. CCPR/CO/72/GTM. (Concluding Observations/Comments), <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/)

2aa3ab87740322a8c1256af100362440?Opendocument> at 7 August 2006

Concluding Observations of the Human Rights Committee: Libyan Arab Jamahiriya. 06/11/1998. CCPR/C/79/Add.101. (Concluding Observations/Comments), <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/de8b82142ebec610802566db00574644?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/de8b82142ebec610802566db00574644?Opendocument)> at 7 August 2006

Concluding observations of the Committee on the Rights of the Child: Saudi Arabia. 22/02/2001. CRC/C/15/Add.148, <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/83d5295595532530c12569ed00585df4?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/83d5295595532530c12569ed00585df4?Opendocument)> at 7 August 2006

Report of the Special Rapporteur, Mr. Nigel S. Rodley, to Commission on Human Rights, 53rd Session, Item 8(a) of the provisional agenda, E/CN.4/1997/7 (10 January 1997), <<http://daccessdds.un.org/doc/UNDOC/GEN/G97/101/13/PDF/G9710113.pdf?OpenElement>> at 7 August 2006

Commission on Human Rights Resolution 2003/32 of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, <ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2003-32.doc> at 7 August 2006